



**Ngeta v Musau & 2 others (Environment and Land Appeal  
2 of 2023) [2024] KEELC 3589 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3589 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 2 OF 2023**

**A NYUKURI, J  
APRIL 29, 2024**

**BETWEEN**

**JULY MUTUA NGETA ..... APPELLANT**

**AND**

**JAMES KIMWELU MUSAU ..... 1<sup>ST</sup> RESPONDENT**

**WAYUA NGETA ..... 2<sup>ND</sup> RESPONDENT**

**LABAN MUTAVI MBEVI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon. A. G. Kibiru, Chief  
Magistrate, delivered on 30<sup>th</sup> October 2019 at Machakos Law  
Courts in Machakos Chief Magistrate Civil Case No. 430 of 2013)*

**JUDGMENT**

1. This appeal was filed by July Mutua Ngeta challenging the ruling of Honourable A. G. Kibiru, Chief Magistrate delivered on 30<sup>th</sup> October 2019 in Machakos Chief Magistrate Civil Case No. 430 of 2013. In the impugned ruling, the learned magistrate declined to grant the plaintiff who is the appellant herein, leave to reopen his case and call two witnesses named in the application, on the basis that the two witnesses stated were not among those that were listed as witnesses; the appellant failed to explain to court why it took him six years from the filing of the case and over one year after the plaintiff closed his case to realize there were two crucial witnesses; and that he did not demonstrate that the evidence held by the two purported witnesses was not within his knowledge at the time of filing suit.
2. Being aggrieved by the aforesaid decision, the appellant filed the instant appeal vide a memorandum of appeal dated 8<sup>th</sup> November 2019 citing the following grounds;
  - a. That the learned magistrate erred in both law and in fact in finding that the appellant's Notice of Motion application lacked merit.



- b. That the learned magistrate erred in both law and in fact in failing to consider the facts pleaded in the Notice of Motion dated 19<sup>th</sup> February 2019, the supporting affidavit thereto, the annexures and submissions filed therein and uphold the appellant's application.
  - c. That the learned magistrate erred in both law and in fact in failing to allow the re-opening of the appellant's case and recalling crucial witnesses who had been inadvertently left out.
  - d. That the learned magistrate erred in both law and fact in failing to appreciate the peculiar circumstances of the case to wit the appellant and the 2<sup>nd</sup> defendant who are son and mother are fighting over the same parcel of land with two separate sale agreements regarding the same parcel of land but authored by one person wherein the purchasers are the appellant and his father having purchased on the same date.
  - e. That the learned magistrate erred in law and fact in failing to appreciate the legal necessity of recalling the author of the two disputed sale agreements to shed light on who actually purchased the disputed parcel of land and why there were two separate sale agreements selling the disputed parcel of land to the appellant and at the same time the appellant's late father.
  - f. That the learned magistrate erred in both law and in fact in failing to reopen the plaintiff's case and recalling the author of the disputed two (2) sale agreements to testify in court and shed light on the disputed sale agreements. The trial court itself will not appreciate the underlying issues regarding the case which will ultimately occasion miscarriage of justice to the appellant.
  - g. That the learned magistrate erred in both law and in fact in failing to appreciate that the intended witness Mr. Jackson Kimuyu Nthuka was adversely mentioned by the 3<sup>rd</sup> Respondent for allegedly having influenced the seller to sign a different sale agreement in favour of the plaintiff and therefore it is in the interest of justice that the said Jackson Kimuyu be granted leave to testify in court and defend himself by allowing the application which is the subject of the appeal.
  - h. That the learned magistrate erred in both law and in fact in holding that the appellant's advocate had unduly taken six years to prosecute the main case for which the period the advocate had failed to justify the delay, a fact that was incorrect as the court file clearly demonstrates the appellant's advocates consistency in prosecuting the main case.
    - i. That the learned magistrate erred in both law and in fact in visiting the omissions and mistake of the appellant's advocates, a decision which occasioned miscarriage of justice to appellant yet the mistake of an advocate should not be visited to the innocent client.
  - j. That by disallowing the notice of motion application dated 19<sup>th</sup> February 2019, the learned trial magistrate had sacrificed the appellant's constitutional right to fair hearing at the expedience of concluding the main suit expeditiously.
  - k. That the ruling delivered on 30<sup>th</sup> October 2019 in its entirety is against the law and an irredeemable travesty of justice.
3. Consequently, the appellant sought the following orders;
- a. That the entire ruling of the subordinate court delivered on 30<sup>th</sup> October 2019 be set aside and this honourable court do proceed to allow the notice of motion application dated 19<sup>th</sup> February 2019.
  - b. That costs of this appeal to abide the outcome of the main suit in the subordinate court.



4. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated 28<sup>th</sup> February 2023. No submissions were filed on behalf of the respondents.

### **Appellant's submissions**

5. Counsel for the appellant cited section 146 (4) of the *Evidence Act* and submitted that the court has discretion to allow recalling a witness for further examination in chief or further cross examination. They also argued that two witnesses were crucial as one of the witnesses purported to have written two controversial sale agreements for the same parcel of land. Reliance was placed on the case of *Raindrops Limited v County Government of Kilifi High Court Civil Case No. 9 of 2015* and *Odoyo Osodo v Rael Obara Ojuok & 4 Others* [2017] eKLR for the proposition that in an application such as the one before court, the court ought to exercise its discretion judiciously. Counsel argued that the appellant had demonstrated that the evidence to be produced is more important and will affect the outcome of the case.
6. On the trial court's finding that the appellants had delayed for a period of 6 years, counsel contended that they have never been involved in acts and or omissions that deliberately delayed the case, and that filing the application was not a delay tactic. It was also their submission that the trial court failed to identify incidences where the appellant delayed the matter. On the issue of costs, they submitted that each party can bear their costs since this was a dispute between a mother and a son.

### **Analysis and Determination**

7. The court has considered the appeal, the record as well as the submissions by the appellant. The decision made by the trial court was an exercise of discretion and therefore the only issue to be determined by court is whether the appellant has demonstrated justification for this court being an appellate court to interfere with the exercise of discretion by the trial court.
8. The appellant has sought to reopen the case and call new witnesses which were not listed among the appellant's list of witnesses. Section 146 (4) of the *Evidence Act* relied upon by the applicant in arguing her appeal provides for recalling of witnesses for further examination in chief or further cross examination. As this provision does not provide for calling new witnesses, it is my position that the said provision is not applicable in the circumstances of this case.
9. Re-opening of a case and calling of witnesses, who were not listed as witnesses by a party is purely at the discretion of the trial court. Discretion in allowing or denying such application ought to be exercised judiciously and not capriciously or whimsically.
10. This court in the exercise of its appellate jurisdiction, will not interfere with the exercise of discretion of a trial court unless it is demonstrated that the trial court misdirected itself and arrived at an erroneous decision, or that it is manifest that the trial court was wrong in the exercise of its discretion.
11. In the case of *Mbogo v Shah*, [1968] EA, the court stated as follows;  

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.
12. The mandate of the court is to strive to do substantive justice, but bearing in mind the tenets of justice including fairness and expeditious justice. In considering an application for reopening a party's case, the court must be cautious so that an applicant does not use the opportunity to prejudice the opposing



party and fill gaps created in their evidence after hearing the opposing party. I associate myself with the reasoning in the case of *Samuel Kiti Lewa v Housing Finance Company Limited & another* [2015 eKLR, where the court took the following stance;

The Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the Court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.

13. In the instant case, the appellant who was the plaintiff in the lower court, filed the suit on 15<sup>th</sup> May 2013. Accompanying the plaint was a list of four witnesses, namely; Jully Mutua Ngeta; Jackson Nthuka; Laban Mutavi Mbevi and John Bosco Ngeta Maundu. At the hearing of the plaintiff's case, the plaintiff presented two witnesses. On 13<sup>th</sup> October 2015 the plaintiff presented one witness Jully Mutua Ngeta and on 11<sup>th</sup> July 2018, the plaintiff presented the second witness one John Bosco Ngeta Maundu and proceeded to close her case. On the same date, the defendant presented two witnesses and a third witness was presented on 23<sup>rd</sup> January 2019. In the application dated 11<sup>th</sup> February 2019, the appellants sought to have the plaintiff's case reopened and to call Jackson Kimuyu Nthuka and Jasper Muumba as witnesses. His reasons were that the two are crucial witnesses and that they were left out inadvertently. He stated that Jackson Kimuyu Nthuka was adversely mentioned in the 3<sup>rd</sup> defendant's witness statement and is willing to testify on what transpired on 14<sup>th</sup> July 2001 because he is the one who drafted the sale agreement in dispute and Jasper Muumba witnessed execution of application for transfer of the suit property.
14. Having considered the record, it is clear that the appellant without compulsion closed his case in 2018. The witness statement filed by the 3<sup>rd</sup> defendant, which is claimed to have adversely mentioned Jackson Kimuyu Nthuku was filed on 26<sup>th</sup> June 2013. Therefore the appellant in his application and supporting affidavit did not attempt to explain or give the justification for not calling the two witnesses earlier when she was aware of the adverse mention in 2013. In addition, Jasper Muumba was not even listed as a witness. Having not given any reason for failure to call the two witnesses before the close of her case and only seeking to call them after the respondents had called three witnesses, is in my view merely meant to fill the gaps of the appellant's evidence, as she has not given any plausible reason for not availing the two persons as her witnesses before the respondents presenting their evidence, when according to her, their evidence was crucial and touched on the disputed agreements.
15. In the premises, I find and hold that the trial court rightly found that appellant failed to explain to court why it took her six years from the filing of the case and over one year after the plaintiff closed his case to realize there were two crucial witnesses; and that he did not demonstrate that the evidence held by the two purported witnesses was not within his knowledge at the time of filing suit.
16. The upshot is that there is no merit in the appeal and the same is hereby dismissed with costs to the respondents.
17. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;



No appearance for the appellant

No appearance for the respondents

Court assistant – Abdisalam

