



**Wambaa v Nairobi City Council & another (Environment & Land Case
645 of 1998) [2023] KEELC 905 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 905 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 645 OF 1998**

**J OMANGE, J
JANUARY 19, 2023**

BETWEEN

ANN MUTHONI WAMBAA PLAINTIFF

AND

NAIROBI CITY COUNCIL 1ST DEFENDANT

MICHAEL K MAINA 2ND DEFENDANT

RULING

1. Before me is the notice of motion dated October 31, 2022 praying for the court to issue summons to SG Mwangi an employee of the Nairobi County Government to attend court and give evidence on the basis of his witness statement dated March 18, 2014. The application is brought on the grounds that the 1st defendant filed a defence and a witness statement Dated March 18, 2014. The 1st defendant has since failed to secure the attendance of the witness whose testimony is crucial to the fair determination of this matter. The application is supported by the affidavit of William Maina Kamanda who holds a power of attorney on behalf of the 2nd defendant. He avers that the failure of the 1st defendant to secure the attendance of the witness would make it difficult for the court to reach a just, concise and fair determination in the case.
2. Senior Counsel Mr Ngatia submitted that the affidavit evidence of Mr. Maina is uncontroverted in its entirety. Counsel submitted that the court should compel the witness to attend court and testify on the basis of the witness statement. Counsel argued that it was incomprehensible why the 1st defendant was trying to keep the witness who had recorded a witness statement from attending court. Senior Counsel submitted that in this matter the court would need to make a determination in favour of one of the parties as both could not win. In the circumstances the court would need all the relevant information to enable it reach a just determination. Counsel filed authorities which the court has carefully considered.



3. Counsel for the 1st defendant objected to the application on the ground that the application was res judicata as the court had already determined the issue in the Ruling dated October 12, 2022.
4. I have considered the application herein, the grounds of opposition and the submissions by counsel for the 2nd defendant. There are three Issues for determination by the court namely;
 - i. Is the application Res Judicata?
 - ii. Has the 2nd defendant laid a basis for calling the witness.
 - iii. Should the court compel the witness SG Mwangi to attend court on behalf of the 2nd defendant?
5. On the question of Res Judicata, the courts determination was on the application that the court compels the 1st defendants advocate not to close the 1st defendants case, in spite of the advocate having indicated that she wished to close the case without the testimony of her witness. The present application is a formal application by counsel for the 2nd defendant to call the witness herein to testify on the basis of a witness statement. The current application could only be made by the 2nd defendant after the closure of the 1st defendants case without calling the witness. I therefore find that the application is not Res Judicata.
6. On the second issue, it is the argument of counsel for the 2nd defendant that given that the land in question was allocated by the 1st defendant, the testimony of the witness will be critical to a fair determination of the issues herein. I concur hence find that a proper basis has been laid for summoning the witness.
7. The only issue the court must then determine is whether the court can compel a witness who has filed a witness statement to appear for an opposing party. It is not contested that the witness SG Mwangi is an employee of the 1st Defendant and that he signed a witness statement. There is no affidavit challenging his capacity or giving any lawful reason why he cannot testify. He is therefore a competent witness.
8. The significance of signing a witness statement was emphasized in ELC Case no 394 of 2017 by Hon Justice Angote J as follows “It is not in dispute that Francis Mburu signed the witness statement in support of the plaintiffs case on October 16, 2019. Having voluntarily signed the said statement, the said Francis Mburu must attend court and give his evidence, which evidence will be tested by the defendants in cross- examination.
9. Apart from the burden placed upon him as a witness who has signed a statement, this witness has an extra responsibility. The uncontroverted averment of the 2nd defendant is that the witness is an employee of the Nairobi City County hence is a public officer. As a Public Officer Mr Mwangi is bound by the values and principles of Public Service. Article 232 (1) (f) of *the Constitution* provides that the values and principles of public service include inter alia; transparency and provision to the public of timely accurate information. Transparency would require that having signed a witness statement, Mr Mwangi should attend court to shed light on the issue.
10. The question then would be can the 2nd defendant seek the courts assistance in calling a witness who was a witness for the 1st defendant. In the case of *Hirji v Modessa* [1967] E.A 724 Law JA had this to say:-

“It was conceded by counsel for the respondent, that the respondent was both a competent and compellable witness, he submitted that as the appellant had taken no steps to summon him under order 16 rule 7 of the *Civil Procedure Code*, the judge had a discretion under order 16 rule 7 whether or not to require him to give evidence. I agree that this is so, but



with respect to the learned judge I do not consider that in this he exercised his discretion judicially. His reason for not requiring the respondent to give evidence for the other side was, apparently, that there was something improper or irregular in one party calling the other party as a witness in civil proceedings. I think that the learned judge erred in this respect. Although it may be unusual, there is nothing wrong in a plaintiff calling the defendant as a witness, especially (as in this case) when counsel for the defendant has indicated that he will not be calling his client. I am of the opinion that the learned judge erred in not allowing the respondent to be called as a witness for the appellant, in the circumstances of this case; but this is not by itself a sufficient reason for allowing the appeal or ordering a new trial”

11. Taking into account the foregoing and considering that the said witness is a public officer who has a duty to provide timely accurate information, I find that there is no bar to an opposing party seeking the assistance of the court as provided by order 16 to secure the attendance of the witness in court. More so in a case such as this where the witness had recorded a witness statement.
12. The upshot of the foregoing is that the 2nd defendants application is allowed as follows;
 - a. Witness summons are hereby issued to SG Mwangi to attend court on a date to be given in court and give evidence on the basis of his witness statement dated March 18, 2014.
 - b. Costs of this application to be in the course.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Nganga for the Plaintiff

No appearance for the Defendants

Steve Musyoki - Court Assistant

