



**Elmi t/a Elmitraders v Chief Land Registrar & 3 others (Environment & Land
Case 1437 of 2016) [2023] KEELC 17457 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1437 OF 2016
OA ANGOTE, J
MAY 18, 2023**

BETWEEN

ABDIRAHMAN MOHAMED ELMI T/A ELMITRADERS PLAINTIFF

AND

THE CHIEF LAND REGISTRAR 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

UNITED CARE LIMITED 4TH DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's/Applicants' Notice of Motion application dated February 18, 2023 filed pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Order 51 Rule 1 and Rule 10(2) of the [Civil Procedure Rules](#) seeking for the following orders;
 - i. This Honourable Court be pleased to grant leave to the Plaintiff to re-open its case limited to presenting before Court a witness from the Registrar of Companies for the purpose of producing documents at Pg 65 and 66 of the Plaintiffs' Bundle.
 - ii. Witness summons do issue to the Registrar of Companies for the purposes of producing documents at page 65 and 66 of the Plaintiffs' Bundle.
 - iii. Costs of the Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Abdirahman Mohamed Elmi, the Plaintiff herein, who deponed that the matter proceeded for hearing before the Court on January 18, 2023 and that his witness, PC Daniel Kairo, who was to produce



documents, including the documents referred to herein, was stepped down as he had not signed the report before Court.

3. It was deposed by the Plaintiff that his Counsel closed the case for the reason that the documents would be produced by a witness from the Ministry of Lands; that the documents at Pg 65 and 66 are crucial documents, authored by the Registrar of Companies which have not been produced into evidence and that the matter is due for hearing on June 5 and 6, 2023.
4. The Plaintiff deposed that it is crucial to have witness summons issued to the Registrar of Companies to come and produce the documents; that the registration particulars of the 4th Defendant are critical to the case because while alleging to have been allotted the suit property in 1996, the Defendant company was registered in 2008 and that the documents referred to have always been in the Plaintiff's bundle and the Defendants have had the documents and will not be prejudiced in any manner.
5. The 1st and 3rd Defendants did not oppose the Application.
6. In response, the 4th Defendant filed Grounds of Opposition in which it was asserted that the application is an abuse of court process; that the Plaintiff having closed its case cannot now purport to call/ summon a witness; that the issue of calling a new witness was unknown to the 4th Defendant and it will be prejudicial to it and that parties are obligated to comply with the provisions of the Civil Procedure Rules.
7. The 4th Defendant averred that the right to fair hearing dictates that parties should disclose all the evidence they seek to rely on; that no reasonable cause has been shown to warrant the Court to exercise its discretion to re-open the case and that the application should be dismissed with costs to the 4th Defendant.

Submissions

8. The parties argued the Motion vide oral submissions. Counsel for the Plaintiff submitted that the 4th Defendant objected to the production of all the documents except one; that the Plaintiff's witness was stood down and closed his case; that upon looking at the record, he discovered documents from the Registrar of Companies at Pages 65 and 66 of the Plaintiff's bundle of documents, a letter from Prof Wayumba at Page 33 and a letter dated July 22, 2021 from the Postal Corporation of Kenya at Page 2 of the bundle all of which need to be produced and that all the documents were duly served.
9. Counsel for the 4th Defendant submitted that the Plaintiff has closed his case; that the present application is an attempt to Appeal through the back door; that the application only sought to have the documents at Pages 65 and 66 allowed while the Plaintiff is by his submission seeking to introduce more evidence; that the Court instructed the Attorney General to file documents and that the Attorney General should call the witnesses the Plaintiff is seeking to call.
10. Counsel for the 1st and 3rd Defendants submitted that they were not opposed to the application and that the Court should exercise its discretion in deciding whether or not to reopen the case. Counsel referred the Court to the decisions of *Samuel Kiti Lewa vs HCFK* [2015] eKLR and *Patriotic Guards Limited vs James Sambu* [2018] eKLR which stated that discretion should be exercised judiciously and that there is need for real and substantial justice.
11. Counsel for the Plaintiff submitted that after the Court disallowed the production of the documents by his witness, there was confusion and in the midst of it all, he erroneously closed the Plaintiff's case; that when he perused the court record, he realized that the documents were on record and that the closure of the Plaintiff's case was a mistake on his part.



Analysis & Determination

12. The sole issue that arises for determination is;

Whether the Plaintiff has met the threshold for the grant of the prayers of re-opening his case and calling additional witnesses?
13. The Plaintiff is seeking for the leave of the Court to re-open his case and have witness summons issued to the Registrar of Companies to testify. Other than the general provisions granting the Court the power to recall witnesses under Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure Rules, there is no express provision on the re-opening of a case. It therefore follows that this is one of those instances in which the Court is called upon to exercise its inherent jurisdiction pursuant to the provisions of section 3A of the *Civil Procedure Act* and exercises its discretionary mandate.
14. It is common ground that where a court is called upon to exercise discretion and its inherent powers, the same must be exercised judiciously and in the interest of justice. This was as aptly expressed by the Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu*, Nairobi CA No. 20 of 2016, [2018] eKLR as follows: -

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
15. The principles that guide the court in exercising its discretion while considering whether to re-open a case or not, and receive evidence, were aptly and persuasively expressed by the Court in *Susan Wavinya Mutavi v Isaac Njoroge & Another* [2020] eKLR as follows:

“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 party’s 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 the 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.”
16. By way of brief background, the present suit was instituted by the Plaintiff, seeking, inter-alia, a declaration that he is the registered owner of the suit property; an order directing the 1st Defendant to register him (the Plaintiff) as the owner of the suit property and revocation of the title held by the 4th Defendant as well as permanent injunctive orders.



17. The matter proceeded for hearing on January 16, 2023 where two of the Plaintiff's witnesses testified. The matter next proceeded for hearing on January 18, 2023 where PW3, PC Daniel Kairu testified. During his testimony, he sought to produce into evidence a report but the same was objected to by Counsel for the 4th Defendant on the basis that it was not authored by PW3. The Court upheld the objection finding that the Report could not be produced by PW3. The Plaintiff thereafter closed its case.
18. The Plaintiff, through his counsel, now asserts that the closure of the case was erroneous; that the documents at Pages 65 and 66 of the bundle are crucial documents and that he should be granted leave to issue witness summons to the Registrar of Companies to come and produce the same.
19. The 1st and 3rd Defendants did not object to the prayer. The 4th Defendant objected contending that the application is an abuse of Court and is an attempt to appeal the decision of the Court with respect to the production of documents by the makers.
20. The Court has considered the evidence sought to be adduced. The documents referred to at Pages 65 and 66 of the Plaintiff's bundle are copies of CR 13 from the Department of the Registrar General and a CR 12 from the Business Registration Service. The Plaintiff is seeking to have the Registrar of Companies summoned to produce the same.
21. The Court has looked at the document objected to by the 4th Defendant. It was a report of the summary of investigations. It is not the same document sought to be produced by the Plaintiff. Further, when Counsel objected to the production of all the documents on January 16, 2023, the Court stated that the Ruling was in respect to individual documents, and not the entire bundle. In light of the foregoing, the Court rejects the assertion that the Plaintiff is attempting to introduce documents, or lodging an appeal, through the back door.
22. Whereas the Plaintiff herein has closed his case, the Defendants are yet to testify. Further, the documents sought to be adduced by the Plaintiff already form part of the Court record and which the Defendants are aware of. The Plaintiff approached the court with the current application to re-open its case with haste to have the impugned documents produced by a competent witness.
23. The totality of the circumstances of this case, and guided by the dictates of Article 50 and 159 of the *Constitution*, and noting that the overriding objective of the Court is to deliver substantive justice to the parties upon giving them a fair hearing, I shall allow the application by the Plaintiff to re-open its case and call witness (es) to produce the documents forming part of its bundle.
24. For those reasons, the application dated February 18, 2023 is allowed in the following terms:
 - a. The Court hereby re-opens the Plaintiff's case limited to the Plaintiff presenting before court a witness from the Registrar of Companies for the purpose of producing the documents at Pages 65 and 66 of the Plaintiff's bundle.
 - b. Witness summons do hereby issue to the Registrar of Companies for the purposes of producing documents at pages 65 and 66 of the Plaintiff's bundle.
 - c. Costs of the Application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MAY, 2023.

O A ANGOTE

JUDGE

In the presence of;



Mr Obuya for Plaintiff

Mr. Cohen Amanyia for 4th Defendant

Court Assistant – Tracy

