



**Murage (Suing as the administrator of the Estate of Bernard Chiori) v
Land Registrar, Kilifi County & another (Environment & Land Case
E046 of 2022) [2024] KEELC 5166 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 5166 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E046 OF 2022**

FM NJOROGE, J

MAY 29, 2024

BETWEEN

**JOSEPH NICHOLAS MURAGE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF BERNARD CHIORI) PLAINTIFF**

AND

LAND REGISTRAR, KILIFI COUNTY 1ST RESPONDENT

MASUMBUKO YERRY KOMBE 2ND RESPONDENT

RULING

1. For determination is the 2nd Defendant’s application dated 5/2/2024 brought under Article 50 and 159 (2) (a) and (d) of *the Constitution*; Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*; and Order 45 and Order 51 rule 1 of the Civil Procedure Rules, 2010. The orders sought were tailored as follows: -
 1. Spent.
 2. This honourable court be and is hereby pleased to grant leave to allow the re-opening of the Plaintiff’s case and that the Plaintiff and any of his witnesses be recalled for the purposes of cross-examination by the 2nd Defendant/applicant.
 3. This honourable court be and is hereby pleased to review its ruling and grant leave to the 2nd Defendant/applicant to introduce his list and bundle of documents and the list of documents dated 23rd October 2023 be deemed as properly filed and on record to aid the court in meeting the ends of justice; and
 4. That costs of the application be provided for.
2. The application is premised on the grounds at the face of the motion and supported by an affidavit sworn by the 2nd Defendant on the even date. The 2nd Defendant deposed that upon being served



- with the plaint and supporting documents, he instructed the firm of Diro Advocates to represent him. The said firm then filed a notice of appointment and grounds of opposition dated 22/9/2022 and a statement of defence and counterclaim dated 14/6/2023. Subsequently, the plaintiff's case was fixed for hearing on 7/12/2023 when his witnesses were heard and case marked as closed in the absence of his (the 2nd Defendant) advocates. The 2nd Defendant added that his advocate failed to inform him of the hearing date and his reasons for failure to attend the hearing as scheduled. The 2nd Defendant was apprehensive that the veracity of the evidence led by the Plaintiff was not tested to help the court arrive at a fair and just position. Further, he added that the said advocate also failed to file a list of documents.
3. The application is opposed. The Plaintiff filed a replying affidavit which he swore on 8/2/2024 stating that indeed the 2nd Defendant was served with the Plaint and accompanying documents and that he appointed the firm of Diro Advocates LLP who filed a notice of appointment, grounds of opposition and a replying affidavit and submissions to the Plaintiff's application for interlocutory orders. The Plaintiff narrated that on 19/6/2023 the 2nd Defendant's advocates requested for 30 days to file the list of documents, list of witnesses and statements, which request was granted. The advocate did not comply. On 25/9/2023 when the matter was listed for mention, the 2nd Defendant's counsel sought a further 14 days to file the said documents. Again, the 2nd Defendant failed to comply; that the 2nd Defendant's Advocates ultimately served the said documents on 25/10/2023. He deposed that the said documents were filed on 26/10/2023 and on the same date, the court delivered a ruling dismissing a preliminary objection filed by the 2nd Defendant. The court also expunged from the record, the said documents filed out of time.
 4. The Plaintiff added that on the same date, the 2nd Defendant's advocate unsuccessfully sought to have the hearing adjourned on the basis that the 2nd Defendant was indisposed. That request was declined and the hearing proceeded as scheduled. He stated that the 2nd Defendant's counsel was present throughout the hearing and even participated in the cross-examination. The Plaintiff deposed that his case was thus closed on 26/10/2023 and the court scheduled the defence hearing for 7/12/2023. On that particular date, the court did not sit and the hearing was adjourned to 17/1/2024. Thereafter and before the hearing date, the 2nd Defendant filed an application on 14/12/2023 seeking to act in person alleging impropriety on the part of his then advocates.
 5. Consequently, the Plaintiff's advocate on 8/1/2024 informed the 2nd Defendant that he will not oppose the application and that the hearing would proceed as scheduled. The 2nd Defendant then wrote to the Plaintiff's advocates stating that he had abandoned his application dated 14/12/2023 and that he would seek an adjournment on the hearing date so as to engage another advocate. As it would be, the hearing was indeed adjourned to 11/3/2024 as proposed by the 2nd Defendant himself.
 6. To the Plaintiff, the intention of the present application is to scuttle the proceedings herein and intended to deny him a fair trial. He added that the application was also made inordinately late in the day, about 3 months after the Plaintiff's case was closed. He urged the court not to allow the same.
 7. The application was canvassed by way of written submissions.

SUBMISSIONS

2nd Defendant's Submissions

8. In his submissions dated 14/2/2024, the 2nd Defendant argued that the decision on whether or not to grant the orders sought is a discretionary one which must be exercised judiciously was stated in David Kipkosgei Kimeli v Titus Barmasai [2017] eKLR. He reiterated the narration of events given by the Plaintiff in his replying affidavit. He however argued that his advocate was not present on 26/10/2023



but another counsel who was present to hold brief. To him, the said advocate holding brief neither had the file nor was he aware of the 2nd Defendant's case to adequately defend his interests therein during cross-examination. He argued that no prejudice will be occasioned to the Plaintiff if the application is allowed since he will be given a chance to re-examine. He relied on the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR.

9. The 2nd Defendant further submitted that the mistake of his former counsel should not be visited upon him and that this court should allow the application in the interest of justice. To this end, he cited the case of Belinda Murai & 6 other v Amos Wainaina [1978] KLR that was cited in Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others [2018] eKLR.

Plaintiff's Submissions

10. In the submissions dated 15/3/2024, counsel submitted that the 2nd Defendant has failed to satisfy the ingredients necessary to re-open a case; that he does not mention the discovery of any new and important evidence that was not in his possession when the Plaintiff gave his testimony and that his application was filed inordinately late. Counsel relied on the case of Hannah Wairimu Ng'ethe v Francis Ng'ang'a & another [2016] eKLR; Nderu v Ng'ang'a (ELC 303 of 2019) [2022] KEELC 12571 (KLR).
11. Further, it was counsel's submission that the prayer to allow the pleadings and documents expunged from the court record on 26/10/2023 is akin to a prayer for review. Counsel argued that the present application does not meet the mandatory conditions for review set out under Order 45 of the Civil Procedure Rules. Counsel further relied on the cases of Muyodi v Industrial and Commercial Development Corporation & another [2006] 1 EA 243; Francis Njoroge v Stephen Maina Kamore [2018] eKLR; Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR; Berber Alibhal Mawji v Sultan Hasham Lalji & 2 others (1990-1991) EA 337; and Job Muriithi Waweru v Mary Waruguru Munene [2020] eKLR.
12. Counsel added that the 2nd Defendant has failed to give any explanation as to why the court should extend time to enable him file the documents that were expunged for being filed out of time. To buttress this point, counsel relied on the cases of Nicholas Kiptoo Arap Salat v IEBC & 7 others [2014] eKLR; County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR; and Wilfrida Arnodah Itolondo v AG & 9 others [2021] eKLR.
13. It was counsel's submission that the 2nd Defendant has always had a counsel on record and was all along aware of every single step in the proceedings. Therefore, so he argued, in the absence of any evidence to the contrary, the court should not allow the applicant to abuse its processes. Counsel relied on the cases of Union Insurance Co. of Kenya Ltd v Ramzam Abdul Dhanji Civil Application No. 179 of 1998; and *Samoei v National Housing Corporation & another (Civil Suit E008 OF 2020)* [2023] KEHC 17919 (KLR).
14. Having carefully considered the notice of motion application, affidavits, submissions and authorities presented by both parties, I identify the following issues as arising for determination: -
 1. Whether the Plaintiff's case should be re-opened and the 2nd Defendant be allowed to cross examine the Plaintiff's witness.
 2. Whether the orders issued on 26/10/2023 should be reviewed and the 2nd Defendant be allowed to file his list of witnesses and documents dated 23/10/2023.

ANALYSIS AND DETERMINATION

15. Section 146 (4) of the *Evidence Act* grants the court powers to recall a witness. It provides as follows:



- (3) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
16. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined. It provides thus:
- The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”
17. The court in *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo* [2019] eKLR broadly stated the principles which guide the jurisdiction to re-open a case and receive additional evidence. The court explained: -
- ..the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; and *Ladd v Mashall* (1954) 3 All ER 745).”
18. In this case, the hearing of the Plaintiff’s case was scheduled for 26/10/2023. On that material date when the matter was first called, one Mr. Moriasi was present in court to hold brief for Mr. Diro for the 2nd Defendant. Later on, at 11.30 am when the Plaintiff’s witness testified, the counsel who was present to hold brief for Mr. Diro was one Mr. Muli. The record shows that Mr. Muli opted not to cross-examine the witness, and the Plaintiff’s case was marked as closed. The 2nd Defendant’s grievance is that the said Mr. Muli was not aware of the facts of the case thus he could not have conducted the hearing diligently in his interest.
19. I am not convinced that the reason advanced by the 2nd Defendant is sufficient to warrant this court to exercise discretion in his favour, I say so because it is always presumed that an advocate who rises up in court and informs the presiding judge that he or she is holding brief has full instructions. It is therefore the responsibility of the principal advocate to fully brief his or her agent advocate. In the circumstances of this case, it was incumbent upon Mr. Diro fully brief Mr. Muli in the matter. That Mr. Muli failed to cross-examine the witness should be presumed that those were the instructions from Mr. Diro, who was the counsel for the 2nd Defendant. In this application I have not seen anything from Mr Diro stating that he never gave those instructions. In the given circumstances, I decline to re-open the Plaintiff’s case.
20. In relation to the second issue, Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules read as below: -
- Section 80
- Any person who considers himself aggrieved—



- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 rule 1

1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

21. On 26/10/2023, the court expunged from the record, the 2nd Defendant’s list of documents that had been filed on the same date for being filed out of time and belatedly so. I have carefully perused the 2nd Defendant’s application, firstly, the same was filed about three months after the impugned orders were given. This delay is in my view inordinate given the circumstances herein, and it has not even been explained.
22. Further, it is clear that contrary to the requirements of Section 80 CPA and Order 45 CPR there is no discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made; it is also evident that the order was not made on account of some error apparent on the face of the record. This court exercised its mind and made a conscious decision on the issue. The pertinent question therefore is whether the reasons advanced by the 2nd Defendant are sufficient to warrant a review of the impugned orders.
23. The 2nd Defendant blamed his advocate for failure to file his documents in time. He seeks leave to introduce the documents at this stage, when the Plaintiff has long closed his case. I have examined the court record and it shows that on 26/10/2023 the main suit came up for hearing. Counsel for both parties were aware of the date and Mr Moriasi held brief for Mr Diro for the 2nd defendant and sought indulgence on the premises that the 2nd defendant was indisposed. The court sat through the lamentations of Mr. Juma for the plaintiff, and which were in this court’s view quite justified, who strenuously protested that he had been served with a notice of preliminary objection as well as a bundle of documents by Mr Diro on the eve of that hearing. To him the preliminary objection had already been dealt with to conclusion by this court earlier. Mr Juma pointed out to the court that the 2nd defendant had failed to comply with the court’s orders made earlier despite having had enough time to do so. Mr Juma also pointed out that there was no evidence that the 2nd defendant was indisposed on that day. While invoking Section 1A of the Civil Procedure Act he stated that parties should comply with court directions. He stated that his client was present in court in readiness for hearing. Mr Ojwang for the 1st defendant was also ready to proceed with the hearing of the plaintiff’s case but he had not been served



with the preliminary objection and the newly filed bundle of documents and that non-service was not disputed by counsel for the 2nd defendant.

24. This court considered the circumstances prevailing and observed that on the basis that the 2nd defendant's counsel appearing on 19/6/2026 had assured the court that all was well and that the 2nd defendant had complied with the rules the court granted a hearing date for 25/9/23.
25. In the Kipkosgei Kimeli case (supra) the court observed that the issue in an application seeking to reopen a hearing of a case which has been substantially heard are *inter alia* whether the plaintiff wants to adduce new evidence which was not within his knowledge at the time of testifying and whether there are any gaps that the party has realized he needs to fill to beef up his case after cross-examination and after hearing the evidence of the defence. In the Kimeli case (supra) where the court had reached the evidence of the second defence witness, the application to reopen the case of the plaintiff made by the plaintiff himself in order to call other "crucial" witnesses was rejected.
26. In the present case though it is not the plaintiff who is seeking to reopen his case and file documents but the defendant, no defence witness has been called, but nevertheless the grant of such an order would entail untidiness, sloppiness and lackadaisical conduct in the litigation process where every party would file documents not in accordance with court orders but when they feel like filing them. Granting such an order is ignoring the fact that the 1st defendant was granted a chance to file his documents only for him to fail to do so; that he was granted a chance to cross examine the plaintiff at the hearing but elected not to do so. When a person has been accorded all room to prepare his case and to prosecute his case and he willfully refuses to do so or is simply negligent in his default, he can not be heard to approach the court to give him a second chance. He is not in the same situation as a person who was not given a chance at all due to inadvertence or mischief on the part of his adversary.
27. On 25/9/23 counsel for the 2nd defendant appeared and sought to file a witness statement for his client and the time for doing that was limited to 14 days and hearing set for 26/10/23. However, the order was not complied with within the given timeframe hence Mr Juma's complaint on the morning of 26/10/23. The court stated as follows on that date:

I find no justification for the filing of any further documents and so belatedly by the 2nd defendant. The plaintiff and the 1st defendant are ready to proceed. I have no evidence of the 2nd defendant's indisposition. I lack any ground to adjourn this hearing today and the application for adjournment is declined... as the documents filed by the 2nd defendant on 26/10/2023 were filed without leave of court and out of time and are not fully served I order that they are hereby expunged from the court record."
28. The hearing of the plaintiff's case proceeded to completion later that morning in the presence of Mr. Diro who, as stated earlier herein before, opted not to cross examine the plaintiff.
29. If only to be fair to all parties and also avoid the tedium of having to regularly roll back the clock on matters whose hearings had already proceeded this court must guard jealously against crafty parties who may by way of ambush, unfair stratagem or ruses seek to delay hearings or steal a march on their adversaries in litigation.
30. Having already declined to re-open the Plaintiff's case as herein above, this case must proceed with the documentation on record for the reason that allowing new evidence at this stage from the 2nd defendant will be extremely prejudicial to the Plaintiff.
31. The outcome is that the notice of motion dated 5/2/2024 lacks merit and it is hereby dismissed with costs. This suit shall be listed on 16/9/24 for fixing of a mutually convenient hearing date.

Dated, signed and delivered at Malindi via electronic mail on this 29th day of May 2024.



MWANGI NJOROGE
JUDGE, ELC, MALINDI

