



Mwamule Company Limited v Chief Land Registrar & 2 others (Environment & Land Case 105 of 2019) [2024] KEELC 6217 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6217 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 105 OF 2019
EK MAKORI, J
SEPTEMBER 26, 2024**

BETWEEN

MWAMULE COMPANY LIMITED PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

FABIAN CAMPANELLA 2ND DEFENDANT

PAOLA CAMPANELLA 3RD DEFENDANT

RULING

1. This matter proceeded to full trial. The plaintiff called one witness. A defense hearing date was placed for 22nd January 2024. Mr. Kariuki came on record for the 2nd and 3rd Defendants. He stated that he realized the matter could quickly be settled under our court-annexed mediation initiative. The Court referred the parties for mediation with the hope of a happy ending and settlement, as is the case with mediation, where after settlement, parties go home—all winners.
2. The parties returned without settlement on 2nd May 2024. It is said the AG could hear none of it. Meanwhile, the AG closed the case for the 1st defendant without calling evidence. Mr. Kariuki, for the 2nd and 3rd Defendants, orally applied to reopen the matter for filing defense and documents. He says the same was served on the parties, but the Court record did not have the same. The Court directed the 2nd and 3rd Defendants to close their case and parties to file written submissions since the record showed no such defense or statements had been filed. In any event, the parties had an advocate actively representing them, Mr. Gicharu.
3. A formal application dated 22nd February 2024 was filed. It seeks to file a defense out of time and to reopen the matter for the cross-examination of the plaintiff's sole witness, Mr. Ernest K. Murimi.



4. The supporting affidavit deposed by Mr. Fabia Campella on 22nd February indicates that the 2nd and 3rd Defendants believed their former law firm had filed a defense and statements on their behalf. Besides, the defense will raise an issue that the 2nd and 3rd Defendants acquired the suit property by way of adverse possession and by dint of the judgment of this Court dated 14th September 2015 (Angote J.).
5. The issues I frame for this Court's determination are whether to reopen the matter and have the defense filed and the statements admitted out of time. Whether to recall the Plaintiff for cross-examination and who should bear the costs of the application.
6. Mr. Kariuki, on behalf of the 2nd and 3rd Defendants, submits that this is a desirable case in which the Court ought to exercise discretion in favor of the Applicants. He says that during pre-trials on 6th June 2023, the parties admitted that the 2nd and 3rd Defendants had filed a defense. They have a meritorious defense. The mistakes of former counsel should not be visited on them.
7. Mr. Muiruri believes that the Applicants' delay is not excusable. Nothing can explain the inordinate delay from 6th March 2023 as to why a defense could not have been filed 14 days after the plaintiffs served the summons as ordained under Order 7 Rule 1 of the Civil Procedure Rules.
8. The matter came up several times for pre-trials, significantly on 6th March 2023, 17th April 2023, 8th May 2023, and 6th June 2023. On 6th June 2023, this Court gave the Applicants 14 days to comply. There is no explanation why compliance never occurred during that period.
9. Mr. Muiruri submits that the Court should not exercise discretion in favor of the Applicants for the inordinate delay. The decision in *Njoroge v Kimani* [2022] KECA 1188 is cited.
10. This is a 2019 matter. Several pre-trials happened before the matter was set down in the manner narrated by Mr. Muiruri. The Plaintiff already testified. The first Defendant will not call any witnesses. The Court ordered the Applicants to close their case, and all parties filed final submissions. I can see that the Plaintiff has already filed the final submissions in compliance. The matter is ideally destined for a judgment—then the current application.
11. Mr. Kariuki provides the reasons for reopening this matter. The more often cited reason for failure to comply arises in this matter: The Applicants all along believed their erstwhile lawyer, Mr. Gacharu, filed a defense on their behalf. The current advocate avers that parties in this suit admitted to having received the defense. But alas! It is not on the Court record. The daily Minute Sheet shows the contrary. Could it have been served and not filed?
12. The Applicants in this matter have all along had counsel who has represented them and advised them on the progression of the matter. Nothing new happened with Mr. Kariuki's appointment to act for them. The reasons for not filing a defense and statement since 2019, as proffered, are not pertinent.
13. In *Samuel Kiti Lewa v Housing Finance Co. Kenya Ltd & another* [2015] eKLR, the discretion to reopen a case rests with the Court, and the Court should decide that question judiciously and with fairness to all the parties litigating before it:

“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.”



14. Mr. Muiruri argues that the inordinate delay must be explained. See Njoroge v Kimani [2022] KECA 1188, where the Court held:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control.”

I agree with that position, but then one issue arises here. In their proposed defense, the defendants raise the issue that they acquired the disputed portion through the operations of adverse possession. They went to Court in ELC 132 2015 – OS. They have a judgment. They believe it will impact this case. I will reopen the case to reckon that point and settle the suit herein fully but with the following terms:

- a. The 2nd and 3rd Defendants are granted leave to file a defence. The attached defence shall be deemed properly filed.
- b. Service of the same and the witness statement and documents be made within 14 days hereof.
- c. The Plaintiff will be recalled for cross-examination.
- d. The 2nd and 3rd Defendants are to pay the Plaintiff thrown-away costs of Kshs. 100,000/. within 14 days to cushion the Plaintiff from the rigors arising from the prolonged litigation herein.
- e. The matter be set down for hearing immediately.
- f. Failure to comply with the conditions aforesaid the earlier position to revert.
- g. Costs of the current application to be borne by the 2nd and 3rd Defendants in any event.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 26TH DAY OF SEPTEMBER 2024

E.K. MAKORI

JUDGE

In the Presence of:

Mr. Muiruri, for the Plaintiff

Mr. Ojwang for the 1st Defendant

Mr.Kariuki, for the 2nd and 3rd Defendant

Happy: Court Assistant

