



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Njuguna & 2 others (Environment & Land Case
737 of 2012) [2023] KEELC 117 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 737 OF 2012
EK WABWOTO, J
JANUARY 19, 2023**

BETWEEN

MARTHA NJERI NGUGI PLAINTIFF

AND

MILKA WANJIRU NJUGUNA 1ST DEFENDANT

PETER MUHOHO NJUGUNA 2ND DEFENDANT

PIUS KINUTHIA NJUGUNA 3RD DEFENDANT

RULING

1. The application for determination is a defendants' notice of motion dated May 25, 2022 and accompanied by supporting affidavit sworn by Agatha Wambui Macharia on the even date. The defendants sought the following orders:
 - i. That this honourable court be pleased to set aside and expunge from court records all the evidence that was adduced by the plaintiff and her witness/es before this honourable court on May 9, 2022 in absence of the attendance of the defendants and their witnesses.
 - ii. That this honourable court be pleased to order that this matter be heard on a day to be agreed on by the parties to the same when all the parties and their witnesses may be present and participate.
 - iii. That costs of this application be provided for.
2. The application was made on the following grounds:
 - i. That the process server by the name Jacob Kinyili Joseph who has deponed to the affidavit of service sworn on the February 11, 2022 in which he avers that



he served the firm of Kamata & Company advocates with the hearing notice dated the 10th day of February has told untruth since he never served the said firm of advocates with the hearing notice a copy of which he has annexed to his said affidavit of service.

- ii. That the rubber stamp affixed to the said hearing notice is not the rubber stamp of Kamata & Co Advocates as alleged, a matter which will be proved in court during the hearing of this application, and also the writings alleged to have been made by the secretary of Kamata & Co Advocates are forged. writings and are not written by the said secretary.
3. On May 9, 2022, the suit came up for hearing where the plaintiff's witnesses testified and their case was consequently closed. Following the absence of the defendants, their case was marked as closed and the plaintiff granted 21 days to file written submissions.
4. In submissions dated October 14, 2022, the defendant's submitted that failure to attend court was not a mistake of their part but on the part of the plaintiff advocates and respective agents. It was argued that by virtue of the process server allegedly forging their rubber stamp, service could not be deemed as duly effected.
5. The application was opposed. In the replying affidavit dated July 25, 2022 and submissions dated October 28, 2022, the plaintiff submitted that service was duly effected and they were under no obligation to enjoin the process server by having him swear an affidavit and depone on matters for the benefit of the applicant's case.
6. Having considered the application and perused the written submissions, court proceedings and supporting documents, it is evident that the issue for determination before this court is whether the defendants/applicants application is merited.
7. Order 18, rule 1 of the *Civil Procedure Rules*, dictates that the plaintiff shall have the right to begin unless the court otherwise orders. In this case, the plaintiffs' witnesses gave evidence but were not cross-examined due to the non-attendance of the defendants. Additionally, order 18, rule 10, outlines the circumstances under which a witness may be recalled:

“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.”
8. This court must consider the balance of fairness for all parties as outlined in section 146 (4) of the *Evidence Act*:-

“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.”
9. The use of the word “may” speaks to the discretionary powers of the court to ensure discovery of evidence is done effectively and allows both parties to appraise the strength or weakness of their relevant cases. In this instance, it is prudent to uphold the principles of natural justice and right to fair hearing rather than set aside evidence.
10. The threshold to re-open a case is emphasized in several instances. First, the Court of Appeal in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suing Division)*



Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR highlighted that the court exercises discretionary powers when determining to re-open a case. In Samuel Kiti Lewa v Housing Finance Company & another [2015]eKLR, the court would not grant the plea if it is intended to fill gaps in the evidence. Lastly, the plea cannot be granted if there is inordinate and unexplained delay on part of the applicant.

7. My perusal of paragraph 7 of the further affidavit by the defendants demonstrates the diligence with which the issue of service was taken up by defendants' counsel:

“I decided to pursue the issue of forgery of my office rubber stamp and use of the same against my firm which I reported at Central Police Station and eventually Jacob Kinyili Joseph, the process server who swore the affidavit of service in issue was arrested and charged in the Chief Magistrate's Milimani Criminal Court in Criminal case number E856 of 2022 which is now pending to be heard. (Please find annexed hereto and marked P.K.K.1 a copy of the charge sheet in respect of that case.”

7. Although the defendants did not produce a DCI report confirming that the rubber stamp was a forgery, I take note that this application was filed in a timely manner within three weeks of the close of the hearing,

8. In the foregoing, the court finds that the application dated May 25, 2022 is merited and the same is allowed under the following terms:

- i. This matter will be heard on a mutually agreed date and when all the parties and their witnesses are present to participate.
- ii. The defendants' case is hereby re-opened for hearing.
- iii. That the plaintiffs' witnesses be recalled for purposes of cross examination and re-examination.
- iv. Each party to bear own costs of the application.

9. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Thungu for the Plaintiff.

Mr. Kamata for Defendants.

Court Assistant; Caroline Nafuna.

