



Kimani & 62 others v Kimuri Housing Company Limited & another (Environment & Land Case 179 of 2019) [2023] KEELC 372 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 179 OF 2019**

**BM EBOSO, J
JANUARY 24, 2023**

BETWEEN

NANCY WANJIRU KIMANI & 62 OTHERS PLAINTIFF

AND

KIMURI HOUSING COMPANY LIMITED 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. This suit came up for hearing on 7/6/2022. At the point of settling the causelist and allocating time, Mr Nguring'a, counsel for the plaintiff, informed the court that the plaintiffs were going to lead evidence by two witnesses. Mr Jeremy Njenga, counsel or the 1st defendant, intimated to the court that the 1st defendant had one witness. Ms Njuguna, counsel for the 2nd defendant, indicated that the Attorney General had one witness. By consensus, the parties present agreed that the evidence of the Land Registrar was to be taken first, to enable him go back to his Office and serve the public. Consequently, the Land Registrar, Mr Joseph Wangombe Kamuyu, testified as DW1 and was released. His testimony preceded the testimony of the plaintiff's witness.
2. Subsequent to that, the plaintiffs led evidence by George Kimani Nganga who testified as PW1. He was cross-examined and re-examined. The court adjourned the proceedings at 1.45 pm to attend to other judicial duties. At that point, the plaintiffs had not closed their case. Indeed, they had not led evidence by their second witness. The court scheduled the case for further hearing on 24/10/2022.
3. When the case came up for further hearing on 24/10/2022, Mr Nguring'a, counsel for the plaintiffs, applied for an adjournment to allow the plaintiffs time to bring additional evidence. He contended that, arising from the evidence of the Land Registrar, it had emerged that "there may have been a forgery." The application for adjournment was opposed by the defendants. Upon considering



the parties' respective submissions, the court rendered a brief ruling through which it granted the adjournment.

4. Subsequent to that, the plaintiff filed a notice of motion dated 26/10/2022, seeking the following verbatim reliefs:
 1. That this honourable court be pleased to grant leave to the plaintiffs to file additional documentary evidence in support of their case and serve a supplementary list of documents to facilitate taking of the plaintiffs evidence.
 2. That this honourable court be pleased to recall the plaintiffs herein and allow them tender additional documentary evidence.
 3. That this honourable court be pleased to take the additional documentary evidence tendered by the plaintiffs.
 4. That this honourable court be pleased to recall the Land Registrar for purposes of being cross-examined as regards the plaintiffs' additional documentary evidence.
 5. That the respondent be at liberty to file a replying affidavit if any.
 6. That costs of this application
5. When the application came up for interpartes hearing on 16/11/2022, parties to this suit recorded a partial consent on the application in the following terms:
 - “(1) The plaintiff be allowed to file two additional documents, namely an account statement from the National Bank and customer transaction receipts from the same bank.
 2. The said documents be produced by their makers.
 3. The Land Registrar be called for purposes of cross-examination on the additional documents.”
6. Upon recording the consent, Mr Nguring'a, counsel for the plaintiffs, intimated to the court that the outstanding aspect of the application was the plea for recall of the plaintiff, adding that parties had failed to agree on the plea.
7. What therefore falls for determination in this ruling is prayer 2 of the above application dated 26/10/2022. Submitting on the plea for recall of PW1, Mr Nguring'a argued that it was necessary for PW1 to be recalled to identify the additional documentary evidence and lay a nexus between the plaintiffs case and the additional documents.
8. Opposing the plea, Mr Jeremy Njenga, counsel for the 1st defendant, submitted that recalling PW1 would be a waste of the court's time. Counsel argued that PW1 was not the maker of the additional documents hence there was no proper reason why he should be recalled. Counsel contended that the plaintiffs were out to fill gaps in the evidence that was already before court.
9. I have considered the plea together with the parties' rival submissions. The issue to determine in the outstanding limb of the application is whether the plaintiffs/applicants have satisfied the criteria upon which our trial courts exercise jurisdiction to recall a witness.



10. Both the *Evidence Act* and the *Civil Procedure Rules* do not have clear and express frameworks on how the jurisdiction to recall a witness is to be exercised. Section 146(4) of *Evidence Act* generally grants trial courts powers to recall a witness. It provides thus:

“(4) 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.”

11. Order 18 rule 10 of the *Civil Procedure Rules* similarly grants trial courts power to recall any witness who has been examined. It provides thus:

“10. 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.”

12. Over the years, courts have developed principles that guide the exercise of the above jurisdiction. Key among them is that, the applicant is required to demonstrate that the evidence he seeks to introduce through a recall could not have been obtained with reasonable diligence at the time of the testimony of the witness. [See (i) *Victoria Naiyoni Kiminta v Gladys Kiminta Prinsloo* [2009] eKLR; (ii) *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamed & others* [2018] eKLR; (iii) *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* [2015] eKLR; and (iv) *Ladd v Masall* [1954] 3 All ER 745].

13. In the present application, the plaintiffs have not closed their case. Secondly, the parties to this suit have agreed that the makers of two additional documents be called by the plaintiff as witnesses. Thirdly, the plaintiffs have explained that the reason why they want PW1 to be recalled is to identify the two documents and lay a nexus between them and their case. The defence has not demonstrated any prejudice they are likely to be exposed to if PW1 is recalled for the above purpose. Indeed, the defence will, undoubtedly, have the right to cross-examine PW1.

14. Given the above circumstances, it is the finding of this court that the criteria upon which a trial court exercises jurisdiction to recall a witness has been satisfied. Consequently, the plaintiffs are granted leave to recall PW1 for the purpose of identifying the two additional documents and demonstrating the nexus between the plaintiffs’ case and the two additional documents. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JANUARY 2023

B M EBOSO

JUDGE

Ms Njuguna for the 2nd and 3rd Defendant

Kimani holding brief for Njenga for the 1st Defendant

Court Assistant: Ms Osodo

