



**Mburu v Wainaina (Environment & Land Case 319 of 2017)
[2025] KEELC 914 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 319 OF 2017
JM ONYANGO, J
FEBRUARY 26, 2025**

BETWEEN

LUCIA NYAGAKI MBURU PLAINTIFF

AND

TERESIA WANJIKU WAINAINA DEFENDANT

RULING

1. What is before me for determination is the Defendant's application dated 6.2.2025 seeking to set aside the orders issued by this Honourable court on 23.1.25 declining the Defendant's request to call an additional witness. She also seeks an order that one Jacinta Wanjiru Njoroge be called as the Defendant's witness.
2. The application is predicated on the grounds set out in the Notice of Motion and the Applicant's Supporting Affidavit sworn on 6th February 2025. The Applicant deposes that she managed to secure a crucial witness, a former Secretary and Chairlady of Nyakinyua Investment Limited who was not available during the pre-trial stage, and before the close of the Plaintiff's case. That she informed the court through her advocate on 25.1.25 but the court declined her request and she thus risks losing an opportunity to call the said witness if the application is not granted. She is of the view that the witness has some vital documents which will assist the court in reaching an informed decision at the time of making its final judgment. She adds that no prejudice will be occasioned to the Plaintiff as the Plaintiff will have an opportunity to cross-examine the witness.
3. The application was strenuously opposed by the Defendant through his Grounds of opposition dated 10th February 2025 in which he sets out the following grounds:-
 - i. That the honourable Court is functus officio having already exhaustively handled and finally decided and delivered a ruling on the Defendant's application to introduce a new witness on 23.1.2025 when counsel for the Defendant made an oral application in open court.



- ii. That the application violates the provisions of article 50 (i) of *the Constitution* on fair hearing as the Defendant intends to introduce new evidence which was not present before the Plaintiff testified and that the same amounts to trial by ambush.
 - iii. That the application offends the rules that permit the court to accept a List of witnesses or documents filed outside the timelines provided in Order 3 Rule 7 and Order 7 Rule 5 which provisions are meant to curb trial by ambush.
 - iv. That the reasons adduced by the Defendant for filing the application after close of pleadings and after the Plaintiff has testified does not fall under the provisions of article 159 (2) (d) of *the Constitution*.
 - v. That the application is a waste of judicial time as no reasonable explanation has been tendered to the indolence of the Defendant.
 - vi. That the application will greatly prejudice the Plaintiff as the trial has progressed.
 - vii. That the application is scandalous, an afterthought and a non-starter, speculative vexatious and premature.
 - viii. That to allow the application would be repugnant to timely administration of justice and fair trial.
 - ix. That the application lacks merit and the same ought to be dismissed with costs.
4. The application was canvassed through written submissions and the parties were directed to file their submissions. Both parties complied with the court's directions.

Defendant/ Applicants Submissions

5. In his submissions dated 17th February 2025 learned counsel for the Defendant implored the court to allow the Defendant to call an additional witness and file additional documents in support of his case. He submitted that article 50 of *the Constitution* granted every person a right to be heard. It was his contention that the witness who is a former chairperson of Nyakinyua Investment would shed light on how the plots were allocated and titles surrendered. He argued that the current chairperson who had testified was a witness of the court and was therefore not independent. He was of the view that no prejudice would be suffered by the Plaintiff as her advocate would cross-examine the witness and she could also be recalled to come and testify. He relied on the case of *Hangover Kaakwacha Hotel Limited v Philip Adundo & Leonard Adundo T/A Hangover Kaakwacha Hotel*.

Plaintiff/ Respondent's Submissions

6. On his part learned counsel for the Plaintiff filed his submissions dated 19th February 2025 in which he contended that the application was a non-starter and an abuse of the court process as the court was functus officio since it had previously rendered itself on a similar application. He relied on the case of *Swastic Holdings Limited v Kimani* (Environment and Land Case Civil Suit No.E369 of 2021) [2024] KEELC 6517 (7 October 2024) (Ruling).
7. It was his contention that article 50(i) of *the Constitution* grants every person a right to a fair hearing and allowing the Defendant to introduce an additional witness after the Plaintiff had testified would amount to trial by ambush. He submitted that allowing the additional witness would fundamentally alter the Defendant's case to one that the Plaintiff did not contemplate when she testified and that the plaintiff would not get a chance to rebut the evidence.



Analysis and Determination

8. I have considered the application, Grounds of Opposition and the rival submissions filed by the parties. The only issue for determination is whether the defendant should be granted leave to call an additional witness and produce additional documents.
9. Under Order 3 rule 2 of the Civil Procedure Rules, the plaintiff is required to file a verifying affidavit, list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial. Order 7 rule 5 of the Civil Procedure Rules provides the documents that ought to accompany a Defence and Counterclaim, These include a list of witnesses to be called at the trial, witness statements and a list of documents to be relied on a the trial. The same rule provides that the witness statements under sub-rule (c) may with leave of the Court furnished at least 15 days prior to the pre-trial conference under order 11.
10. Order 18 Rule 10 of the Rules and section 146 of the *Evidence Act* give the court the discretion to recall witnesses and allow additional witnesses or documents even after the hearing has commenced. In *Raila Odinga & 5 Others vs IEBC & 3 Others, SCK* Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR, the Court had to consider whether to allow additional evidence filed outside the contemplation of the rules in a Presidential election petition. The Court set out the principles applicable as follows;

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

11. In the instant case, the hearing commenced on 2.10.2023 when the Land Registrar and the plaintiff who was aged 85 at the time testified and was stood down for further cross-examination. When the matter came up for further hearing on 15.2.24, counsel for the Plaintiff informed the court that the Plaintiff had filed an application seeking to file a supplementary bundle of documents. The court gave directions on the disposal of the application and when it came up for hearing o 14.5.24 a consent was recorded allowing the Plaintiff to file a Supplementary trial bundle within 21 days with corresponding leave to the Defendant to do the same. The case was then fixed for hearing on 23.1.25.
12. On the said date, the Plaintiff and 2 of her witnesses testified after which counsel for the plaintiff applied for an adjournment in order to call two more witnesses. It is at this juncture that counsel for the Defendant indicated that the Defendant wished to call an additional witness- a former chairperson of the company that sold the land to her. Counsel for the Plaintiff objected to the request as he had not seen the witness statement of the said witness and he pointed out that the Plaintiff would be prejudiced if the witness was allowed to testify after the Plaintiff and two of her witnesses had testified.



13. After considering the oral application and the brief submissions of the Plaintiff's counsel in opposition thereto, the court rendered its ruling in which it declined to allow the application. The matter was then fixed for hearing on 13.2.25 on priority basis owing to the advanced age of the Plaintiff who is now aged 87 years.
14. On the said date counsel for the Defendant informed the court that the Defendant had filed an application seeking to set aside the orders of the court made on 23.1.23.
15. I note that the Defendant had the opportunity to make the request to call an additional witness and file more documents in May 2024 when she consented to the Plaintiff's application seeking to file a supplementary trial bundle, and indeed she was granted corresponding leave to file any additional documents but for unexplained reasons, she waited until the Plaintiff and two of her witnesses had testified before making her application.
16. The timing of the application is suspect and I am inclined to agree with the Plaintiff that it is not only prejudicial but it is an ambush. Even though the additional documents sought to be introduced are not bulky, the idea of calling an additional witness whose statement was recorded after the plaintiff and two her 2 witnesses had testified appears to be intended to fill the gaps in the Defendant's case. The fact that the plaintiff may be recalled to testify will not overcome the prejudice that will be occasioned to the plaintiff by allowing the Defendant to call a witness who was never mentioned in her List of witnesses and produce documents which were never alluded to.
17. Taking all the above-mentioned factors into consideration and considering the age of this matter and he parties as well as the overriding objective of the [Environment and Land Court Act](#) in section 3 of the Act which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the said Act, I decline to exercise my discretion to set aside my orders made on 23.1.23.
18. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT THIKA THIS 26TH DAY OF FEBRUARY 2025.

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J. M ONYANGO

JUDGE

In the presence of :

Mr Odoyo for the Defendant/ Applicant

Miss Kinyanjui for Miss Kinyua for the Plaintiff/ Respondent

Court Assistant: Hinga

