



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogolla & another v Omanje & another (Environment and Land Appeal  
E019 of 2023) [2024] KEELC 5345 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5345 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E019 OF 2023**

**SO OKONG'O, J**

**JULY 18, 2024**

**BETWEEN**

**FREDRICK OTIENO OGOLLA ..... 1<sup>ST</sup> APPELLANT**

**CHARLES OMONDI OGOLLA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LEE OMANJE ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, NYANDO, NYAKACH & MUHORONI .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an appeal from the ruling and orders made by Hon. A.K.Mokoross(SPM)  
delivered on 9th May 2023 at Tamu Law Court in Tamu PMC ELC No. E025 of 2021)*

**JUDGMENT**

1. The Appellants filed a suit against the Respondents at Tamu Law Court namely, Tamu PMC ELC No. E025 of 2021 (hereinafter referred to only as “the lower court”) on 18<sup>th</sup> November 2021. The Appellants claimed that they were the lawful owners of all that parcel of land known as Kisumu/Sidho East/22 (hereinafter referred to only as “the suit property”) having acquired the same from one, Kadundo Simon on 3<sup>rd</sup> March 2021. The Appellants averred that the 1<sup>st</sup> Respondent had also claimed to have acquired a portion of the suit property from the same vendor and that he had a title to the said portion. The Appellants sought judgment against the Respondents for a permanent injunction restraining the Respondents from interfering in any manner whatsoever with the Appellants’ possession and enjoyment of the suit property, and the costs of the suit.
2. The 1<sup>st</sup> Respondent filed a defence to the Appellants’ claim on 31<sup>st</sup> December 2021. The 1<sup>st</sup> Respondent denied that the Appellants were the proprietors of the suit property. The 1<sup>st</sup> Respondent averred that the suit property ceased to exist on 22<sup>nd</sup> March 1994 when the same was subdivided into two portions



namely, Kisumu/Sidho East/2585 and 2586 (hereinafter referred to only as “Plot No. 2585” and “Plot No. 2586” respectively). The 1<sup>st</sup> Respondent averred that the said subdivision was carried out following the sale of a portion of the suit property to her mother one, Janet Omanje by Kadundo Simon in 1994. The 1<sup>st</sup> Respondent averred that a title was issued in the name of her mother for the said portion of the suit property namely; Kisumu/Sidho East/2586 (Plot No. 2586) on 29<sup>th</sup> June 1995. The 1<sup>st</sup> Respondent averred that any transaction over the suit property between the Appellants and Kadundo Simon could only be fraudulent. The 1<sup>st</sup> Respondent urged the court to dismiss the Appellants suit with costs as an abuse of the court process.

3. At the trial that commenced in the lower court on 12<sup>th</sup> July 2022, the Appellants called a total of 4 witnesses before they closed their case on the same date. Although the witnesses referred to a number of documents in their testimonies, none of those documents were produced in evidence although the Appellants had filed a list and bundle of documents together with the plaint. On his part, the 1<sup>st</sup> Respondent called 3 witnesses before he closed his case on 9<sup>th</sup> September 2022. The 1<sup>st</sup> Respondent produced several documents in evidence during his testimony.
4. The advocate who was appearing for the Appellants died at the tail end of the trial after both parties had closed their cases and had agreed that the 2<sup>nd</sup> Respondent who had not filed a defence attend court to testify on the existence or non-existence of the suit property. The Appellants’ advocates on record took over the conduct of the lower court suit on behalf of the Appellants on 29<sup>th</sup> November 2022 after the death of their previous advocate. The lower court gave the Appellants’ new advocates time to familiarise themselves with the matter. On 21<sup>st</sup> February 2023, the parties agreed to do away with the evidence of the 2<sup>nd</sup> Respondent and to make closing submissions in writing. The court gave them timelines for the filing of submissions and fixed the matter for judgment on 11<sup>th</sup> April 2023.
5. When the matter came up for judgment on 11<sup>th</sup> April 2023, the Appellants’ advocates asked the court to defer the judgment so that the court could consider an application that they had filed. The Appellants’ application was brought by way of a Notice of Motion dated 6<sup>th</sup> April 2023. In the application, the Appellants sought orders that they be allowed to recall one witness to produce their bundle of documents filed on 18<sup>th</sup> November 2021 and in the alternative that the Applicants’ bundle of documents filed on 18<sup>th</sup> November 2021 be deemed to be properly produced without calling any witness to produce the same. The application that was supported by the affidavit of Henry Washington Oloo Adem sworn on 6<sup>th</sup> April 2023. The Appellants averred that their former advocates filed a plaint together with a bundle of documents on 18<sup>th</sup> November 2021. The Appellants averred that their bundle of documents contained several documents which they intended to use in support of their case. The Appellants averred that when their witnesses testified, they referred to the said documents but through oversight they failed to produce the said documents in evidence. The Appellants averred that failure to produce the said documents in evidence was not as a result of the Appellants’ fault.
6. The Appellants averred that their new advocates discovered that the said documents were not produced in evidence while preparing the closing submissions. The Appellants averred that the said documents were very important for their case.
7. The Appellants’ application was opposed by the 1<sup>st</sup> Respondent through a replying affidavit filed sworn on 17<sup>th</sup> April 2023. The 1<sup>st</sup> Respondent challenged the legality and the importance of the documents that the Appellants wished to produce as exhibits through the application. The 1<sup>st</sup> Respondent averred that he was not supposed to be inconvenienced as a result of a mistake on the part of the Appellants’ former advocates. The 1<sup>st</sup> Respondent averred that the Appellants’ new advocates had ample opportunity to put the Appellants’ house in order which opportunity they did not use. The 1<sup>st</sup>



Respondent urged the court to exercise its discretion judiciously. The 1<sup>st</sup> Respondent averred that the application if allowed would delay the disposal of the matter.

8. The Appellants' application was argued by way of written submissions. The lower court considered the application and the submissions by the advocates for the parties and delivered a ruling on 9<sup>th</sup> May 2023 dismissing the application. The court observed that a mistake of an advocate is not a panacea for all the blunders made by advocates. The court noted that the appellants' witnesses were examined on the documents in question and cross-examined on the same in detail and despite that, the same were not produced in evidence. For that reason, the court doubted that the failure to produce the documents was a result of inadvertence. The court also observed that if there was an oversight in the production of the said documents, the Appellants' previous advocates had the opportunity to rectify the situation which they did not. The court attributed the failure to produce the said documents to lethargy on the part of the Appellants' previous advocates rather than a mistake. The court noted further that the Appellants' new advocates also had an opportunity after coming on record and perusing the proceedings to detect the anomaly and move the court earlier which they never did. The court noted that the Appellants' new advocates waited until the submission stage to file the application that was before the court. The court stated that each party to a suit had a duty to ensure that he produced all the documents in support of his case and that if there was a mistake on the part of the Appellants' advocates, the Appellants could only look to the said advocates for relief. The court held that that was not a fit case in which it could exercise its discretion in favour of allowing the application.
9. The Appellants were aggrieved by the said ruling and filed this appeal on 12<sup>th</sup> May 2023. In their memorandum of appeal dated 11<sup>th</sup> May 2023, the Appellants challenged the said decision on various grounds. The Appellants contended that the lower court failed to appreciate that any prejudice to the 1<sup>st</sup> Respondent could be atoned in costs while denying the Appellants a chance to produce evidence would occasion them irreparable loss. The appellants contended that the lower court erred in its finding that the Appellants' was not a fit case to exercise its discretion in allowing the recall of a witness to produce further evidence. The appellants averred that the lower court erred in ignoring the Appellants' submissions which were on record.
10. The Appellants prayed that the ruling and orders made by the lower court be set aside and substituted with an order granting the Appellants leave to recall one witness to produce their bundle of documents filed on 18<sup>th</sup> November 2021, and in the alternative the said bundle of documents be deemed as having been produced without calling any witness to produce the same. The Appellants also prayed for the costs of the appeal.
11. The appeal was heard by way of written submissions. The Appellants filed submissions dated 8<sup>th</sup> January 2024. I did not see a copy of the 1<sup>st</sup> Respondent's submissions on record at the time of writing this judgment. I have considered the Appellants' application in the lower court, the 1<sup>st</sup> Respondent's response to it, and the ruling by the lower court. I have also considered the grounds of appeal put forward by the Appellants to the said ruling and the written submissions filed by the Appellants. The Appellants' application before the lower court was brought under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 51 Rules 1 and 17 of the Civil Procedure Rules, and all other enabling provisions of the law. The lower court had power under section 146(4) of the *Evidence Act*, Chapter 80 Laws of Kenya and Order 18 Rule 10 of the Civil Procedure Rules to recall a witness to give further evidence. Section 146(4) of the *Evidence Act* provides that:

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. Order 18 Rule 10 of the *Civil Procedure Rules* provides as follows:

"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 powers granted to the court under the foregoing provisions of the *Evidence Act* and the Civil Rules are discretionary. In *Patriotic Guards Ltd. v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

14. What I need to determine in the appeal before me is whether the lower court exercised its discretion properly when it declined to grant leave to the Appellants to recall a witness to produce further evidence. In *Mbogo v. Shah* [1968] E. A. 93 the court stated as follows at page 94:

"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. It is common ground that when the Appellants filed the plaint in the lower court on 18<sup>th</sup> November 2021, the same was accompanied by among others a list and bundle of documents that the Appellants wished to rely on at the trial in support of their case. The bundle had six documents namely; an agreement of sale through which the Appellants claimed to have acquired the suit property from Kadundo Simon, a title deed for the suit property that was issued to them upon the transfer of the property, a certified copy of the extract of the register for the suit property, the proceedings and judgment in Criminal Case No. 209 of 2016 which concerned the suit property and Plot No. 2586, and a Power of Attorney on the strength of which the Appellants' suit was brought. Upon perusing the pleadings filed in the lower court and the proceedings of that court, I do not doubt that the documents that the Appellants intended to produce in evidence were crucial to their case. The success or failure of their claim depended on the same. I have also noted that the documents were not entirely new to the 1<sup>st</sup> Respondent. A number of them had featured in Criminal Case No. 209 of 2016 in which Kadundo Simon was the accused while the 1<sup>st</sup> Respondent's brother was the complainant. I agree with the lower court that the application to recall one of the Plaintiffs' witnesses who had testified to give further evidence and produce the said documents was made at the tail end of the proceedings. I am also in agreement with the lower court that with the exercise of due diligence, the Appellants' previous advocates would have realised much earlier that they had omitted to produce the Appellants' bundle of documents as exhibits. These in my view were not sufficient reasons for refusing to allow the Appellants' application.

16. I agree with the Appellants that the lower court should have considered the prejudice that could be occasioned to the 1<sup>st</sup> Respondent if the application was allowed and the effect of refusing the application on the appellants' case. In my view, the consequence of disallowing the application was



grave to the Appellants' case. As mentioned earlier, the success or failure of their case depended on these documents and failure to produce them in evidence meant that their case would fail. To the 1<sup>st</sup> Respondent, the only prejudice he was likely to suffer was a delay in the suit's conclusion which I believe could be compensated in costs. I find the lower court's suggestion that the Appellants' failure to produce the said documents during the trial resulted from lethargy rather than an oversight not supported by any evidence on record. From the record, the Appellants' case was handled properly until the time when their previous advocate died and even thereafter, there were only a few adjournments before the hearing was closed and directions given for the filing of submissions.

17. I am of the view that the Appellants had shown sufficient cause for their failure to produce their bundle of documents at the trial. They had also demonstrated that the documents were crucial to their case. I am of the view that a case had been made by the Appellants for the recall of the witness they wished to recall in the lower court. In *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR (Ruling delivered on 28<sup>th</sup> September 2018) the Supreme Court stated as follows while allowing an application to adduce additional evidence:

(90) We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution. In addition, we are satisfied that allowing the additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of a proper judicial finding as to whether the Appellant had the requisite academic credentials to vie for governor of Wajir County which are core issues before the Court.”

18. In *Samuel Kiti Lewa v. Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, the court stated that:

”20. 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.”

19. I am of the view that taking into consideration the importance of the evidence the Appellants intended to produce to their case, the refusal by the lower court to allow them to adduce the same amounted to denying them a fair trial more so when it was not demonstrated that the 1<sup>st</sup> Respondent would suffer any prejudice that could not be compensated in costs. It is therefore my finding that the lower court did not exercise its discretion properly. The court failed to consider relevant matters and as a result arrived at a wrong decision.

## Conclusion

20. For the foregoing reasons, I find merit in the Appellants' appeal. The appeal is allowed. The ruling and orders made by the lower court on 9<sup>th</sup> May 2023 are set aside and substituted with an order allowing the Appellants' Notice of Motion application in the lower court dated 6<sup>th</sup> April 2023 in terms of prayer 3 thereof. The order for the recall of the witness is granted on the assumption that the lower court has not given its final judgment in the lower court matter. Each party shall bear its costs of the appeal

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG'O**

**JUDGE**



Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Tawo for the Appellants

Mr. Odhiambo for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Ms. J. Omondi-Court Assistant

