REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 45 OF 2018

TECHBIZ LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

ROYAL MEDIA SERVICES LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 2nd July, 2019 brought under the provisions of Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A and 5 of the Civil Procedure Act CAP 21 Laws of Kenya, Order 51 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The applicant seeks the following orders –

(i) Spent

(ii) Spent

(iii) This suit be re-opened for the purposes of calling the plaintiff's two (2) witnesses Mr. Manoj Shah and Harish Shah to testify as the plaintiff's/applicant's witnesses;

(iv) The plaintiff be permitted to file the witness statements of Mr. Manoj Shah and Harish Shah within twenty-one (21) days; and Costs of the application and the suit be provided for.

2. The application is brought on the grounds on the face of it and the affidavits sworn on 2nd July, 2019 by Ketan Doshi, one of the directors of the applicant herein and on 4th July, 2019 by Manoj Shah, a director of Reliable Electrical Engineers (M) Limited, among other companies.

3. In response thereto, the defendant/respondent on 29th July, 2019 filed a replying affidavit sworn on 24th July, 2019 by Njenga Njihia, the defendant's/respondent's Legal Officer.

4. The application was canvassed by way of written submissions. The applicant's submissions were filed on 11th March, 2020 by the law firm of Anjarwalla & Khanna LLP Advocates, while the respondent's submissions were filed on 14th January, 2020 by the law firm of Kamau Kuria & Co. Advocates.

5. Mr. Ismael, learned Counsel for the applicant submitted that the suit came up for hearing on 14th May, 2019 and the applicant's only witness Mr. Ketan Doshi testified and the applicant closed its case on account of there being no other witnesses. That on the same date, the respondent's witness also testified and subsequently, the respondent closed its case. He stated that thereafter parties agreed to file their written submissions within twenty-one days.

6. The applicant's Counsel submitted that at the time the applicant was contemplating defamation proceedings against the respondent, it had reached out to several people who had close business connections with the applicant but such relationships became frosty on account of the defamatory publications made by the respondent as a result of the stigma surrounding the NYS scandal to which the applicant had been linked to.

7. He stated that on or about 17th May, 2019 after the close of the applicant's case, the applicant met with Mr. Manoj Shah, his former client, who on being informed that the applicant had successfully managed to clear its name with the Asset Recovery Agency, he expressed willingness to testify on behalf of the applicant. Mr. Ismael stated that one of the applicant's other business associates, Harish Shah had also agreed to testify upon reviewing Court documents and seeking legal advice.

8. It was submitted by the applicant's Counsel that paragraphs 5b, 5c, 5d, 5e and 5o of the respondent's replying affidavit should be

disregarded and expunged as they violate the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 which provide that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. He relied on the case of **Mbugua & Mbugua Advocates vs Kenindia Assurance Co. Ltd** [2014] eKLR, where the Court held that an affidavit filed with argumentative propositions, expressions, expressions of opinions, law and cases are oppressive. Learned Counsel also relied on Order 19 Rule 6 of the Civil Procedure Rules which allows the Court to strike out from any affidavit any matter which is scandalous, irrelevant or oppressive.

9. Mr. Ismael submitted that this Court has the discretion to re-open the applicant's case and allow additional witnesses to testify as was held in the case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another** [2015] eKLR, in which the Court held that Courts should exercise its discretion judiciously in an application such as this one. Further, that the re-opening should not prejudice or embarrass the opposing party and the application should be made without inordinate or unexplained delay. The applicant's Counsel was of the view that Courts are guided by completely different principles while determining an application for leave to amend pleadings.

10. On the issue of the court exercising its discretion judiciously, he indicated that this Court ought to be guided by Article 159 of the Constitution of Kenya which states that that justice shall be administered without undue regard to procedural technicalities. He further indicated that Section 1A of the Civil Procedure Act which provides that Courts shall seek to give effect to the overriding objective of the Act while exercising its powers thereunder is also relevant to the matter before this court. He submitted that this Court can grant the orders sought by the applicant if it is satisfied that the explanation given as to why the evidence was not first adduced is valid and that the omission was not premised on negligence and that it was not deliberate.

11. Mr. Ismael submitted that the applicant's list of witnesses indicated *"any other witness"* after listing the available witness, since the applicant had been trying to get its customers to testify but despite all reasonable efforts by the applicant to get witnesses, it was unable to do so on account of the stigma surrounding the NYS scandal. He submitted that in view of the aforesaid, the applicant had demonstrated that the failure to get other witnesses was neither deliberate nor negligent. He relied on the case of **Joseph Ndungu Kamau v John Njihia** [2017] eKLR, where the Court allowed a similar application after it was satisfied that sufficient reasons had been advanced as to why the additional evidence was not adduced at trial and that the failure was not deliberate.

12. On whether re-opening the case would not prejudice or embarrass the opposing party, Mr. Ismael held the position that the respondent would not suffer any prejudice since it will have the opportunity to cross-examine the applicant's witnesses as well as to re-open its case and present its own witnesses, if it so wishes. He submitted that re-opening of the case will entail allowing the respondent an opportunity to rebut the testimony by the witnesses to be called. The applicant's Counsel relied on Section 146(4) of the Evidence Act Cap 80 Laws of Kenya and Order 18 Rule 10 of the Civil Procedure Rules, which provide for recalling of a witness for further examination. He submitted that this Court has the authority to permit the respondent to recall its witness.

13. Mr. Ismael submitted that he who alleges prejudice must prove it as was held in the case of **D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority** [2017] eKLR. He further submitted that the respondent had failed to demonstrate how it stands to suffer prejudice from the re-opening of the case. Counsel also placed reliance on the case of **R v District Land Registrar, Uasin Gishu & another** [2014] eKLR, where the Court held that justice is not dependent on the rule of technical procedures therefore shutting out a witness who initially had refused to testify and not out of the plaintiff's indolence would be an injustice in itself (sic).

14. The applicant's Counsel also relied on the case of **Kenya Commercial Bank Limited v Nicholas Ombija** [2009] eKLR, in which the Court of Appeal held that until judgment is finally delivered, proceedings are very much alive entitling any party to even apply for amendment of pleadings before judgment. He was of the view that the applicant would suffer prejudice if the orders sought are not granted since it would be prevented from bringing all its evidence before the Court and that would impact its constitutional right to be heard.

15. On whether the present application has been made without inordinate or unexplained delay, the applicant's Counsel was of the view that the application had been filed in good time without any delay. He further submitted that the application had been filed only a few days after the said Messrs Manoj Shah and Harish Shah indicated their willingness to testify. Mr. Ismael submitted that the applicant had satisfied all the principles required for a Court to allow an application for the re-opening of a case. He urged this Court to allow the application as prayed.

16. Mr. Munyori, learned Counsel for the respondent submitted that an application for re-opening of a case is analogous to an application for leave to amend pleadings. He indicated that re-opening the applicant's case would occasion prejudice on the respondent. He stated that the Court in **B.D Joshi v J.C Patel** [1952] 19 EACA 48 and **Bhari v Khan** [1965] EA 95 barred re-opening of the proceedings since it offended the rules of procedure which are designed to formulate the issues which the Court has to determine and to give fair notice thereof to the other parties.

17. It was submitted by the respondent's Counsel that the questions put to the applicant's witness exposed the weakness in the applicant's case, therefore the sole subject of the applicant is to fill in gaps in its case. Mr. Munyori contended that the present application was incompetent as it did not contain prayers for review and vacation of orders made by this Court on 19th February, 2019 and 14th May, 2019. He submitted that the applicant was seeking to introduce an inconsistent cause of action which would substantially alter the case which had been heard and completed.

18. Mr. Munyori also submitted that the defence that the respondent had raised was based on the applicant's suit as formulated and urged this Court not to allow the applicant to change goal posts at this late stage. He stated that in the case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another** (supra), where the Court was dealing with a similar application, it was held that the court in exercising its discretion should ensure that such re-opening does not prejudice the opposing party and the re-opening should not be allowed where it is intended to fill gaps in evidence.

19. He also relied on the decisions in **Justa Wawira Kiura v Multi Media University & another** [2019] eKLR and **Wibeso Investments Limited & another v Tamarind Meadows Ltd & 5 others** [2020] eKLR, where the Courts disallowed applications similar to the one before this Court on grounds that the opposite parties stood to suffer prejudice. Mr. Munyori submitted that the respondent herein stands to suffer great prejudice from the re-opening of the case as it will be accosted by new evidence. He was of the view that the applicant's

intention is to introduce an inconsistent cause of action which will substantially alter the case which has been heard and completed.

20. The respondent's Counsel submitted that the respondent has a right under Article 50 of the Constitution to a fair hearing. He relied on the case of **Joseph Ochieng' & 2 others t/a Aquiline Agencies v First National Bank of Chicago** [1995] eKLR, in which the Court of Appeal cited with approval the case of **Ketterman v Hansel Properties Ltd** [1988] 1 ALL ER 35, where it was held that to allow an amendment before a trial begins is quite different from allowing it at the end of a trial to give an apparently unsuccessful defendant an opportunity to renew the fight from an entirely different defence. Counsel urged this Court to dismiss the applicant's application with costs.

ANALYSIS AND DETERMINATION.

21. This Court has considered the application, the supporting and replying affidavits and rival submissions including the various cases cited. The issue that arises for determination is whether the application dated 2nd July, 2019 is merited.

22. In the supporting affidavit sworn by Ketan Doshi, he averred that upon filing the suit on 21st June, 2018, he reached out to several people to testify as witnesses for the applicant in relation to the alleged defamatory article published by the respondent but none of the individuals were prepared to testify on account of the stigma surrounding corruption in general. He deposed that the potential witnesses declined to testify citing fear of being linked to the NYS scandal and being put on the radar of government agencies for being linked with the applicant.

23. The applicant's deponent averred that on 21st May, 2019, he received a call from Mr. Manoj Shah who informed him that he had taken legal advice from his lawyers who had informed him that testifying on behalf of the applicant would not expose him or his companies to any criminal action or proceedings in relation to the NYS scandal and he expressed willingness to come forward and testify in these proceedings. The said deponent also averred that on the strength of Mr. Manoj's response, he approached one Harish Karamshi Shah of Sai Properties Limited who also agreed to come forward as a witness in these proceedings.

24. In his affidavit, Mr. Manoj Shah averred that he entered into various contracts with the applicant on behalf of the companies for which he is a director for the supply of IT equipment, consultancy and software services and that they maintained a good business relationship between the years 2009 and 2018 until the time when the defamatory news clips were broadcasted by the respondent. He also deposed that he was requested by Mr. Ketan Doshi to be a witness in this case but he was not prepared to do so on account of the stigma surrounding corruption in general, coupled with the fact that the applicant was cited by the respondent as being involved in and corruptly receiving monies from the NYS scandal.

25. Mr. Manoj Shah further deposed that he was afraid of being linked to the NYS scandal and being put on the radar by government agencies for being linked with the applicant. That on 21st May, 2019 after receiving legal advice from his lawyers he expressed willingness to testify in this case.

26. In the replying affidavit by the respondent in opposition to the application herein, its deponent averred that the applicant's application is an abuse of the Court process. He deposed that the applicant was represented by Counsel at the trial of this suit and during pre-trial directions which took place on 19th February, 2019 and it informed the Court that it would only call the witness whose statement it had filed.

27. He further averred that on 14th May, 2019, the applicant informed the Court that it had only one witness, Mr. Ketan Doshi and proceeded to call him and closed its case. Subsequently, the respondent called its witness Mr. Hassan Mugambi and closed its case.

28. Mr. Ismael for the applicant raised a pertinent issue that needs to be addressed from the outset. It is evident to this court that paragraphs 5(b), 5(c), 5(d), 5(e), and 5(o) of the respondent's affidavit violate the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 for being expressions of the law and contentions based on decided cases. This court holds that the said paragraphs are not only irrelevant but oppressive as such matters are best addressed in written submissions. It is dismaying to note that the said affidavit was made by an Advocate of the High Court of Kenya who should have known better than to cite authorities with accompanying extracts of legal precedents in an affidavit. This court proceeds to strike out paragraphs 5(b), 5(c), 5(d), 5(e) and 5(o) of the replying affidavit under the provisions of Order 19 Rule 6 of the Civil Procedure Rules, for being argumentative expositions of the law and for being oppressive to the applicant who knew better than not to file a supplementary affidavit to counteract the depositions containing points of law.

29. It is noteworthy that the application before me was filed after the close of both the applicant's and the respondent's cases and after parties had taken directions on the filing of written submissions. In determining an application such as the present one, this court needs to find out why the witnesses were not availed before the close of the rival cases. It must also be demonstrated that failure to avail the said evidence was not deliberate. Bearing in mind that this Court has discretion to grant or decline to grant an order on the re-opening of a case, the said discretion must be exercised judiciously.

30. In **Susan Wavinya Mutavi v Isaac Njoroge & another** [2020] eKLR, the Court in disallowing an application similar to this one 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 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."

31. Similarly, in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another** [2015] eKLR, the Court observed as follows-

> ***"Uganda High Court, Commercial Division in the case of SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was held:***
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> ***"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."***
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> ***The Ugandan Court in the case SIMBA TELECOM (supra) held thus:***
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> ***"I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not." …..***
>
> ***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."*** (emphasis added)

32. The pleadings in the main case show that both the applicant and the respondent closed their cases on 14th May, 2019. It is evident that the applicant closed its case before calling Messers Manoj Shah and Harish Shah to testify on its behalf. From the affidavits in support of the application herein, it is evident that the witnesses the applicant intends to call were unwilling to testify before the applicant closed its case for reasons that they did not want to be associated with it due to the fact that its name had been linked to the widely televised NYS scandal. In light of the foregoing, it is evident that the present application is neither an afterthought nor did the applicant deliberately neglect to call the said witnesses before the close of both the applicant's and the respondent's cases.

33. The applicant was of the view that no prejudice shall be occasioned upon the respondent if the case is re-opened since the respondent will have the opportunity to cross-examine the witnesses. The respondent will also have the option to re-open its case and present its own witnesses, if it so wishes, under Section 146(4) of the Evidence Act Cap 80 Laws of Kenya and Order 18 Rule 10 of the Civil Procedure Rules.

34. **Section 146(4)** of the **Evidence Act** provides as hereunder-

> "***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."***

35. Similarly, Order 18 Rule 10 of the Civil Procedure Rules provides 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."***

36. The above provisions do not specifically address the issue of re-opening of cases with a view of calling additional witnesses. The powers to make orders for reopening of cases for purposes of calling additional witnesses is a matter exercised under the inherent powers of the Court as per the provisions of Section 3A of the Civil Procedure Act. It is a matter that calls for the Court to grant such orders in the interest of justice so that all the evidence available to the parties can be put before a Court for consideration and determination.

37. The respondent averred that it shall be prejudiced since it had formulated its defence based on the applicant's suit, thus allowing the orders sought by the applicant would alter the character of the case. Having taken due consideration of the arguments by both parties, I hold that no prejudice will be occasioned on the respondent if the applicant's case is reopened since it will have the opportunity to cross-examine the 2 witnesses the applicant intends to call and even to recall its witness pursuant to Section 146(4) of the Evidence Act Cap 80 Laws of Kenya, for purposes of clarification of any issues that will be raised by the applicant's witnesses. It can also call additional witnesses if it intends to do so, with leave of the court.

38. The affidavit by Manoj Shah leaves this court with no doubt that the applicant did not deliberately withhold evidence and it is imperative for the applicant's intended witnesses to adduce evidence. The Constitution in Article 159(2)(d) enjoins this Court to dispense substantive justice without undue regard to procedural technicalities. This Court's broad powers in regard to case management under the Civil Procedure Act and Rules are aimed at achieving the objective of facilitating just, efficient, timely and cost-effective resolution of the real issues in dispute. In furtherance of the said objective, the Court may make any order or give any direction with regard to the just determination of civil proceedings and the efficient conduct of the business of the Court.

39. In this case, I note that the application was brought approximately a month after the close of the applicant's and the respondent's cases. Mr. Manoj Shah in his affidavit deposed that he reached out to Mr. Ketan Doshi on 21st May, 2021 and he expressed willingness to testify in these proceedings. I am therefore satisfied that although there was some delay, the same was not inordinate as to warrant this Court to decline to grant of the prayers sought by the applicant, as the delay has been sufficiently explained. In view of the aforesaid, I do exercise my discretion in favour of the applicant, subject to having the case heard expeditiously without undue delay.

40. The applicant's application is hereby allowed in the following terms;

(i) The applicant's case is hereby re-opened for the purposes of calling the two (2) witnesses, Messrs Manoj Shah and Harish Shah to testify as its witnesses;

(ii) The respondent shall be at liberty to recall its witness Mr. Hassan Mugambi for purposes of further examination, cross-examination and re-examination;

(iii) The applicant to file the witness statements of Messers Manoj Shah and Harish Shah within twenty one (21) days from the date of this ruling; and

(iv) Costs of the application shall be borne by the applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JULY, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff/applicant

Mr. Munyori for the defendant/respondent

Mr. Cyrus Kagane – Court Assistant.