REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

(COMMERCIAL & ADMIRALITY DIVISION)

CIVIL CASE NO. 9 OF 2015

RAINDROPS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

RBZ Advocates for the plaintiff/applicant

Munyao, Muthama & Kashindi Advocates for the defendant/respondent

RULING

The plaintiff herein filed a notice of motion application dated 14.10.2020 under Section (3), (3A), (63e) of the Civil Procedure Act Cap 21, Section 146 (4) of the Evidence Act, Chapter 80 Laws of Kenya, Order 18 Rule 10 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya for orders:

> ***(a). That this Honourable Court be pleased to order the plaintiff's case to be re-opened and heard for purposes of adducing audio-visual evidence of the pictorial documents earlier produced and found on pages 279-285 of the statement of Shaib Hamisi Mtuwa.***
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> ***(b). That this Honourable Court be pleased to recall the plaintiff witness number 1, Shaib Hamisi Mtuwa for further examination in chief, for further cross-examination and re-examination respectively for the purposes of adducing audio-visual evidence of the documents founds on pages 279-285 of the statement of Shaib Hamisi Mtuwa.***
>
> ***(c). That costs of this application be in the cause.***

The application was grounded upon the grounds espoused therein and by the sworn affidavit of one **Shaib Hamisi Mtuwa** dated 15.10.2020. The respondent opposed the application by way of a replying affidavit sworn by Benjamin Kai dated 19.10.2020. This Court then directed that the application be disposed by way of written submissions.

The bone of contention in this application is whether the plaintiff at the close of its case and before the close of the defence's case can recall a witness to adduce evidence already before it within the circumstances of this case.

The applicant's case

The application is grounded on the fact that the plaintiff witness produced before the Court during his examination in chief, pictorial presentation of what was presented during a meeting between the plaintiff and defendant's officials as minuted by the defendant in its minutes dated 6.01.2015 which minutes were produced by the defendant in its list of documents. The applicant argues that this Court can only administer substantive justice by allowing this evidence already adduced by the plaintiff to be further produced by way of audio-visual format to enable the Court appreciate how the plaintiff intended and currently is collecting revenue. They further argue that the failure to produce and or omission is not intentional but rather an oversight and its production will not be prejudicial to the other party as it is evidence that is already before the Court and not novel.

Further, they contend that the defendant is yet to close its case and that the application is necessitated by the fact that the defence opposed the cross-examination of defence witness 2 with regard to the audio-visual presentation that took place in his presence on 6.01.2015.

Submissions

In his submissions dated 28.10.2020 and filed on an even date, RBZ advocates, for the applicant submitted that Section 146 (4) of the Evidence Act Chapter 80 Laws of Kenya allows the Court to permit a witness to be recalled either for further examination in chief or further cross-examination and if it does so parties have the right of further examination and cross-examination respectively. He further submitted that Order 18 Rule 10 of the Civil Procedure Rules provide that a Court may 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 it thinks fit. Further counsel submitted that Article 159 (2) (d) of the Constitution of Kenya provides that justice shall be administered without due regard to procedural technicalities.

Counsel argued and submitted that the Law allows this Court to exercise its unfettered discretion in allowing a party to reopen its case recall a witness for further examination in chief, cross-examination and re-examination, that there is no rider to the Law and that a party can make an application any time before Judgment is rendered.

Counsel contention was that recalling the plaintiff's witness will allow for the Court to see what was presented by the plaintiff company to the defendant's officials and whether the evidence produced therein will enable this Court to satisfactorily determine whether the revenue collection system is manual or not. The evidence as currently produced in the pictorial format does not clearly show what was presented during the meeting that was attended by both parties and is annexed to the plaintiff's and defendant's list of documents. Counsel further submitted that the defendant's case is not closed yet and even in circumstance where the defence has closed its case the Court has allowed for re-opening of cases.

In his contention counsel submitted that Article 159 of the Constitution provides for hearing of disputes on merits, the plaintiff is seeking to produce evidence that is both the plaintiff's and defendant's documents. He argued that the audio-visual presentation was reduced to pictorials evidence by the parties which both parties are aware but the Court cannot take cognizance what was actually presented at the meeting it is therefore imperative that the Court be placed in that meeting and is shown what actually transpired and not left to imagine what could have transpired. Counsel submitted that the hearing should not be conducted as a matter of formality but that the Court should be placed at all angles of the suit through production of all evidence in possession of all parties allowed thoroughly dissect and understand the dispute at hand, narrow down the issues at hand and finally give a just decision. He submitted that no prejudice caused the defendant as its officials were present in the said meeting and further they have similarly produced the pictorial evidence in their bundle of documents.

For these submissions counsel relied on the cases of; **Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo {2019} eKLR, Stephen Ngatia v Clement Kamau Gitau {2013} eKLR, Joseph Ndungu Kamau v John Njihia {2017} eKLR and Mohamed Abdi Mohamud v Ahmed Mohamed & 3 others {2015} eKLR,** seeking this Court's discretion to grant the application**.**

The Respondent's case

The respondent opposed the application alleging that the plaintiff's was making a belated attempt at this late stage of the proceedings to adduce evidence whose sole purpose is to plug in the gaps in his case which had been caused by insufficient evidence. Counsel argued that the grant of leave sought is not a matter of right but of the Court's discretion which should be carefully exercised. According to counsel's contention the application only sought to produce new or additional evidence deliberately left out and created through forgery and panel beating so as to specifically answer the case for the defence as put forth by the defendant.

Counsel further contends that the plaintiff is on a fishing expedition in an attempt to produce new evidence thinly veiled to embarrass the conduct of the case for the defence as such is an abuse of the Court process and should not be allowed. Counsel also submitted that as the two defence witnesses have already testified, one witness has already been cross-examined and re-examined to closure, the second witness is currently pending cross-examination and re-examination the application has been brought under inordinate delay which has not been explained by the plaintiff.

Counsel also argued and submitted that the plaintiff is conducting the case in a most casual manner as the application was not brought under certificate of urgency despite the matter being part-heard at the tail end of the trial and having been scheduled for further hearing on 21.10.2020. Finally, counsel contention was that the true intent of the application is to scuttle further hearing of the suit and consequently delay its conclusion by whatever means including producing tailored evidence deliberately created to plug the gaps in their case.

In their further submissions counsel for the respondent submitted that the main issue for determination is whether the plaintiff meets the threshold for the grant of the sought orders. He submitted that the application had been brought too late in the day and with the aim of embarrassing the conduct of the case for the defence and delaying the conclusion of the trial. He further submitted that the evidence sought to adduced is sufficiently able to speak for itself and as such is not really required for the Court to render substantive justice to the parties.

Counsel contended that the plaintiff had not explained to the Court where the purported evidence they now seek to introduce has been all along and as such there can no doubt that they actually had been in possession of the said evidence since the inception of the suit or alternatively were busy crating it to suit their case. He submitted that the plaintiff had more than six years to put the said evidence on record to supply it to the defendant and produce it during the conduct of its case.

Further, counsel contend that the plaintiff has still not filed the purported evidence in Court nor produced a copy thereof to the respondent in some form of electronic storage device, so that he can get an opportunity to review and interrogate on whether the evidence is required in the first place. He further submitted that it would be injustice to the defendant if the application is allowed.

Counsel submitted that the applicant had numerous opportunities to produce the evidence during the many mentions and pre-trial conferences but failed to do so. He also contend that no prior notice of intention to had been given to the defendant or the Court yet it was not new evidence that had just come into their possession. Counsel submit that the same is an afterthought or that it is evidence which has been forged and tailored to fit with the plaintiff's case after observing how the defendant's case had proceeded. He submit that the Court should be carefully in exercising its discretion to ensure that it does not prejudice the opposing party.

Counsel, further submitted that the primary principles governing an application such as the one before the Court are that; the Court needs to find out why the evidence was not adduced prior to the hearing of the case being closed, that re-opening will not normally be allowed if failure was deliberate and the decision on whether or not to allow the application is discretional and must be exercised judiciously. He also submitted that even the overriding objective principle under Section 1A and B of the Civil Procedure Act can come to the aid of the applicant. Counsel submitted that the cardinal tenets of the overriding objective still remain to be that justice should be delivered in an efficient and expeditious manner and that the applicant runs counter to these tenets as it is evident their conduct is against the efficient and expeditious finalization of the suit.

Finally, it was counsel submission that if the application is allowed it will be severely prejudicial to and embarrassing to the defendant and that it will further delay the prosecution of the case to its logical conclusion and will provide the plaintiff with an opportunity to present tailored and fabricated evidence meant to fill up the evidential gaps in their case and as such should be dismissed with costs.

For these submissions the respondent relied on the cases of; **Samuel Kiti Lewa v Housing Finance Company Limited & Another {2015} eKLR, Simba Telecom v Karuhanga & Another {2014} UGHC 98, Smith v New South Wales {1992} HCA 36 {1992} 176 CLR 256, Emily Cherono Kiombe v Jacob Kamoni Kari {2018} eKLR and Odoyo Osodo v Rael Obara Ojuok & 4 others {2017} eKLR.**

Determination

I have considered the application which is the subject of this Ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. I have also considered the relevant legal framework and jurisprudence on the key issues in this application. Two key issues fall for determination in the application. The first issue is whether the plaintiff has satisfied the criteria upon which the Court exercises jurisdiction to re-open a case and receive additional evidence. The second issue is whether the plaintiff has satisfied the criteria upon which leave is granted. Having said that, I shall now put my mind to the two issues at hand:

Whether the plaintiff has satisfied the criteria upon which the Court exercises jurisdiction to re-open a case and receive additional evidence?

Both the Civil Procedure Rules and the Evidence Act do not have clear and express framework on how that jurisdiction is to be exercised. Section 146 (4) of the Evidence Act generally grants the Court powers to recall a witness. It provides thus:

> ***"(4) 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."***

Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the Court powers to recall any witness who has been examined. It provides thus:

> ***"10. 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."***

The decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion to albeit to be exercised judiciously and in the interest of justice.

Out of the primary concern would at what stage can a trial Judge permit the re-opening of the case to admit further evidence. Here is where jurisprudence is divided founded in the facts and circumstances of particular cases. The crucial question to be resolved in either situational analysis upon an application to re-open a litigant civil case is whether the adverse party will suffer prejudice in the legal sense.

The ambit of that trial, judicial discretion move to re-open the case and introduce additional evidence has also to be recognized under the fair trial rights which are constitutionally protected pursuant to Article 50 of the Constitution. Depending at what phrase such an application is made to re-open the case certain interrogatories question do arise and they are all in the interest of justice to grant or deny re-opening of the case.

I have in mind the various principles developed overtime governing an application of this nature to re-open the on-going case to adduce and admit further evidence.

In **State v Hepple, 279265, 271 {1977}:**

> ***"the Judge must consider whether the party deliberately withheld the evidence proferred in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts."***

While the dictum in **Cason v State 140 MD App 379 {2001}** espouses the principles such as:

> ***"Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony."*** *(underlined emphasis mine)*

Traditionally, our case management directions anchored in the Civil Procedure Act and Rules 2010 within the context of a trial envisages a

safeguard in which a particular claimant or defendant substantially advances his or her case as directly outlined in the statute. To that extent the plaintiff has a right to begin with the evidence against the defendant. Similarly, its expected that the plaintiff and defendant having gone through full disclosure and pretrial conference under Order 11 of the Civil Procedure Rules the calling of evidence for either party will follow procedural orderliness.

The preserve of this procedural dictates is as espoused in the legal text by the **Learned Authors of Murphy on evidence 12th Edition at paragraph 17.17** thus:

> ***"the general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case. (See Kane {1977} 65 CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses' statements, is designed to enable this to be done wherever possible."***

This is consonant with the principles in **Oakley v Royal Bank of Canada {2013} ONSC 145 {2013} OJ NO. 109 SC**. It was stated:

> ***"the Court requires the parties to mitigation to bring forward their whole case, in both civil and criminal matters, the crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice."***

The principles noted above are significant on the weight to be given by the Court to subsequently decline or permit the re-opening of a case. The foundation of the applicants case before the Court was that the yardstick of re-opening the case is for the Court to have a better view of the so called system evidence regarding the contract.

An apparent opposition by the defendant to this application is premised that its being brought later in the day entitling the Court to out rightly reject it. None of these considerations amounts in my view to extraordinary circumstances to fetter the discretion of the Court to determine the best outcome in respect to the application.

This was recognized in the words of the **Learned Author in the Canadian Encyclopedic Digest Evidence IV. 12 (a)** which summarizes the approach the Court should adopt in assessing a party's conduct as a relevant factor thus:

> ***"where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.***
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> > ***(1). Whether the evidence. If it had been properly tendered. Would probably have altered the Judgment and***
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> > ***(2). Whether the evidence could have been discovered sooner had the party applied reasonable diligence.***
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> ***Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger, the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."***

This high threshold found its way to our jurisprudential principles considerations that respects an appropriate balance to effect the scheme in general of exercising discretion that lie at the core of re-opening a case to admit further evidence. The answers to this question have broad implications on the rights of the parties to a litigation. Together with the above outlined tests, more to the point in the present case is clearly postulated in the following local cases. **(See the case of Andrew Mugandi Nuri & 2 others v China Dalian International Group {2020} eKLR).** First, the jurisdiction is a discretionary one and is to be exercised judiciously as seen in the case of **Samuel Kiti Lewa v Housing Finance Company Limited & another {2015} eKLR**. 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. In the case of **Samuel Kiti Lewa (supra), Lady Justice Mary Kasango** while considering a somewhat similar application where the plaintiff sought to have his case re-opened so that he could recant the evidence adduced by one of the defence witnesses, stated as follows:

> ***"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."***

Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the Court will not grant the plea, **(See Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd (supra)** where the Judge went on to observe thus:

> ***"…. in my view if the plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant was different to the one he had would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants."***

Thirdly, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant **(See the cases of Victoria Naitano Kiminta v Gladys Kiminta Prinsloo (supra), Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & others {2018} eKLR; Samuel Kiti Lewa v Housing Finance Company Limited & Another (supra); and Ladd v Marshall {1954} 3 ALL ER 745. In the case of Hannah Wairimu Ngethe v Francis Ng'ang'a & Another {2016} eklr, Lady Justice Achode** declined to allow a petitioner in a Succession Cause to reopen the case to adduce further evidence. The Judge in the case interalia stated:

> ***"This Court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case."***

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 and lastly 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.

In the case of **Raila Odinga & 5 others v IEBC & 3 other {2013} eKLR** the Supreme Court stated as follows on the correct legal position where the Court has to consider whether to admit or reject additional evidence:

> ***"the parties have a duty to ensure they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the Court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."***

The Court held in the case of **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."***

It is common ground that hearing of the plaintiff's case closed and that what is pending is the hearing of the defendant's case. The present application was brought after hearing of the defendant's case has already commenced. However, evidence set to be adduced is already a part of both parties' cases as such is not entirely foreign or new.

The question that the calling of additional evidence would not have been probably obtained without exercise of due diligence does not necessarily apply to the instant application. It was held in **Risoro v State Farm Mutual Automobile Insurance Co {2009} 70 CPC Out Div CL** that:

> ***"An orderly system of litigation requires that each party put his or her best foot forward."***

In the same breadth my observation is that the applicant has a legitimate expectation from this Court to be granted leave to factor in the additional evidence to clarify contentious issues to the claim. This is an application in which the mover has sought leave and discretion of the Court before Judgment and the test is whether the evidence if presented would clarify issue and buttress the position taken by the plaintiff.

In my considered view materially the plaintiffs claim under the contract is based among other elements on payment of quantum regulated by a revenue system developed for the benefit of the defendant. The initial evidence canvassed by (PW1) emphasized the key question of a revenue system among other various features of the contract subject matter of this trial. That means the granting of the plaintiff's application would not be to condone laxity or indolence but to permit the clarification and demonstration of such evidence via digital link. It is therefore practically not new evidence that was hard to access and which is not relevant to the dispute.

In this regard, I am cognizant of the fact that after a pretrial conference parties had an opportunity to covenant to the Court that they were relying entirely on the threshold of the bundles of documentary evidence annexed to the pleadings.

Accordingly, in weighing whether to allow the application no reservation has been issued by either party in the matter challenging any of the documentary evidence to form part of the case to be decided at the end of it all by the Court. In contesting the re-opening of the case at cross-examination stage the defendant has not shown that it would alter the character of the case as presented by the plaintiff or occasion a miscarriage of justice or in that context a mistrial which cannot be remedied by being given an opportunity to recall further evidence limited to the raised additional evidence. Furthermore, the witness to be recalled was already in the list of witnesses as such I find that no prejudice will be suffered by the respondent.

Whether the plaintiff's notice of motion application should be allowed?

The Constitution in Article 159 (2) now enjoins this Court to dispense substantive justice without undue regard to technicalities. Thus the primary consideration is whether the interests of justice require that the application be allowed. This Court's broad powers of case management under the Civil Procedure Act and Rules need to be noted: to achieve the objective of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute, the Court may make any order or give any direction with regard to the just determination of the Civil proceeding and the efficient conduct of the business of the Court.

The plaintiff argues that the defendant and its officials were present in the said meeting which was further minuted and that they have similarly produced the pictorial evidence in their bundle of documents, however it also their contention that the audio-visual evidence if allowed to be adduced will be able to provide this Court with a concrete perspective of the issue at hand. Though it is true that the applicant has not explained the delay in filing the instant application 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 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. Further, they agree that the recalled witness should be subject to cross-examination by defendant. I find that this is a reasonable request in the interest of justice.

It should be noted that the defence has not closed its case. In the case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another {2015} eKLR Kasango J.** stated:

> ***"17. Ugandan High Court, Commercial Division in the case 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 v New South Wales {1992} HCA 36; {1992} 176 CLR 256 where it was held:***
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> ***"If an application is made to re-open 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 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 re-open should be exercised."***
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> ***18. 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 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……"***
>
> ***20. 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."***

It is thus my finding that this Court is obligated to consider the evidence sought to be introduced, so as to determine the real issues in controversy and dispense justice to the parties, and any prejudice caused to the defendant in this regard can be cured by such further orders as may be necessary.

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 case will be concluded without any further unnecessary delay. I however do not think that it is in the interest of justice to give an open ended order. The re-opening must be done within clearly defined parameters so as not to throw the proceedings generally open and cause delay.

In this case, I am satisfied that the reason for the delay may have been occasioned by the applicants right to change counsel in the midst of the trial. The right to choose and be represented by an advocate of his choice is underpinned in Article 50 of (2) (g) of the Constitution.

Subsequently, in exercising that right to instruct another counsel should not be a blunder or mistake to be visited against the plaintiff. To some degree, the further clarification of the evidence to be adduced is relevant to the dispute between both parties, and the possibility to shape the issues before Judgment is to be weighed against the sought leave, the degree of prejudice likely to be suffered and greater need to finality of the proceedings tilts in favour of granting the application.

Consequently, the application is allowed on condition that the applicant will avail his intended witness and conclude it on the next hearing date to be mutually taken by both parties. The applicant will also pay the respondent costs occasioned by the application. Accordingly, the motion dated 14.10.2020 is hereby allowed and subsequently, the evidence to be adduced be subjected to the normal rules of Evidence Act.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Ochieng advocate for plaintiff

2. Muthama advocate for the defendant