



REPUBLIC OF KENYA



**Musyimi & 2 others v Muriuki & another (Environment & Land Case
1042 of 2015) [2024] KEELC 3819 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1042 OF 2015**

JA MOGENI, J

MAY 9, 2024

BETWEEN

JUSTUS KIMAU MUSYIMI 1ST PLAINTIFF

**VERONICA NDINDI MUSYIMI (SUING AS ADMINISTRATOR OF THE
ESTATE OF STEPHENE MUSYIMI KIMOLO - DECEASED) 2ND PLAINTIFF**

TAHIR IQBAL RAFIQUE 3RD PLAINTIFF

AND

JAMES KABAU MURIUKI 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

1. Before this Court for determination is the 1st Defendant/Applicant's Application dated 19/12/2023 filed under Sections 1B & 3A of the [Civil Procedure Act](#), Order 45 of the [Civil Procedure Rules 2010](#) and all other enabling provisions of the law. The 1st Defendant/Applicant is seeking for the following Orders:
 - 1 Spent.
 - 2 That the Honourable Court do review its orders made on 27/11/2023 and allow the 1st Defendant reopen his case to allow a crucial witness give his evidence.
 - 3 That the costs of the application be provided for.
2. The motion is premised on the grounds set out on its face together with the Supporting Affidavit of Taracisio Murage Lucas, an Advocate sworn on 19/12/2023.
3. The Application is opposed. The 1st Plaintiff has opposed the Application through the Replying Affidavit of Justus Kimau Musyimi sworn on 27/01/2024.



4. On 06/02/2024, directions were given on filing of written submissions to the application. A ruling date was also reserved. By the time of writing this Ruling, it was only the 1st Defendant/Applicant who had duly submitted which I have considered. The 1st Defendant/Applicant filed written submissions dated 26/02/2024.
5. I have considered the motion together with the rival affidavits and the Applicant's submissions. I have also considered the relevant law. I in turn have had time to analyze the emerging issues therein and this court is of the considered view that the germane issue falling for consideration is whether the 1st defendant's case should be reopened for hearing.
6. This Application is seeking the court to review the orders of 27/11/2023 and allow the 1st Defendant to reopen his case and allow a crucial witness give his evidence.
7. It is noteworthy that the application before me was filed after the close of both the applicant's and the respondent's cases and after parties had taken directions on the filing of written submissions and a judgment date had been reserved. In determining an application such as the present one, this court needs to find out why the witnesses were not availed before the close of the rival cases. It must also be demonstrated that failure to avail the said evidence was not deliberate. Bearing in mind that this Court has discretion to grant or decline to grant an order on the re-opening of a case, the said discretion must be exercised judiciously.
8. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the court in disallowing an application similar to this one held that:

“Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, 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 the 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.”

9. In *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, the Court observed as follows-

“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. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

10. Similarly, in *Smith v New South Wales* [1992] HCA 36, [1992] 176 CLR 256, 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 in 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.”

11. The Court notes that the Applicant was of the view that no prejudice shall be occasioned upon the respondent if the case is re-opened. Section 146(4) of the *Evidence Act* provides as hereunder-

“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.”

12. Similarly, Order 18 Rule 10 of the *Civil Procedure Rules* provides that:

“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.”

13. The above provisions do not specifically address the issue of re-opening of cases with a view of calling additional witnesses. The powers to make orders for reopening of cases for purposes of calling additional witnesses is a matter exercised under the inherent powers of the Court as per the provisions of Section 3A of the *Civil Procedure Act*. It is a matter that calls for the Court to grant such orders in the interest of justice so that all the evidence available to the parties can be put before a Court for consideration and determination.

14. Sequence of events in this litigation does not inspire confidence for this court to exercise discretion to re-open the proceedings as urged by the applicant. The guidelines in the above cases shut the door for the Applicant to proceed further to adduce evidence in support of his case.

15. I am of the considered view to also invoke the doctrine of estoppel for there is a season to commence proceedings and a season to terminate. Proceedings are not to be conducted ad infinitum. This is a formidable armory against the applicant’s motion. I am guided by the wise words of Bosire, J.A in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2007] eKLR where he stated as follows:

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.”

16. I am of the view that the present circumstances do not merit the allegation that there was mistake of advocate. Alleging that the advocate for the 1st Defendant did not have the witness’ diary and was not aware that the witness had another matter on the same day at Kitale being ELCC No 52 of 2011 Sirikwa Mumbai v Simon Kiptum Choge & 7 others is not sufficient.

17. Additionally, I note that there was inordinate and unexplained delay on the part of the Applicant in filing the present application. The hearing date of 27/11/2023 was taken by consent on 20/09/2023. I believe if counsel was keen enough, he would have approached the court with the present application sooner. Instead, the Application was filed on 19/12/2023. A period of sixty-eight (68) days is inordinate delay. The application was brought approximately twenty-two (22) days after the close of the Applicant’s cases. Counsel has not given an explanation for the delay in filing of the application either. This issue had been brought up on 27/11/2023, I see no reason why this application would not have been filed a few days after the Applicant closed his case noting that the documents being produced



are within the Applicant's reach and within his knowledge. Counsel only explained why he was not able to give his evidence on the impugned hearing date. It is my finding that the present application is an attempt to delay the matter and the court shall not participate in the delay of justice.

18. This Court will not lose sight of the Overriding Objective of the Court as given under Section 3 of the *Environment and Land Court Act* which is "... to facilitate the just, expeditious, proportionate and accessible resolution of disputes...", and the provisions of Section 1A (1) of the *Civil Procedure Act* which is couched in the same words as Section 3 of the *ELC Act*, and Section 1B of the *Civil Procedure Act* which obligates this court of further the overriding objective stated before.
19. Litigation ought to be speedily. Such applications as the present one serves to negate the overriding objective of the Court. This Court is duty-bound to do otherwise than indirectly sought by the Applicant, given the history of this matter as given before.
20. In the premises, I decline to grant the orders sought and dismiss the application with costs to the 1st Plaintiff/respondent.
21. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Chege holding brief for Issa for Plaintiff

Mr. Wanjohi for 1st Defendant

No appearance for 2nd Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

