



**Mayfair Holdings Limited v Ondu & another (Sued in their capacity as the
Chairman and Secretary of East to West Youth Group) (Environment & Land
Case 302 of 2015) [2023] KEELC 16785 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 302 OF 2015**

E ASATI, J

APRIL 13, 2023

BETWEEN

MAYFAIR HOLDINGS LIMITED PLAINTIFF

AND

AUGUSTINE ABUYA OSINDE 1ST DEFENDANT

GEORGE ONDU 2ND DEFENDANT

**SUED IN THEIR CAPACITY AS THE CHAIRMAN AND SECRETARY OF
EAST TO WEST YOUTH GROUP**

RULING

1. The plaintiff's case herein was closed on January 30, 2023 after PW1's testimony and the suit adjourned to March 1, 2023 for hearing of the defence case. However, by Notice of Motion application dated February 27, 2023 and filed in court the same day, the Plaintiff sought for orders that the Plaintiff's case be re-opened so as to allow the Plaintiff to adduce additional evidence. The application was brought pursuant to the provisions of sections 1a, 1B, and 3A of the [Civil procedure Act](#) and order 2 Rule 15 of the [Civil Procedure Rules 2010](#).
2. The grounds upon which the application was brought as contained in the Notice of Motion and Supporting Affidavit sworn by Eric Otieno Ojuro Advocate on 29th February 2023 are that though the Plaintiff's case was closed on January 30, 2023, it become necessary to produce a survey report in support of the Plaintiff's case. That Counsel appearing in the matter had indicated to court that they were to try an out of court settlement and that on February 2, 2023 both Counsel visited the suit parcel of land to see the developments thereon when it was noted that the buildings by the Defendant are on the service line. That the Plaintiff engaged a surveyor to give a report on the status of the service line and that the plaintiff wishes to have the surveyor's report produced in court to show the extent of



the development. A copy of the surveyor's report was annexed to the Supporting Affidavit and marked EOO-1.

3. The application was opposed vide the grounds of opposition contained in the Replying Affidavit sworn by George Ondu on March 22, 2023. He deposed that the orders sought in the application are discretionary. That the application does not disclose justifiable cause to grant the orders. That the application is an afterthought to deny him a constitutional right to be heard expeditiously, that one of the overriding objectives is that justice should be delivered in an efficient and expeditious manner. That the applicant had opportunity to file the documents before hearing begun and there is no explanation given why this was not done. That the application is a belated attempt to plug the gaps in the applicant's case which had been caused by insufficient evidence that will embarrass the conduct of the case for the defence and is an abuse of the court process and should be disallowed.
4. In *David Kipkosgei Kimeli vs Titus Barmasai* [2017] eKLR the court, - when considering an application to re-open a case held that

“Kasango J in the case of Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & Another [2015] eKLR referred to a Uganda High Court Commercial Division Case of Simba Telecom Vs Karuhanga & Another [2014] UGHC 98 which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case SMith Versus New South Wales [1992]HCA 36: (1992) 176 CLR 256 where it was held that “if an application is made to re- open the case on the basis that new or additional evidence is available, it will be relevant at that stage to inquire why the evidence was not called at the hearing....”

the court added that “the court should pose the question; is the re-opening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative, then the discretion should not be exercised in the applicant's favour.”

5. The proceedings show that on January 30, 2023 when the Plaintiff closed its case, Counsel for the Defendant informed the court that his client was amenable to the matter being referred to mediation or negotiations. The proceedings further show that Counsel for the Plaintiff agreed that in the meantime, before the defence case is heard, parties could engage in negotiations with a view to amicable settlement. The Respondent has not denied that Counsel for both parties visited the suit land subsequently in a bid to reach amicable settlement and made observations. Though parties need to deal with the issue of documents to be relied upon and witnesses to be called at the pre-trial stage, considering that the defence is yet to adduce its evidence and hence has a chance to respond to the Plaintiff's additional evidence, no injustice will be caused to any of the parties herein if the application is allowed.
6. For the foregoing reasons I find that the application is merited. I allow the application and make the following orders: -
 - a. The order made on January 30, 2023 closing the Plaintiff's case is hereby set aside and the Plaintiff's case re-opened for purposes of production of additional evidence namely; a surveyor's report on Kisumu Block 7/214 & 464
 - b. Costs of the application to the Defendants.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 13TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.



E. ASATI,

JUDGE.

In the presence of:

Neville -Court Assistant.

Ojuro- for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

