



**Ngao v Munga & 5 others (Environment & Land Case 64 of 2016)  
[2024] KEELC 6066 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6066 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 64 OF 2016  
FM NJOROGE, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**SULTAN CHAI NGAO ..... PLAINTIFF**

**AND**

**HARRISON MUNGA ..... 1<sup>ST</sup> DEFENDANT**

**NDORO CHAKA ..... 2<sup>ND</sup> DEFENDANT**

**TSUMA CHAKA ..... 3<sup>RD</sup> DEFENDANT**

**KATANA CHAKA ..... 4<sup>TH</sup> DEFENDANT**

**ALI KARISA ..... 5<sup>TH</sup> DEFENDANT**

**CHIZI CHARO KOMBE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1st - 4th Defendants notice of Motion dated 9/6/23 seek the following orders:
  1. ....Spent;
  2. ....Spent;
  3. That this honourable court be pleased to set aside the proceedings already undertaken ex parte hearing and reopen the case for both the plaintiff and the defendants to be heard on merits;
  4. That the costs of this application be provided for.
2. The Application is founded on the grounds set out on its face and the supporting affidavit of Apollo Muinde, Counsel for the Applicants who deponed that the matter came up for hearing on 24th February 2022 when both counsel on record appeared but the matter was adjourned as the judges were away for a conference. He stated that by mistake of counsel for the 1<sup>st</sup> – 4<sup>th</sup> Defendants did not get the



next hearing date and it is not clear whether the other two defendants who were acting in person were ever served. Thus the matter proceeded in absence of the defendants. He additionally stated that the Applicants have raised pertinent issues in their defence and that they have also raised a counterclaim which ought to be ventilated on merits.

3. In response, the Plaintiff filed a replying affidavit sworn by himself. He stated that the matter was fixed for hearing by consent of counsel which hearing was scheduled on 14th February 2023 and the applicant cannot therefore purport have not heard the next date the matter was scheduled for hearing, that failure to attend court was intentional hence thus inexcusable.

### **Disposition**

4. The application was disposed of by way of written submissions. I have considered the Application, the grounds it is set upon, the replying affidavit and the submissions by the parties. The only issue arising for determination is whether the order sought seeking the reopening of the case is merited. Whether or not to reopen a case is the discretion of the court which discretion ought to be exercised judiciously. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the Court 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.”

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

“Uganda High Court, Commercial Division in the case of *Simba Telecom v Karuhanga & Anor*[2014] UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case *Smith v New South Wales*[1992] HCA 36; [1992] 176 CLR 256 where 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 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.”



6. The Ugandan Court in the case Simba Telecom (supra) held thus:

“I agree with the holding in the case of SmithSouth Wales Bar Association [1992] 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.” .....

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.”

7. This court thus has a wide discretion to reopen a suit but there must be reasonable grounds for such course of action and besides preventing the applicant from filling in gaps in his case by use of that discretion, the court must also avert any prejudice that may be occasioned to a respondent.

8. The Applicants seek to have the case reopened on account that they were not aware of the hearing date. I have perused the proceedings and noted that the matter was scheduled for hearing on 24th November 2022. On the said date counsel for the Applicants indicated that the other defendants had not been served. The matter was then fixed for hearing on 14th February 2023 by consent of the Applicants’ and the Plaintiff’s counsel. I further note that an affidavit of service was duly filed indicating that the 5<sup>th</sup> and 6<sup>th</sup> Defendants had been served and the present application has been brought by only the 1<sup>st</sup> -4<sup>th</sup> defendants. In light of this information, I do not see any good ground upon which to extend the court’s discretion to reopen the case. Consequently, the application dated 9/6/23 is hereby dismissed for want of merit with costs to the plaintiff.

9. Having noted that the suit was heard to conclusion before Hon Justice Odeny, I hereby order that the Deputy Registrar of this court shall forthwith transmit the original file to the ELC at Nakuru to be placed before Hon Odeny J for preparation of judgment. Judgment shall be delivered on notice.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 24TH DAY OF SEPTEMBER 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

