



REPUBLIC OF KENYA



KENYA LAW
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**Odula v Wosianju (Environmental and Land Originating Summons
7 of 2019) [2024] KEELC 4461 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 7 OF 2019**

EC CHERONO, J

MAY 23, 2024

BETWEEN

FREDRICK GIGWA ODULA PLAINTIFF

AND

TITUS WANYONYI WOSIANJU DEFENDANT

RULING

1. This ruling arises from the applicants Notice of Motion dated 5th April 2024 brought under the provisions of Article 50 & 159 of *the Constitution*, 2010, Section 1, 1A, & 3A of the *Civil Procedure Act* together with all enabling provisions seeking the following orders;
 - a. Spent
 - b. That the firm of Seneti & Oburu Associates Advocates be granted leave to come on record for the Defendant/Applicants herein.
 - c. That this honourable court do issue an order to stay/arrest the delivery of judgment scheduled for 23rd May, 2024 and review its directions that parties file their submissions until this application is heard and determined.
 - d. That the plaintiff/respondent's case be re-opened and all his witnesses be recalled for the limited purpose of cross-examination by the defendant/applicants: the defendant/applicant be permitted to give his evidence in response to the Plaintiff/Applicant's case by filing additional crucial and/or further documents in support of his case and be cross-examined.
 - e. Costs of this application be provided for.
2. The application is based on grounds apparent on the face of the application and the supporting affidavit of the applicant sworn on 5th May, 2024. In his supporting, the applicant deposed that he is surprised that this case is at the submission stage yet he has never been allowed to defend the same. It was



his contention that he has been unwell during the entire hearing period and due to miscommunication between him and his former counsel who ceased from acting for him, he was not given his day in court. It is the applicant's further contention that he has since appointed the firm of Seneti Oburu & Co. Advocates to come on record and that he intends to file crucial documents in support of his defence and that he now wishes to be heard. He deposed that as a witness, he was coerced to testify in the absence of his counsel and that he was ill prepared when he was forced to participate during the trial. He stated that in the event the orders sought are not issued, he will suffer irreparable loss that cannot be compensated by damages.

3. The application is opposed by the respondent vide a replying affidavit sworn on 20th April, 2024. In his replying affidavit, the respondent deposed that the application was a delaying tactic and a mockery of the court process since the applicant has always deployed tactics to delay the finalization of this suit. He further deposed that after the firm of Kassim Sifuna & Co. Advocates ceased acting for the applicant, he agreed to act in person and participated in taking hearing dates and cross-examining the respondent herein and his witnesses and he offered his testimony during defence hearing. The respondent stated that before the matter was set down for hearing, the court gave the respondent several adjournments to seek representation but he failed to engage one. He argued that the applicant has been actively participating in the proceeding in this case since he acted in person after his previous counsel ceased from acting. The respondent deposed that no sufficient reasons have been advanced to warrant the grant of the orders sought by the applicant and urged the court to dismiss the application.
4. When the said application came for directions, the parties agreed to have the same canvassed by way of written submissions.
5. The applicant filed submissions dated 30th April, 2024 where he submitted that due to medical reasons, he was unable to attend court on diverse dates and carry out his defence as required under the law. He sought to have the judgment of this court arrested and argued that the respondent would not suffer any prejudice if the orders sought were granted.
6. The Respondent on his part filed submission dated 7th May, 2024 and submitted that the current application was a delaying tactic intended to prevent the finalization of this matter. The Respondent contends that the applicant was untruthful and was making a mockery of this court since he has participated in this case from the beginning and even conducted cross-examination of the respondent's witnesses. It was his further contention that the current application was an afterthought and he urged the court to dismiss the same with costs. Reliance was placed in the case of High Court at Eldoret Civil Suit No. E008 of 2020 *Samoei vs. National Housing Corporation & Another* KLR and High Court at Mombasa Civil Suit No. E049 of 2022 *Rafiki Microfinance Bank Ltd vs. John & Another* KLR.
7. I have considered the application which is the subject of this Ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I have also considered the relevant legal framework and jurisprudence on the key issues in this application and I find that the main issue for determination is whether the applicant has established the conditions for the grant of the orders sought. The applicant is seeking to have the order for filing submissions reviewed, the delivery of the scheduled judgment arrested, leave to re-open the respondent's case for the witnesses to be cross examined and for the applicant to give evidence and file additional documents in support of his case.
8. On the prayer to re-open the respondent's case for purposes of cross-examining the witnesses, the court in the case of *Raindrops Ltd – Versus - County Government of Kilifi* (2020) eKLR observed that both the Civil Procedure Rules, 2010 and the *Evidence Act* Cap. 80 do not have clear and express provisions on how a court should exercise the jurisdiction to re-open a case. Although the closest one would think of was for the Court to invoke the provisions for re – calling of witnesses for purposes of cross –



examination. These are founded under the provision of Section 146 (4) of the Evidence Act, Cap. 80. Section 146 (4) of the Evidence Act generally grants the Court powers to recall a witness. It provides thus:

“(4) 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.”

9. 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:

“10. 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.”

10. The decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion to albeit be exercised judiciously and in the interest of justice. In Samuel Kiti Lewa – Versus - Housing Finance Company Limited & another {2015} eKLR the court held that “the Court’s discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.

11. This application calls for this honourable court to examine the court record. From the court record, it is clear that this suit was instituted by the respondent herein vide an Originating summons dated 20th March, 2019 where he seeks a declaration that he has acquired 2 acres comprised in Land Parcel No. Bungoma/kiminini/1 by operation of law under the doctrine of adverse possession. The applicant herein entered appearance on 17th April 2019 being represented by the firm of M/s Kassim Sifuna & Ass Advocates. The applicant filed his replying affidavit sworn on 7th May, 2019. When the matter came up for pre-trial conference, the Parties confirmed compliance with Order 11 of the Civil Procedure Rules and the matter was set down for hearing.

12. On 27th July 2022, the respondent called one witness (PW1) who was stood down to allow service of some documentary to be produced in evidence upon the applicant herein. The matter was rescheduled for hearing to 19th October, 2022 when the respondent herein called 2 witness who were cross-examined by M/S Wanyama for the applicant. The matter was thereafter adjourned for further hearing to 17/11/2022 when the case could not proceed as the court was not sitting. When the matter came up for further hearing on 27/03/2023, counsel for the applicant sought leave to file a formal application to cease acting for want of instructions. The said application was filed and when it came up for hearing on 19th October, 2023 the same was allowed and the suit was fixed for hearing on 27th November, 2023 and the court directed that the applicant herein to be served personally. On 27th November 2023, the applicant herein was present in person and even sought for an adjournment on medical reasons. While declining the adjournment, the court noted that the treatment notes produced were in relation to the previous year, 2022. Consequently, the court directed this case to proceed for hearing with the Respondent calling 2 witnesses who were cross-examined by the applicant herein. The matter was thereafter adjourned to 12th March, 2024 for defence hearing wherein the applicant confirmed that he was ready to proceed with the defence hearing. The defence case was heard after which the Applicant closed his case and directions for submissions taken and a judgment date reserved. It is surprising that the applicant is now denouncing the process and proceedings in a case where he fully participated as a litigant.



13. From the exposition hereinabove demonstrated in the proceedings in this matter, it becomes apparent that the applicant's application is marred with untruths. The proceedings herein are in conflict with the averments of the applicant who states that he was surprised to learn that this matter is at the submissions stage since he was not heard i.e. he was not given a chance to defend this case and that the court coerced him into proceeding with a hearing despite being unwell. The applicant also argued that his previous counsel on record did not serve him with a notice to cease acting since there was a miscommunication between the two of them due to his illness and that the mistake of counsel should not be visited upon him.
14. This Court is indeed surprised by the applicant that he was denied the right to defend itself. It is clear from the record that the applicant was notified on every step of the proceedings and was present in all court sessions after his previous counsel ceased from acting. In as much as the applicant stated he was unwell, he did not produce any medical documents in support of his allegation. The law is that adjournments are not automatic or a matter of course but should only be granted based on sufficient reasons. Since no sufficient grounds were given by the applicant for adjournment when this matter came up for hearing, the Applicant was informed as much and the case proceeded with his participation in cross-examination of witnesses. The overriding objective of the Civil Procedure Rules, 2010 as stipulated in the provision of Section 1A of the Civil Procedure Act, Cap. 21 is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This objective could not have been served by delaying hearing of the suit further.
15. In relation to the prayer for re-opening the respondent's case, the applicant sought for leave to file additional crucial and/or further documents in support of his case. For this prayer to be allowed, 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 the hearing of his case and 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. The dispute in question revolves around a claim of ownership by operation of law through adverse possession. The applicant in the supporting affidavit states that he wishes to produce a letter from the chairman of the land control board Tongaren. The applicant has not explained to this court why the said documents were not made available initially despite pre-trial directions having been taken at a stage when the applicant had the privilege of representation by counsel.
16. In the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR Justice B.M Eboso stated that; "...failure by a defendant to lead evidence is not a legitimate basis for re-opening a plaintiff's case." Parties are expected to tender all their evidence prior to closing their respective cases. In the case of Hannah Wairimu Ngethe -vs- Francis Ng'ang'a & Another [2016] eKLR, Lady Justice Achode declined to allow a petitioner in a succession cause to reopen the case to adduce further evidence. The judge in the case stated inter alia:-

"This court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case."
17. Whereas it may be permissible in deserving cases to re-open a case after it has been closed, it should not and must not be allowed where it is intended to help one party to fill up gaps in evidence of his case. Re-opening a case is an extreme measure that should only be allowed sparingly and with the greatest care ("Raindrops Ltd case – supra").



18. In my humble view, the applicant has not laid a basis in which this Court can exercise its discretionary jurisdiction to re-open this case.

The applicant cannot be heard to say that he was denied an opportunity to be heard when he was aware and fully participated in all the proceedings in the case and was given opportunity, just like the plaintiff to file his documentary evidence in advance and prepare for hearing either by being represented by an advocate of his choice or electing to act in person. In all fairness and given the circumstances, I am not persuaded that the applicant has made a case for the re-opening of this case after all parties have had their day in court and closed their respective cases. The application in my view is one brought tactically to fill in gaps in evidence and to have a second bite of the cherry.

19. On the prayer to arrest the court's judgment, the Powers to arrest a Judgment are also discretionary intended to be exercised to avoid injustice and not designed to assist a person who has deliberately chosen to delay and obstruct the course of Justice. G.V Odunga J in *Wambua Maithya – Versus - Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested parties)* eKLR noted as follows;

“Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be properly exercised after a lot of circumspection and soul searching by the judge...whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court.

20. Having declined the prayer to recall the defendant/applicant's witnesses for re-examination and the filing of additional documents, cross-examination of the applicant herein and the prayer for review, the directions for parties to file submissions and the date for judgment shall remain in force.
21. Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs follow the events. Since the application by the 1st Defendant/Applicant has not been successful, I find that the costs of the application shall be borne by the 1st Defendant/Applicant herein
22. The upshot of my analysis is that the application dated 5th April, 2024 is devoid of merit and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at BUNGOMA this 23rd day of May, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wanjala H/B Mr. Onyando for plaintiff/Respondent

Defendant/Applicant in person-present

