



Njoroge (Suing as the administrator of the Estate of the Estate of Wangui Njoroge (Deceased) v Ticha (Environment & Land Case E068 of 2021) [2024] KEELC 3574 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E068 OF 2021**

LA OMOLLO, J

APRIL 11, 2024

BETWEEN

JAMES WAWERU NJOROGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE ESTATE OF WANGUI NJOROGE (DECEASED) PLAINTIFF

AND

STANLEY NDUNGI TICHA DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's/Applicant's Notice of Motion application dated 25th September, 2023 which is expressed to be brought under Article 48, 50 and 159 of the Constitution of Kenya, 2010, Section 146 (4) of the Evidence Act, Sections 3 and 13 of the Environment and Land Court Act, Order 18 rule 10 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.
2. The Application seeks the following orders:
 1. That this Honourable Court be pleased to re-open the Plaintiff's case for purposes of receiving additional evidence being the following documents on record in Re Estate of Joseph Githiri Gitau Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009;
 - a. Notice of Motion dated 8th June, 2016
 - b. Affidavit by Domimic Ng'ang'a Gathimo sworn on 15th July, 2016.
 - c. Supplementary Affidavit by James Gitau Githiri sworn on 9th August, 2016.
 - d. Ruling and Order by Hon. S. Atambo (SPM) dated 14th November, 2016
 2. That this Honourable Court be pleased to order that Domimic Ng'ang'a Gathitho be recalled for cross-examination on the affidavit sworn on 15th July, 2016.



3. That the costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 25th September, 2023 by one James Waweru Njoroge, the Plaintiff/Applicant.

Factual Background.

4. The suit was commenced by way of a plaint dated 1st September, 2021 and filed on 16th September 2021. In the Plaint, the Plaintiff is seeking the following orders:
 - a. A declaration that any sale agreement between the Defendant and Wangui Njoroge (Deceased) is void and that Wangui Njoroge (Deceased) is the sole owner and/or proprietor of all that parcel of land known as Plot No 180 Missouri Farm in Naivasha.
 - b. An order that the Land Registrar, Naivasha rectifies all records in respect of Plot No 180 Missouri Farm to reflect only the name of Wangui Njoroge (Deceased) as the proprietor of the property.
 - c. A permanent injunction restraining the Defendant whether by himself, his employees, servants, agents, or otherwise howsoever from entering, occupying, carrying on any development, or dealing with all or any portion of that parcel of land known as Plot No. 180 Missouri Farm in Naivasha in any manner prejudicial to the interests of the Plaintiff.
 - d. Costs and Interest.
 - e. Any other orders that the court may deem just and fit to grant.
5. As at the time of filing this application, all parties had testified, their cases closed and the matter was pending submissions and judgment.
6. The application came up before this court on 2nd October, 2023 and the court directed that the application shall be heard by way of written submissions. The Applicant was given leave to file a supplementary affidavit and submissions. The matter was scheduled for mention on 6th November, 2023.
7. On 6th November, 2023, counsel for the Plaintiff/Applicant confirmed that both parties had filed their submissions and the court scheduled the matter for ruling.

The Plaintiff's/Applicant's Contention.

8. The Plaintiff/Applicant contends that while in the process of carrying out research towards the drafting of submissions in this matter, on 22nd September, 2023 they came across the High Court's decision in James Gitau Githiri v Jecinta Wairimu Thumbi & 4 others Kiambu High Court Civil Appeal No 198 of 2016.
9. He further contends that Kiambu High Court Civil Appeal No 198 of 2016 was an appeal against the Ruling and Order by Hon, S. Atambo delivered on 14th November 2016 in Re Estate of Joseph Githiri Gitau Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009.
10. He contends that the dispute in Kiambu High Court Civil Appeal No 198 of 2016 was over the ownership of a property known as Naivasha/Maraigushu Block 1/6 (Missouri) acquired through shareholding in Missouri Safari Farmers Company Limited. He contends that the property in the said suit was allocated to the holder of share certificate number 57 and that it measured approximately 10 acres. He contends that one Dominic Ng'ang'a Gathitho had sworn an affidavit on 15th July, 2016.



11. The Plaintiff/Applicant contends that upon perusing the Court file in Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 they established and verily believe that the court documents therein are relevant to resolution of the dispute herein.
12. The Plaintiff/Applicant also contends that he has equally perused the documents from the Court file in Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009, except the ruling and order of Hon. S. Atambo and he has established the said Dominic Ng'ang'a Gathitho who swore an affidavit on 15th July, 2016 filed therein is the same person who testified herein for the Defendant.
13. He also contends that the court documents in Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 are relevant to resolution of the dispute herein. He contends that Dominic Ng'ang'a Gathitho who testified as DW2 ought to be recalled and cross-examined on his affidavit sworn on 15th July, 2016.
14. The Applicant contends that he was not a party to Kiambu High Court Civil Appeal No 198 of 2016 or Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 and he had no knowledge of the existence of the documents therein prior to the hearing of his case.
15. He contends that no amount of due diligence would have revealed to him the existence of the documents in Kiambu High Court Civil Appeal No 198 of 2016 or Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 on 22nd September, 2023. He contends that he has brought the instant application timeously and he believes that it is in the interest of justice and equity that he be allowed to produce the said documents in support of his case.

Defendant's/Respondent's Response.

16. The Defendant/Respondent filed a Replying Affidavit sworn by himself on 16th October, 2023.
17. He contends that the application is made in bad faith, has no merit and is meant to delay the finalization of this case. He contends that the decision of James Gitau Githiri v Jecinta Wairimu Thumbi & 4 others Kiambu High Court Civil Appeal No 198 of 2016 has been existence from 25th October, 2019 when the judgement was delivered and has been in the Law Reports since.
18. He contends that he has gone through the said judgment which stemmed from an appeal in a succession dispute which had been handled by the Chief Magistrate's court.
19. He contends that the dispute in that case was whether parcel Naivasha/ Maraigushu Block 1/6 Missouri formed part of the Estate of the deceased and whether the deceased had left a written will or not.
20. He contends that the issue of the affidavit sworn by Dominic Nganga Gathitho states that parcel Naivasha/Maraigushu Block 1/6 Missouri measuring 12.8 acres belonged to Joseph Githiri Gitau. He also contends that this evidence is exactly the same the witness gave in this case that a member was entitled to 12.8 acres per share, 1.4 acres on rocky land and 50 by 100 plot along the tarmac.
21. The Defendant/Respondent contends that there is no need for re-opening the Plaintiff's case as the counsel can submit on the affidavit which was sworn by the witness in the Succession cause. He contends that the re-opening of the case is unmerited as no new evidence shall be led to contradict what the witness Dominic Nganga Gathitho had given in court.



22. He contends that the applicants are on a fishing expedition which this court ought not to allow for the sake of tidiness of the proceedings and good order. He contends that a party cannot be allowed to bring in new evidence once they have closed their case as this would amount to having endless litigation in court.
23. He contends that the Applicant can have submissions filed on the Kiambu case without causing back peddling in the proceedings. He contends that the re-calling of the witness to be cross-examined on the acreage a member was entitled to does not need the re-opening of the case rather it's an issue for submissions.
24. The Defendant/Respondent prays that the applicant's application be dismissed and the court to proceed and hear the evidence of the remaining witness who is the land registrar Naivasha.

Plaintiff's/Applicant's Further Contention.

25. The Plaintiff/Applicant further deposes that Dominic Nganga Gathitho is not a party to this suit and hence he is not a respondent in his application. It is his deposition that being neither a party nor a respondent herein, Dominic Nganga Gathitho cannot lawfully oppose his application and his purported replying affidavit is improperly on record and it ought to be struck out.
26. He contends that it is within his knowledge that while the decision in Kiambu High Court Civil Appeal No 198 of 2016 has been in existence from 25th October, 2019, the same was not within his knowledge as he was not a party to that case.
27. He deposes that having just had knowledge of the said decision and all the other documents on 22nd September, 2023, he could not have produced the documents during the hearing of his case. He contends that while he can make submissions based on the decision in Kiambu High Court Civil Appeal No 198 of 2016, he cannot rely on the documents the Court relied on in reaching that decision.
28. The Applicant contends that the Court cannot rely or act on documents that have not been produced in evidence as exhibits. He contends that the evidence of Dominic Nganga Gathitho contained in his affidavit sworn on 15th July 2016 in Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 contradicts his evidence in this matter and he deserve a chance to cross-examine him.
29. He contends that new evidence may be admitted at any stage of the proceedings even on appeal. He contends that he is desirous of having the court consider all the documents in making a decision on his suit.
30. He contends that he can only prove the relevance of the documents to his case after they become part of the record but not before. He deposes that the Defendant has not averred to or demonstrated any prejudice to be suffered by him or Dominic Nganga Gathitho if the application is allowed.
31. He deposes that the Defendant will not be prejudiced in any way whatsoever by the grant of the orders sought. He adds that it is in the interest of justice and equity that the application be allowed.

Issues for Determination.

32. The Plaintiff/Applicant filed his submissions on 2nd November, 2023 and identified the following issue for determination:
 - a. Whether the Court should re-open the Plaintiff's case for purposes of receiving additional evidence being the named documents on record in Re Estate of Joseph Githiri Gitau Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009?



- b. Whether Dominic Ng'ang'a Gathitho should be recalled for cross examination on his affidavit sworn on 15th July 2016?
33. He relies on the judicial decision of *Cyrus Shakhbalaga Khwa Jirongo v Soy Developers Limited & 9 others* [2020] eKLR. He submits that the application is meritorious and the substantive question before the Court in this suit is how much land a holder of one share of was entitled to. He submits that the documents sought to be produced are relevant to the determination of the question before the Court and have a direct bearing on the main issue in the suit. He submits that the Court will find the further evidence needful and the evidence will no doubt influence or impact upon the court's decision in this matter.
34. He submits that he was not a party to the proceedings in Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009 and Kiambu High Court Civil Appeal No 198 of 2016. He submits that he got to know of the existence of the documents on 22nd September, 2023. He submits that he had no knowledge or possession of the documents and adds that he seeks to produce before or during the hearing of his case.
35. The Plaintiff/Applicant further submits that the documents sought to be produced are court documents. He submits that the High Court and the Chief Magistrate's Court have already pronounced themselves based on these documents in Kiambu High Court Civil Appeal No 198 of 2016 and Kiambu Chief Magistrate's Court Succession Cause No 341 of 2009. He submits that the credibility of the evidence is not in doubt and the evidence is capable of belief.
36. The Plaintiff submits that on proportionality and prejudice, the additional evidence is admissible at any stage of the proceedings even on appeal at the Supreme Court. He submits that in this case, it is only the Plaintiff who has closed his case. He submits that the trial is yet to be concluded and the Defendant has not demonstrated any prejudice he may suffer if the evidence is admitted and in any case, the Defendant will have a chance to comment on the evidence.
37. He relies on Section 146 (4) of the *Evidence Act* and submits that it will be seen from the documents annexed to the application that the holder of share certificate number 57 of 102 shares (equivalent to 1 share) was allocated land being Naivasha/Maraigushu Block 1/6 (Missouri) measuring approximately 12.8 acres.
38. He submits that Dominic Nganga Gathitho confirmed the said acreage in his affidavit sworn on 15th July, 2016. He submits that the said Dominic Nganga Gathitho testified for the Defendant and his evidence is that the Plaintiff and the Defendant who sold 204 shares (equivalent to 2 shares) between them are entitled to the suit parcel of land which measures 12.8 acres only.
39. He submits that the witness affidavit sworn on 15th July, 2016 having come to light after he had testified. He submits that it is in the interest of justice that the witness be recalled for further cross examination to clarify issues on shareholding and equivalent land allocation. He submits that this is crucial to the fair determination of the issues before the Court. He urged the Court to make the order.
40. The Defendant filed his submissions on 18th October, 2023. He submits that the re-opening of a party's case and adducing of additional and or further evidence is a discretionary remedy by the court. He relies on the judicial decision of *David Kipkosgei Kimeli v Titus Barmasai* [2017] eKLR.
41. He submits that the court can still reopen the case and



disregard the evidence from the witnesses. He submits that the court should pose the questions “is the re-opening of the case likely to embarrass or prejudice the opposing party and whether it is going to cause injustice?”. He submits that if the answer is in the affirmative then the discretion should not be exercised in the Applicant’s favour.”

42. He submits that the Respondent has not departed from the defence he presented and that the additional evidence is likely to confront a new line of defence. He submits that the Defendant has not departed from his defence and neither did the witness Dominic Nganga Gathitho depart from his witness statement dated 21st October, 2021 and filed in court on the 22nd October, 2021.
43. He submits that the applicant has not shown any reason why the plaintiff’s case should be re-opened and further documents be introduced. He relies on Section 146 (4) of the *Evidence act*. He submits that this court in all fairness gave the applicants their day in court. He submits that they were given an opportunity to comply with Order 11 before the trial began. He submits that their case was heard and they have forfeited the clause of introducing new evidence which shall be prejudicial to the Respondent. He relies on provisions of Article 48, 50 and 159 of the *Constitution* which guarantee the right of parties’ access to justice and a fair hearing were all accorded to the applicants.

Analysis and Determination.

44. I have considered the application, the affidavits in support of the application, the replying affidavit and the rival submissions filed.
45. In my view, the questions that arise for determination are:
 - a. Whether this Honourable court should re-open the Plaintiff’s case for purposes of receiving additional evidence?
 - b. Who shall bear costs of this application?

A. Whether this Honourable court should re-open the Plaintiff’s case for purposes of receiving additional evidence?

46. The Plaintiff/Applicant has asked this court to allow him to adduce additional evidence on the basis that he had no knowledge of the existence of the documents prior to closure of his case.
47. The documents annexed to the affidavit in support of the application relate to a judgment delivered by the High court sitting at Kiambu. The Judgement stems from an appeal against the ruling and order in Kiambu succession Cause No. 341 of 2009 delivered by Hon. S. Atambo in 2016. The parties are different, the subject matter of the dispute is different.
48. In *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another* [2015] eKLR the court stated:
 - “ 17. Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karuhanga & Anor* (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case *Smith v New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively



against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *Simba Telecom (supra)* held thus:

“I agree with the holding in the case of *Smith Versus South Wales Bar Association (1992) 176 CLR 256*, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. (Emphasis mine) Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”...(Emphasis mine)

20. The court retains discretion to allow re-opening of a case. (Emphasis mine) 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. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

49. The Plaintiff/Applicant in his supporting affidavit to the application states that his counsel stumbled upon the documents when drawing submissions. Order 11 of the Civil Procedure Rules 2010 has elaborate provisions aimed at preparing suits for trial. The Defendant on the other hand in his submissions opposing the application states that he prepared his case based on the documents that the Plaintiff had supplied the Court.

50. The Applicant seeks orders to recall DW2; Dominic Ng’ang’a Gathitho to cross examine him on the contents of an affidavit sworn by him on 15/7/2016 in a succession cause in Kiambu. I have perused the said affidavit. It has 6 paragraphs. In paragraph one and two, he introduces himself as a person of sound mind and a former chairman of Missouri Safari Farmers Company Limited. In paragraph three he confirms that the deceased was a member of Missouri Safari Farmers Company Limited. In paragraph 4, he deposes that the deceased was issued with a parcel of land known as Naivasha/Maraigushu Block 1/6. In paragraph five he deposes that the purpose of his affidavit is to inform concerned authorities and the public that the deceased was their member, was registered and issued with land known as Naivasha/Maraigushu Block 1/6 measuring approximately 12.8 acres as per his ballot. At paragraph 6 he states that what is deposed is true to the best of his knowledge information and belief.

51. Dominic Ng’ang’a Gathitho in the succession cause deposed that parcel Naivasha/Maraigushu Block 1/6 Missouri measuring 12.8 acres belonged to Joseph Githiri Gitau. This is exactly his evidence in this matter. He stated that a member of Missouri Farmers Company was entitled to 12.8 acres of arable land, 1.4 acres on rocky land and 50 by 100 plot along the tarmac.

52. I do not agree with the Applicant’s contention that Dominic Ng’ang’a Gathitho’s evidence is contradictory to the affidavit sworn by him in the Kiambu succession cause.



53. As rightly observed by both parties herein, a decision whether or not to re-open a case is discretionary. Having interrogated the said affidavit vis-a vis the evidence tendered by Dominic Ng'ang'a Gathitho (Dw2), I am not persuaded that the affidavit or its contents will add any value to the resolution of this dispute.

B. Who shall bear costs of this application?

54. On the question of costs of the application, the general rule is that cost shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

Disposition.

55. Consequently, I find that the Notice of Motion application dated 25th September, 2023 lacks merit and it is hereby dismissed with costs.

56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO

THIS 11TH DAY OF APRIL, 2024

L. A. OMOLLO

JUDGE

In the presence of:

No appearance for the Applicant.

Mr. Maiwa for Nancy for the Respondent.

Court Assistant: Ms. Joseph Makori.

