



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 336 OF 2014**

**JAMES WAMBUA KIMILA.....PLAINTIFF**

**VERSUS**

**SINOHYDRO CORPORATION LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES NJUHO..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 8<sup>th</sup> April 2020 and filed in court on even date, the 2<sup>nd</sup> defendant (applicant) approached this court seeking the following substantive orders:

- i. THAT this Honourable Court be pleased to arrest judgment in the present matter coming up before Honourable Lady Justice Cecilia W. Githua.*
- ii. THAT this Honourable Court be pleased to allow the 2<sup>nd</sup> defendant/applicant to re-open his case and call evidence in defence of the matter.*
- iii. THAT this Honourable Court be pleased to make any such order or further orders it may deem fit, fair and just in the circumstances and in the interest of justice.*

2. The application is anchored on Sections 1A, 1B of the Civil Procedure Act; Order 21 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. It is premised on grounds stated on its face and the depositions made in the applicant's supporting affidavit sworn on 8<sup>th</sup> April 2020.

3. In a nutshell, in prosecuting the application, the applicant blamed his erstwhile advocates for failing to inform him of the date fixed for defence hearing and for closing the defence case without calling witnesses who according to him were ready and willing to give credible evidence regarding the circumstances in which the accident subject matter of the suit occurred.

4. The applicant contended that the evidence he intends to call if his application was allowed would assist the court in arriving at a just and fair determination on the issue of liability since it demonstrates that another motor vehicle registration number KBH 718V was also partly to blame for the accident; that given the nature of the injuries sustained by the respondent in the accident, if the application was dismissed, he will suffer great prejudice as the amount the court is likely to award as general damages is likely to exceed KShs.3,000,000 which is the maximum amount insurance companies are limited by law to pay on behalf of their insured's meaning that he will be forced to settle the difference on his own yet his driver was not solely to blame for the accident.

5. The applicant further deposed that mistakes of his previous counsel should not be visited on him and that the court has a duty to render justice to all parties at all times; that if the application was allowed, the respondent is not likely to suffer any prejudice.

6. The application is contested by the plaintiff (respondent). In his replying affidavit, *Mr. Patrick Kimathi Muchena*, the respondent's learned counsel deposed that the application was frivolous, vexatious and an abuse of the court process; that the application lacked merit since the applicant was indolent and has not explained why the application was not filed promptly or what steps he took, if any, to follow up on hearing of the suit with his previous advocates.

7. Learned counsel in addition averred that the sole aim of the application was to cause unnecessary delay to conclusion of the plaintiff's case which should not be allowed by this court as allowing the application would run counter the overriding objective; that if the application was allowed, the respondent will be highly prejudiced by the further delay occasioned by re-opening of the defence case; that in the interest of

justice, the application should be dismissed and the court should proceed to read its judgment.

8. By consent of the parties, the application was prosecuted by way of written submissions. The applicant filed his submissions on 18<sup>th</sup> June 2020 while those of the respondent were filed on 13<sup>th</sup> July 2020.

9. I have carefully considered the application, the affidavits on record and the parties' rival submissions as well as the authorities cited. I have also perused the court record. Having done so, I find that the only issue which arises for my determination is whether the applicant has demonstrated that he is deserving of the exercise of the court's discretion in his favour by arresting the judgment which was scheduled to be delivered on 26<sup>th</sup> March 2020 and allowing a re-opening of the defence case to enable him call witnesses in support of his case.

10. As correctly submitted by the respondent and as was held by the court in *Odoyo Osodo V Rael Obara Ojuok & 4 Others, [2017] eKLR*, the court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.

11. Some of the principles which should guide the court in the exercise of the aforesaid discretion were enumerated by *Eboso J* in *Victoria Naiyanoi Kiminta V Gladys Kiminta Prinsloo, [2019] eKLR* in which the learned judge expressed himself as follows:

***“Over the years, courts in the Commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a 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 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. ...”***

These principles apply disjunctively as opposed to conjunctively depending on the facts and circumstances of each case.

12. In this case, the applicant has deposed that his erstwhile advocates failed to notify him of the date fixed for defence hearing and proceeded to close the defence case without calling his witnesses despite their availability; that the witnesses he intended to call are eye witnesses to the accident whose evidence is credible and if admitted, it is likely to influence the court's finding on the issue of liability; that the interests of justice requires that he be granted an opportunity to present evidence in support of his defence before court pronounces its judgment in the suit.

13. I have perused the court record and I entirely agree with the respondent's submissions that allowing the re-opening of the applicant's case will cause further delay to the conclusion of his case which was instituted in the year 2014. Though the respondent has blamed the applicant for the delay in hearing of the case, the record shows that the applicant is not entirely to blame for the delay. Most of the delay was occasioned by the parties' failure to agree on whether another case which involved the same parties and emanated from the same accident namely HCCC 174 of 2013 could be treated as a test suit on liability instead of having two cases based on the same cause of action heard separately.

14. That said, the record also reveals that on 8<sup>th</sup> November 2018 and on 3<sup>rd</sup> December 2018, *Mrs. Marete*, the advocate then on record for the applicant informed the court that the applicant intended to call two witnesses but on 21<sup>st</sup> January 2019 after the respondent closed his case, the applicant's advocate a *Mr. Ogode* closed the defence case without calling any witness. In the circumstances, the applicant's contention that his previous advocates mismanaged his case by closing it without calling his witnesses cannot be dismissed as a claim without any foundation.

15. Given the applicant's assertion that his intended witnesses were eye witnesses to the accident, it is my view that evidence from such witnesses if admitted would greatly assist the court in arriving at a fair and just determination of the suit on the issue of liability.

16. In applications such as the present one, the court is called upon to undertake a delicate balancing act between the competing rights and interests of the parties because both deserve justice. The court must bear in mind that the respondent has a right to expeditious conclusion of his suit but must balance that right with the applicant's right to be heard and to adduce evidence in the trial before the suit is finally determined. This constitutes the essence of the right to a fair trial.

17. Though it is true that the applicant has not explained the delay in filing the instant application and has not also demonstrated that he took active steps to follow up with his erstwhile advocates on the progression of the suit, given the nature of the injuries sustained by the respondent and considering the effect of the amendment to *Section 5 (b)* of the *Insurance (Motor Vehicles Third Party Risks) Act*, it is my considered opinion that the interests of substantive justice would be better served if the applicant was given another chance to call evidence in support of his case so that the court can take it into account when determining the suit. Moreover, the respondent has not demonstrated that he will suffer any prejudice that cannot be ameliorated by an award of costs if the application was allowed.

18. In view of my foregoing findings, I am inclined to exercise my discretion in favour of the applicant but on terms that will ensure that the re-opened defence case will be concluded without any further unnecessary delay.

19. Consequently, the application is allowed on condition that the applicant will avail his intended witnesses and conclude the defence case within the next 90 days in default of which judgment will be delivered on the basis of the evidence tendered by the respondent. The

applicant will also pay the respondent costs occasioned by the application.

**20.** It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of September 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kanyi for the 2<sup>nd</sup> defendant/applicant

Mr. Kirika holding brief for Mr. Kimathi for the plaintiff/respondent

Ms Mwinzi: Court Assistant