



**Nielsen (Also known as Rachel Njoki Karumbi) v Abdi & 5 others  
(Environment & Land Case 875, 876 & 877 of 2016 (Consolidated))  
[2024] KEELC 13338 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 875, 876 & 877 OF 2016 (CONSOLIDATED)  
AA OMOLLO, J  
NOVEMBER 14, 2024  
(CONSOLIDATED WITH ELC NO. 876 OF 2016 AND ELC NO. 877 OF 2016)**

**BETWEEN**

**RACHEL NJOKI NIELSEN (ALSO KNOWN AS RACHEL NJOKI  
KARUMBI) ..... PLAINTIFF**

**AND**

**AHMED MOHAMED ABDI ..... 1<sup>ST</sup> DEFENDANT  
NAJMA AHMED MOHAMED ..... 2<sup>ND</sup> DEFENDANT  
PETER O ONGORI T/A ONGORI AUTA & COMPANY  
ADVOCATES ..... 3<sup>RD</sup> DEFENDANT  
INVESTMENTS & MORTGAGES BANK LIMITED ..... 4<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR, NAIROBI ..... 5<sup>TH</sup> DEFENDANT  
ISEME KAMAU & MAEMA ADVOCATES ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This determination is with respect to the notice of motion application dated 18<sup>th</sup> July, 2024. In the first application, the Plaintiff/Applicant moved the court for ORDERS:
  1. That this Honourable Court be pleased to issue Summons to the Director of Immigration and Registration of Persons to produce the travel records of Rachel Njoki Nielsen through Norwegian Passport No. 26515799 from the year 2011 to 2014 and/or the entry and exit records into the Republic of Kenya for the said period.
  2. That the costs of this application be in the cause.



2. That The motion is premised on the affidavit sworn in support and the grounds listed on its face as follows;
  1. The issue in dispute in this suit is the fraudulent sale and transfer of the Plaintiff's suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through a Special Power of Attorney dated 20<sup>th</sup> June 2011 and Sale Agreements which were prepared by the 3<sup>rd</sup> Defendant and purportedly signed by the Plaintiff.
  2. The Plaintiff has vehemently denied having signed the Special Power of Attorney, the Sale Agreements dated 28<sup>th</sup> September 2011 and 23<sup>rd</sup> November, 2011 and/or the Transfer documents conveying the properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and asserted that she was not in Kenya at the material time.
  3. The plaintiff has produced in evidence her Norwegian Passport No. 26515799 to support her contention that she was not in Kenya at the material time.
  4. During the trial and particularly during cross-examination of the 3<sup>rd</sup> Defendant, the specific dates when the Plaintiff entered and left Kenya in the year 2011 and 2014 respectively was in serious contention between the Counsels for all the parties.
  5. The determination of when the Plaintiff entered and left Kenya is critical for the purposes of determining the validity of the Special Power of Attorney, the Sale Agreements and Transfer documents used in the sale and transfer of the suit properties in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  6. The Director of Immigration and Registration of Persons is not being summoned as a witness for the Plaintiff but merely to produce a public document.
  7. Production of the travel records of the Plaintiff will assist this Honourable court to make an informed, fair, accurate and just determination of the dispute herein.
  8. No party will suffer any prejudice if the Director of Immigration and Registration of Persons is summoned to produce the travel records as sought in the application.
3. 1<sup>st</sup> & 2<sup>nd</sup> Defendant's filed Ground of Opposition dated 13<sup>th</sup> September, 2024 stating that;
  1. The application is seeking summons additional witnesses and/or produce additional documents at this state of the proceedings is overtaken by events as the Plaintiff closed their case and allowing the same would be tantamount to them reopening it unprocedurally.
    2. The Application seeking to summon additional witness and/or produce additional documents at this stage of the proceedings is an afterthought with the objective of filling up holes in the Plaintiff's/Applicant's case poked during cross-examination.
4. That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants brought Grounds of Opposition pleadings that;
  1. The Application seeking to summon additional witnesses and/or produce addition documents this late in the proceedings amounts to trial by ambush as the Defendants based their defence on documents filed from the onset. The prayers sought would be highly prejudicial as they would destabilize the parties' defences that had been formulated based on the documents served at the inception of the suit.
  2. The Application is a back-door attempt by the Plaintiff to seal the gaps identified in her case through cross-examination. It is unfair for a party to be allowed to correct its position and/or



make changes to its case after cross-examination and after the close of its case, as this would amount to state-managing how witnesses testify.

3. The Application has been brought with inordinate delay, namely, over a year since the close of the Plaintiff's case on 16<sup>th</sup> March, 2023, which delay has not been sufficiently explained, and would needlessly delay the resolution of the suit more than 8 years since the Applicant filed the suit.
  4. The Plaintiff has not provided any and/or any justifiable reasons or excuse to explain why the Director of Immigration and Registration of Persons could not have been summoned prior to the close of her case. She has also not tendered any reasons to explain and/or demonstrate that the additional travel records she seeks to introduce at this stage could not have been procured with reasonable due diligence.
  5. The Application is therefore an abuse of the Court process and should forthwith be dismissed with costs to the Third and Fourth Defendants.
5. Vide Ground of Opposition dated 13<sup>th</sup> September, 2024 the 6<sup>th</sup> defendant impleaded thus;
1. That the Plaintiff already closed her case and she has neither filed an application before this Honourable Court requesting for the re-opening of her case nor included a prayer requesting the same in the Notice of Motion application dated 18<sup>th</sup> July, 2014. This court cannot therefore grant orders not sought for by the Plaintiff.
  2. That the application is frivolous and vexatious and is only a backdoor approach by the Plaintiff to have a second bite at the cherry which has the effect of allowing the Plaintiff to fill the gaps in her evidence which have arisen in the course of trial and that would be prejudicial to the 6<sup>th</sup> Defendant.
  3. That, the application is an afterthought as it has been brought at a very late stage of the proceedings. The Plaintiff all along knew that the production of the said 'public document' was important but elected not to request for witness summons for the Director of Immigration of Persons to come and testify and/or produce the said document before closing her case.
  4. That the Plaintiff has not provided a reasonable and justifiable basis for this Honourable Court to exercise its discretion and issue summons to the Director of Immigration and Registration of Persons.
  5. That, in view of the foregoing, the Plaintiff's Notice of Motion dated 18<sup>th</sup> July, 2024 should be dismissed with costs to the 6<sup>th</sup> Defendant and the hearing of the main suit allowed to proceed as scheduled.
6. That the Applicant deposes that in the suit, she has denied instructing the 3<sup>rd</sup> Defendant to prepare the alleged special power of attorney and denied signing it. That during cross-examination by the 3<sup>rd</sup> Defendant, the specific dates when she entered and left Kenya was in contention and that the issue is critical for determining the validity of the alleged special P.O.A.
  7. She deposes that her travel record via the Norwegian passport No. 26515799 is a public document which is in the exclusive possession of the Director of Immigration and Registration of persons who she wishes to summon to produce the public document. That the production of her travel history would assist the court to make an informed accurate and just determination of the dispute.
  8. The applicant avers that the Respondents will not suffer any prejudice if the application is allowed and that this court should dispense justice without any undue regard to procedural technicalities.



## Submissions:

9. The plaintiff filed their submissions dated 11<sup>th</sup> October 2024 and submitted that the court has the power to summon a witness under Section 22(b) of the *Civil Procedure Act*. On the relevance of the evidence of the Director of Immigration and Registration of Persons, she submitted it is an established rule of practice and procedure that before the court can issue summons to witness, the party must lay the basis for the relevance of the witness and the documents/evidence sought to be produced.
10. Whether the evidence is essential to aid the court in arriving at a fair and just determination of the dispute, She stated that in view of the contention regarding the date of entry and exit, it is crucial for this court to determine with clarity the proper dates when she entered and left Kenya. She said this finding will be crucial as it will also facilitate the court to determine whether indeed she signed the Special Power of Attorney, the sale agreements and transfer documents used to transfer the suit properties in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
11. She clarified that the Director of Immigration and Registration of Persons is not being summoned as a witness for the plaintiff as misconceived by the defendants. She contends that the officer be summoned by the court to produce a public document which is in his exclusive possession to assist the court to make an informed, fair, accurate and just determination of the dispute at hand. She claimed that the defendants' contention that the plaintiff has already closed her case and/or is seeking to re-open the case is therefore wholly misconceived and urged the court to disregard the same.
12. On whether the defendants will suffer any prejudice if the application is granted, she submitted that the defendants' counsel will be granted an opportunity to cross examine and/or ask any questions to the Director of Immigrations as they deem fit when he appears before the court to produce the original travel history of the plaintiff. She placed reliance on the case of *Manchester Outfitters Limited v Pravin Galot*, Civil Suit no. 55 of 2012 (2021) EKLK where a three-judge bench unanimously decided that the court suo moto, can summon any person it deems necessary either for the purposes of giving testimony or for producing a document or upon application by a party.
13. She concluded that the honourable court has the power and jurisdiction to summon any person suo moto to adduce evidence or produce documents if his testimony is relevant and/or will assist the court in arriving at a fair and just decision. She therefore urged the court to grant the orders sought in the application accordingly.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions dated 13<sup>th</sup> September 2024 and stated that the application has been brought after the defendants' advocates disputed the validity of the entries in the applicant's/plaintiff's passport that had been produced during cross-examination. That the plaintiff now wishes to move this court to rectify her mistake in her prosecution of the matter after she had already closed the case. They submitted that the procedure under Order 16 is not for aiding parties to make right their mistakes uncovered during the trial process, more so, after they had already had their day in court.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that what is fair under the circumstances at hand to all parties in this suit while being guided by the rules and principles of law, is to dismiss the plaintiff's application to protect the integrity of the proceedings from being proliferated by blatant disregard of rules of procedure. In conclusion, they pray that the application should fail on the basis of it being done procedurally as an afterthought and in an effort to fill holes poked during cross examination.
16. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed submissions on 13<sup>th</sup> September 2024. They submitted that if the application is allowed, it will result in the re-opening of the plaintiff's case and the introduction of



new evidence. They cited the decision of the Supreme Court in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others (2018) eKLR which outlined the governing principles on allowing additional evidence in appellate courts in Kenya. They stated that the plaintiff's application falls short of the aforementioned criteria for the reasons that the additional evidence sought to be introduced was never alluded to by the plaintiff at any stage during the trial.

17. That defendant contended that the plaintiff called a plethora of witnesses who testified at great length before this court from 1<sup>st</sup> July 2019 to 16<sup>th</sup> March 2023. PW1 and PW2 were cross-examined by the defendants' advocates on 4<sup>th</sup> March 2020 and 9<sup>th</sup> March 2020 on the alleged dates of entry and exit as purportedly reflected in the plaintiff's passport. On 14<sup>th</sup> April 2021, the Honourable Justice Okong'o granted leave to the plaintiff and the defendants to file additional and/or further witness statements. Upon conclusion of the evidence as presented by the plaintiff's witnesses, the plaintiff sought leave to further amend her pleadings, which leave was granted by the Honourable Court on 20<sup>th</sup> March 2023. They stated it is manifest therefore that, for the entire period leading up to the close of her case, the plaintiff never alluded to the existence of further and/or other travel documents which she believed were necessary to prove her claims. They placed reliance on the case of Johanna Kipkemei Too v Hellen Tum (2014) eKLR where the court determined as follows on the introduction of documents that were not initially referred to by the parties:

“The additional evidence is not new and is being introduced to fill in loopholes in the plaintiff's case.”

18. They pesit that the plaintiff's application is a veiled attempt to rectify errors she made during her cross-examination, which were also highlighted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their respective testimonies. More particularly, the plaintiff failed to tender any evidence to show that travel documents were endorsed by handwriting. She also failed to counter the evidence led by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants with respect to her presence at several meetings concerning the sale of the suit properties.
19. It is averred that the plaintiff has not elaborated how the additional evidence would aid in the just determination of the issues before the court. The plaintiff does not explain the inordinate delay in filing the said application. They said it is manifest that the plaintiff utilized this period to re-evaluate the case after the testimony of her witnesses and those of the 1<sup>st</sup> to 3<sup>rd</sup> defendants to contemplate the defendants' line of defence. They said the documents sought to be produced at this stage are thus intended to prejudice the defendants by defeating an already established line of defence.
20. The 5<sup>th</sup> Defendant filed their submissions dated 30<sup>th</sup> September 2024 and outlined two issues for determination of the application. On whether witness summons can be issued without seeking to reopen the plaintiff's case, they said a party should call all the evidence which he proposes to rely on during the presentation of his case, and before closing his case. They said the plaintiff seeks witness summons after close of her case, without seeking to re-open her case. If the court were to issue witness summons against the said intended witness, the question that will arise is, how the plaintiff will present the evidence of said witness without first seeking to re-open her case.
21. On whether the plaintiff has given sufficient reasons to warrant grant of the orders sought, they submitted that during the hearing of the plaintiff's case, the plaintiff produced extracts of her passport, she was cross-examined on the contents of the said passports including the dates of entry and exit. It is therefore not correct for the plaintiff to allege that the issue of the dates on the said passport arose during the 3<sup>rd</sup> defendant's case. They contended that the plaintiff had an opportunity during the hearing of her case to seek witness summons against the Director Immigration and Registration of Persons to provide her travel records and clarify the issue of the dates of her travel. No reasons have



been advanced whatsoever to explain why that was never done. It was their humble submission that the application is misconceived, mischievous, frivolous and an abuse of the court process and the same should be dismissed with costs to the defendants.

### **Analysis and Determination**

22. I raise the following issues come up for determination of this application:
  - a. Whether summons should issue against the Director of Immigration to produce the plaintiff's travel records;
  - b. Whether the application is merited;
  - c. Who should pay costs?
23. The plaintiff has sought for summons to issue to the Director of Immigration and Registration of Persons to produce her travel records through Norwegian Passport No. 26515799 from the year 2011 to 2014 and/or entry and exit records into the Republic of Kenya for the said period. She has claimed that this is not an attempt to introduce new evidence or re-open her case as claimed by the defendants. It is an attempt to give the court clarity on an issue that was already before it in order to make a just determination.
24. The defendants have argued that this is an attempt by the plaintiff to patch up the gaps that were unveiled during cross-examination and strengthen her case. Further, the 5<sup>th</sup> defendant stated that the plaintiff cannot seek summons for a witness without first re-opening her case.
25. Section 22(b) of the *Civil Procedure Act* states: 'Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party-(b) issue summonses to person whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;'
26. Order 16 Rule 6 of the Civil Procedure Rules reads that: "Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same."
27. Courts in various jurisdictions have developed governing principles when faced with the question of re-opening a case and allowing additional evidence. In the case of *Raindrops Ltd – Vs County Government of Kilifi (2020) eKLR*, the Court cited and quoted the *Canadian Encyclopedia Digest Evidence (V) 12, (a)*, which summarized the approach a Court should adopt in assessing a party's conduct as a relevant factor as follows: -
  - i. "Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered. While some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.
    - i. Whether the evidence; if it had been properly tendered would probably have altered the judgment, and



- ii. Whether the evidence could have been discovered sooner had the party applied for reasonable diligence.

Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger, the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."

28. In the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR the Supreme Court stated as follows at paragraph 79:-

"Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.



- j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
29. From the records of the proceedings, the plaintiff had closed her case on 16<sup>th</sup> March 2023. The 1<sup>st</sup> to 4<sup>th</sup> Defendants have equally led evidence and closed their cases and only the 5<sup>th</sup> and 6<sup>th</sup> Defendants are left to testify. Before she closed her case, the parties were granted leave to file additional and/or further witness statements. After the close of her case, the plaintiff sought leave to further amend her pleadings, which leave was granted. This was after she was cross-examined by the defendants where issues on date of travels and the evidence she wishes the Director of Immigration and Registration to produce came up. The plaintiff was aware of the evidence sought to be introduced to fortify her case then but she did nothing to move the court.
30. Even though the plaintiff has pleaded that the purpose of summoning the intended witness is to give the court clarity as to the entry and exit dates in Kenya as per her passport, it is akin to re-opening her case to call an additional witness without praying for an order re-opening her case. This witness, if summoned to produce the travel records, will be for the benefit of her case as against the defendants. Secondly, this is not new evidence that was not within her knowledge at the time she was closing her case. The information is in her passport which was already produced and if she needed to provide further corroboration, she should have done so during the hearing of her case or when she sought to amend her pleadings. Thirdly, the application has been made after over one year after the plaintiff closed her case. No explanation has been rendered for the delay.
31. Allowing the application after the 1<sup>st</sup> to 4<sup>th</sup> defendants have closed their case will prejudice them as it may change their defence. The claim that the witness will provide clarity to the court on the contention that arose during cross examination is not sufficient cause to allow the application. The plaintiff cannot use this court to exercise of discretion to fill gaps poked during hearing of a case.
32. In *Odeyo Osodo Vs Rael Obara Ojuok & 4 Others* (2017) eKLR, the Court stated that the discretion whether or not to re-open a case which the applicant had previously closed should be exercised with caution not arbitrarily, whimsically but only in favour of an Applicant who has established sufficient cause. The applicant in this case is guilty of laches and is not deserving of the court's discretion.
33. The upshot is that the application is not merited and is hereby dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024

A. OMOLLO  
JUDGE

