



**Bemis Limited v Archdiocese of Nairobi Registered Trustees & 4 others (Environment & Land Case 252 of 2003) [2023] KEELC 18984 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18984 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 252 OF 2003**

**AA OMOLLO, J  
JULY 27, 2023**

**BETWEEN**

**BEMIS LIMITED ..... PLAINTIFF**

**AND**

**ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES ... 1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS KENYA ..... 3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 4<sup>TH</sup> DEFENDANT**

**REV. FATHER PELIN D'SOUZA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a notice of motion dated January 11, 2019 under the provisions of Section 3A of the *Civil Procedure Act* seeking for the orders that;
  - a. The Plaintiff be granted leave to reopen its case and recall witness(es) as may be deemed necessary.
  - b. That the costs of this application be in the cause.
2. The application was supported by the affidavit sworn on January 11, 2019 by Mandip Singh Amrit, a son to Mr Harbans Singh who is a former shareholder/director of the Plaintiff. The Applicant stated that the Plaintiff's case was closed on May 7, 2018 but some files deemed lost and which contained documents relevant to the matters in dispute have since been found. He deposed that the transactions in issue started in late 1970's to 1980's during which time the late Mr. Harbans Singh was a shareholder/director of the Plaintiff. That he offered various services to the 1<sup>st</sup> Defendant at St Mary's school which transactions informed the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant.



3. The Applicant stated that he discovered the said files while re-organizing the late father's old archives previously managed by the Plaintiff's secretary (Mrs. Agilee Pereira), who migrated to the United Kingdom in the early 1990s. He asserted that documents are relevant for the full and final determination of the suit as it will help the court understand the context in which the sale agreement for the sale of the suit property was entered into. That the Plaintiff stands to suffer great prejudice if their case is not re-opened and relevant witnesses called to testify further on the newly discovered documents and that the Defendants will suffer no real prejudice.
4. The 1<sup>st</sup> and 5<sup>th</sup> Defendants filed grounds of opposition dated January 28, 2019 stating that the application has been brought after inordinate delay therefore the Plaintiff is not entitled to the discretionary orders. They stated that the documents the Applicant is seeking to adduce are irrelevant to the case as they relate to correspondence between the Plaintiff and St Mary's School which is not and has never been the owner of the suit property.
5. The parties submitted orally in support of and against the application on June 29, 2023. The Plaintiff argued that the documents which are highly relevant to the case were not within their reach and that the Defendants will have a chance to cross examine the Plaintiff's witness on them once the application is allowed. He added that this court has powers under Section 146(4) of the *Evidence Act* to permit the recall of witnesses. In support of this argument, it cited the case of *Laikipia University College v Registered Trustee of Child Welfare Society* [2019] eKLR.
6. The 1<sup>st</sup> and 5<sup>th</sup> Defendants contended that the Plaintiff's witnesses testified and were cross examined extensively and that the Plaintiff is looking to fill gaps brought out during this cross examination with the documents to be introduced which will water down their defence and prejudice the 1<sup>st</sup> Defendant's case. In support they relied on the case of *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR.
7. The Defendants submitted that the law in respect of re-opening and recalling of witnesses is governed by Order 18 rule 10 and section 146 of Cap 80 which power being requested requires exercise of discretion as was held in *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR that the court should look at whether the application is aimed at filling gaps. They stated that Order 3(2) of CPR provides for documents to accompany plaint and the Plaintiff should not do trial by ambush. The Respondents noted that there is no evidence of hardship in accessing the documents sought to be introduced. The Defendants also submitted that the Plaintiff closed their case on June 7, 2018 while this application was filed on January 14, 2019 hence brought after inordinate delay.

### **Analysis**

8. There are two dependent issues for determination before this court. First, whether the application has been brought after inordinate delay and second, whether the Plaintiff should be allowed to reopen its case to introduce new evidence.
9. The 1<sup>st</sup> and 5<sup>th</sup> Defendants submitted that this case was filed in the year 2003, the Plaintiff's witness testified and closed its case on May 7, 2018. That the present application was filed in January 2019 hence guilty of inordinate delay and should not be granted. There is no doubt that this matter is old and the pre-trial ought to have been closed. I have perused the record and note that after the Plaintiff closed their case, the Defendants asked for adjournment to prepare to present their case. When the matter came up in Court on January 28, 2019 and after which date the application was filed, the advocates on record informed the Judge that parties were negotiating.



10. For purposes of computing time for this application, I take the date from when the matter was last in court on May 7, 2018. The Plaintiff's witness began his testimony on April 22, 2017 and concluded on May 7, 2018. The time difference between May 2018 and January 2019 is approximately Six (6) months which in my view is delay but does not amount to inordinate. It is well settled in law that the question of inordinate delay is to be determined on a case by case basis as held by the Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat v IEBC and 7 Others* [2014] eKLR.

11. On the limb of whether or not to grant the order for re-opening the case, the case of *Simba Telecom v Karubanga & Anor* [2014] UGHC 98, Uganda High Court, Commercial Division considered an application to re-open a case for purpose of submitting fresh evidence. It referred to an Australian case of *Smith v New South Wales* [1992] HCA 36; [1992] 176 CLR 256 where it was held:

“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...”

It continued that.....:

“I agree with the holding in the case of *Smith v 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.” .....

12. On the issue as whether the court should allow reopening of the Plaintiff's court, the court in *Simba Telecom* (supra) held;

“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.

13. It has been established in various cases; *Mohamed Abdi Mohamud v Ahmed Abdullabi Mohamad & others* [2018] eKLR; *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* [2015] eKLR; *Ladd v Marshall* [1954] 3 All ER 745; *Reid v Brett* [2005] VSC 18; *Smith v New South Wales Bar Association* [1992] 176 CLR 256; and *EB v CT(No 2)* [2008] QSC 306, many of which have been relied on by the 1<sup>st</sup> and 5<sup>th</sup> Defendants, that jurisdiction to re-open a case and receive additional evidence in a civil trial court is a discretionary one and is to be exercised judiciously.

14. 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 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.

15. In this application, the Plaintiff have argued that the documents they wish to produce before the court as new evidence will give the court an understanding of how the sale agreement for the suit property arose. They stated that the said documents were not within their reach and had been considered lost but was discovered while reorganizing the files after the death of the Plaintiff's director Mr. Harbans Singh.
16. The Respondents argued that the Plaintiff is seeking to fill the gaps in their case and in support relied in the case of Susan Wavinya Mutavi (*supra*) which is distinguishable from the present case. It is notable in Susan Wavinya case, the case had been fully heard and one of the grounds for the application was on the strength of the 1<sup>st</sup> defendant witnesses and their evidence which it was argued, would expose the applicant to extreme prejudice, loss and damage. In the instant case, the application has been made before the defence is heard and or produce their documents.
17. I have looked at the documents in subject and note that the same are correspondences between the Plaintiff and St Mary's School with regard to Plot No 6863/80 which is the suit property. The 1<sup>st</sup> and 5<sup>th</sup> Defendants argued that St Mary's School is not a party to this suit and the documents in subject are not direct evidence to the dispute at hand. Those are issues they can put to the witness during cross-examination once the case is opened.
18. The Respondents further argued that allowing the Plaintiff to re-open their case will tantamount to trial by ambush. The Plaintiff has not sought to amend the plaint which contains the claim. What the Plaintiff is trying to do is source evidence that will prove their case. Thus, the Respondents are aware of the claim against them and introduction of additional evidence does not equate to trial by ambush. If there is any prejudice that will be occasioned to the Respondents, the prejudice can be cured by cross-examining the witness during the hearing as well as being granted leave to call additional witnesses if they deem fit.
19. The Plaintiff has explained why they were unable to obtain and file the documents sought to be introduced earlier. The prejudice if any, to be occasioned to the Respondents can be cured because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will have an opportunity to cross examine the producer of the new evidence as well as leave to call additional witness(es) if they deem necessary. Consequently, I find no basis to refuse the orders sought in the present application. In conclusion, I do grant the orders in the application dated 11<sup>th</sup> January 2019 with costs to the Defendants/Respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023**

**A. OMOLLO**

**JUDGE**

