



REPUBLIC OF KENYA



**Mahui & another v Gatei & 3 others (Commercial Case 330 of 2008)
[2024] KEHC 6635 (KLR) (Commercial & Admiralty) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE 330 OF 2008**

MN MWANGI, J

MAY 24, 2024

BETWEEN

NELSON KIGURU MAHUI 1ST PLAINTIFF

ELIZABETH WANJIKU MAHUI 2ND PLAINTIFF

AND

VIOLET WANJA GATEI 1ST DEFENDANT

PARAMOUNT UNIVERSAL BANK LIMITED 2ND DEFENDANT

HARBOUR HELP (K) LTD 3RD DEFENDANT

HERBERT MWANGI KAMAU 4TH DEFENDANT

RULING

1. The plaintiffs filed a Notice of Motion application dated 12th April, 2024 pursuant to the provisions of Order 18 Rule 10 of the [Civil Procedure Rules](#), 2010 and Section 146(4) of the [Evidence Act](#), seeking the following orders –
 - i. That the Honourable Court be pleased to order that Mr. Michael Riitho the witness of the 2nd defendant be recalled for further cross-examination; and
 - ii. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Kibe Mungai, an Advocate of the High Court of Kenya and learned Counsel for the plaintiffs. In opposition thereto, the 2nd defendant filed a replying affidavit sworn by Kevin Wakwaya, an Advocate of the High Court of Kenya and learned Counsel for the 2nd defendant, on 4th March 2024.



3. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 9th April, 2024 by the law firm of Kinoti & Kibe Company Advocates, whereas the 2nd defendant's submissions were filed by the law firm of Rachier & Amollo LLP on 26th April, 2024. On 6th March, 2024, Ms. Kavere, learned Counsel for the 1st & 3rd defendants indicated that the 1st & 3rd defendants were not opposing the instant application.
4. Mr. Kibe Mungai, learned Counsel for the plaintiff referred to the provisions of Articles 25 & 50 of the Constitution of Kenya, 2010 and submitted that the plaintiffs have a right to cross-examine the defendants' witnesses on all aspects of their defence before judgment has been rendered. Further, that this Court is permitted under Section 146(4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules, 2010, to recall/or allow the recall of a witness for further examination-in-chief and/or for further cross-examination, and if it does so, parties have the right of further examination and cross-examination, respectively. To buttress these submissions, Counsel relied on the cases of Raindrops Limited v County Government of Kilifi [2020] eKLR and Samuel Kiti Lewa v Housing Finance Company Limited & another [2015] eKLR.
5. Counsel submitted that recalling of the 2nd defendant's witness is not meant to fill in gaps in the plaintiff's case since at the time of the hearing, neither the 1st nor the 3rd defendants had entered their appearance, and as such, it will be in the interest of justice for the Honourable Court to exercise its discretion in favour of the plaintiffs. In addition, he stated that procuring the presence of the 1st & 3rd defendants at the time the 2nd defendant's witness testified was beyond the plaintiffs' control. Mr. Kibe Mungai referred to the case of Risoro v State Farm Mutual Automobile Insurance Co. [2009] 70 Cpc Out Div Cl and argued that recalling of the 2nd defendant's witness will mitigate the prejudice that the plaintiffs stand to suffer on account of the leave granted to permit the participation of the 1st & 3rd defendants after the close of the plaintiffs' and 2nd defendant's cases.
6. Mr. Wakwaya, learned Counsel for the 2nd defendant relied on the cases of Raindrops Limited v County Government of Kilifi (supra) and Trust Bank Limited v Shah & 8 others (Civil Suit 73 of 2001) [2023] KEHC 21017 (KLR) and submitted that the powers donated by Section 146(4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules, 2010 are discretionary and should be exercised judiciously. He referred to the Learned Authors of Murphy on evidence 12th Edition at paragraph 17.17 and submitted that whereas the Court has the discretion to recall a witness, an applicant must bring themselves within the strictures and principles established by law, by first seeking the re-opening of the case and demonstrate that the application has not been mounted to get a second bite at the trial, having failed to establish their case before closing the case.
7. Counsel cited the case of Osodo v Rael Obara Ojuok & 4 others [2017] eKLR and argued that a witness cannot be recalled for purposes of filling gaps that ought to have been filled when the witness first took the stand, as cogent reasons must be advanced to allow the Court to exercise its discretion in favour of the recall. He contended that in this case, no valid reasons have been advanced to warrant the plaintiffs being granted the orders sought. It was stated by Counsel that allowing the application herein at this juncture will be presumptuous since the 2nd defendant is yet to cross-examine the 1st & 3rd defendants' witness to test the testimony given by the said witness. Mr. Wakwaya cited the case of Willoughby v I.M.B. Ltd [1987] and stated that the plaintiffs have not disclosed the questions or clarifications that the 2nd defendant's witness is required to make thus the instant application is the plaintiffs attempt to get a second bite at the cherry.
8. Counsel relied on the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR, and asserted that allowing the instant application will be tantamount to granting the plaintiffs an



opportunity to fill the gaps that they failed to fill at the time they were cross-examining the 2nd defendant's witness, which will be prejudicial to the 2nd defendant. That in any event, the said witness can only be recalled once the 2nd defendant's case has been re-opened, which prayer has not been sought by the plaintiffs in the instant application.

Analysis And Determination.

9. I have considered the instant application, the grounds on the face of it, and the affidavit filed in support thereof. I have also considered the replying affidavit by the 2nd defendant and the written submissions by Counsel for the the parties. The issue that arises for determination is whether the plaintiffs have made out a case to warrant being granted an order to recall the 2nd defendant's witness, Mr. Michael Riitho for further cross-examination.
10. Mr. Kibe Mungai in the plaintiffs' affidavit in support of the instant application deposed that the plaintiffs testified before the 1st & 3rd defendants were granted leave to file their pleadings and defend this case. He averred that the 1st defendant in her testimony shed light on her relationship with the plaintiffs and gave details of the transactions with the 2nd defendant, its officials and Advocates.
11. It was stated by Counsel that as a result of the aforesaid testimony, certain facts have come to light which the plaintiffs wish to further cross examine the 2nd defendants witness on. He further stated that further cross-examination of the said witness will enable this Court to secure a fair trial and substantive justice for all the parties herein. Mr. Kibe Mungai asserted that no party will suffer any prejudice in the event the instant application is allowed.
12. Mr. Wakwaya in the 2nd defendant's replying affidavit averred that there is no reasonable ground advanced and disclosed as to why the 2nd defendant should be recalled for cross-examination, and/or a mention of what the 2nd defendant is required to come and be cross-examined on.
13. Further, that all the documents relied on by the 2nd defendant's witness and his testimony are already before this Court and the plaintiffs had an opportunity to cross-examine the said witness on the basis of the said testimony and documents. Therefore, the instant application is an attempt by the plaintiffs to get a second bite at the cherry
14. It was stated by Counsel that the plaintiffs are relying on their own cross-examination of the 1st defendant to purport to seek the recalling of the 2nd defendant, when the 2nd defendant is yet to cross-examine the 1st defendant. He further stated that the 2nd defendant's cross-examination of the 1st defendant will disclose that there is no need for recalling of the 2nd defendant's witness for further cross-examination.

Whether the plaintiffs have made out a case to warrant an order recalling the 2nd defendant's witness, Mr. Michael Riitho for further cross-examination.

15. This Court has the discretion to recall a witness pursuant to the provisions of Section 146(4) of the [Evidence Act](#) which states as follows -

“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.”



16. Further, Order 18 Rule 10 of the [Civil Procedure Rules](#), 2010 grants the Court powers to recall any witness, it states that -

“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.”

17. It is now well settled that the Court’s discretion to recall a witness for further examination-in-chief and/or cross-examination should be exercised judiciously. Further, in determining whether it is just and in the interest of justice to allow an application that seeks recalling of witnesses, this Court has a duty to ascertain why the clarification and/or testimony sought to be adduced by the 2nd defendant’s witness was not done before the close of the 2nd defendant’s case, and establish if failure to avail the said evidence was not deliberate. The Court in [Susan Wavinya Mutavi v Isaac Njoroge & another](#) (*supra*) in disallowing a similar application 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 part’s (sic) 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 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.”

18. Similarly, in [Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another](#) [2015] eKLR, Kasango J., made the following observation in regard to applications such as the one before this Court -

“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.”

19. In the instant application, the plaintiffs have not sought for an order to re-open the 2nd defendant’s case. However, I opine that if this Court finds that the plaintiffs have made out a case to warrant recalling of the 2nd defendant’s witness for further cross-examination, the Court in exercise of its inherent jurisdiction provided for under Section 3A of the [Civil Procedure Act](#) can *suo moto* make an order for re-opening of the 2nd defendant’s case to allow for the further cross-examination of the 2nd defendant’s witness by the plaintiffs.

20. The plaintiffs’ application is anchored on the fact that by the time the 1st & 3rd defendants were granted leave to file their pleadings and defend this case, the plaintiffs and 2nd defendant had already closed their cases. However, during cross-examination of the 1st & 3rd defendants’ witness, certain facts which will



enable this Court to secure a fair trial and substantive justice for all the parties herein came to light, which facts the plaintiffs wish to further cross-examine the 2nd defendant's witness on.

21. It is not disputed that the plaintiffs' case was closed on 21st February, 2019, whereas the 2nd defendant's case was closed on 26th June, 2019. By this time, the 1st & 3rd defendants had neither entered appearance nor filed their pleadings either in support or in opposition to the plaintiffs' case. The 1st & 3rd defendants were only allowed to file their defence to this suit vide a consent recorded between the parties herein on 28th January, 2020. It is manifest from the record that the 1st & 3rd defendants' witness testified on 11th December, 2023, which means that before that date, the plaintiffs had no way to decipher what her testimony would entail, and the effect of that testimony to the plaintiffs' case.
22. The plaintiffs submitted that ordinarily, the 1st defendant who testified on behalf of the 1st & 3rd defendants, ought to have testified before the 2nd defendant called its witness, and if this was the case, the plaintiffs would have had the advantage of having heard the 1st defendant's testimony/evidence before cross-examining the 2nd defendant's witness. I agree with Counsel for the plaintiffs that since the 1st & 3rd defendants' witness testified after the close of both the plaintiffs and 2nd defendant's case, the evidence of the 1st & 3rd defendants' witness could not inform the cross-examination of the 2nd defendant's witness by the plaintiff.
23. Although the 2nd defendant contended that it will be prejudiced in the event the instant application is allowed, it did not demonstrate what kind of prejudice it will suffer and to what extent. To the contrary, this Court is persuaded that the 2nd defendant stands to suffer no prejudice in the event that the orders sought in the instant application are granted, since the 2nd defendant will have an opportunity to re-examine its witness if need be, for purposes of clarifying any issues that will be raised during the further cross-examination of its witness.
24. In as much as the plaintiffs' affidavit in support of the instant application does not disclose the nature, extent and context of the further cross-examination of the 2nd defendant's witness, I opine that the circumstances of this case as explained above herein calls for this Court to invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act and make an order allowing the plaintiffs to recall the 2nd defendant's witness for further cross-examination. This will not only be in the interest of justice, but will also secure a fair trial between the parties herein. In addition, this Court's broad powers of case management under the Civil Procedure Act and Rules need to be noted: to achieve the objective of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute, the Court may make any order or give any direction with regard to the just determination of the Civil proceeding and the efficient conduct of the business of the Court.
25. The application herein was filed on 12th February, 2024, approximately two months after the date when the 1st & 3rd defendants' witness testified and was cross-examined by Counsel for the plaintiffs. This Court is of the view that in as much as there was delay in filing the instant application, the same was not so inordinate as to lead to the dismissal of the application herein, noting that by the time the application herein was filed, this matter had not proceeded to further hearing of the 1st, 3rd & 4th defendant's cases, and it had not been reserved for judgment. In the end, this Court is satisfied that the plaintiffs have made out a case to warrant an order recalling the 2nd defendant's witness, Mr. Michael Riitho for further cross-examination.
26. In the circumstances, this Court finds that the application dated 12th February, 2024 is merited. It is allowed in the following terms;
 - i. The 2nd defendant's case is hereby re-opened for the purposes of re-calling the 2nd defendant's witness Mr. Michael Riitho for further cross-examination; and



ii. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED AT NAIROBI ON THIS 24TH DAY OF MAY 2024. RULING
DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

