



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 100 OF 2018

GLADYS WAKIURU NYOTA.....PLAINTIFF

VERSUS

DR PINCLE L. NJOROGE.....1ST DEFENDANT

KENYATTA NATIONAL HOSPITAL.....2ND DEFENDANT

RULING

1. In its Notice of Motion application dated 30th June 2020 and filed on 1st July 2020, the 2nd Defendant sought an order to re-open the case and to be allowed to file the Ruling of the Preliminary Inquiry Committee in **Case No 4 of 2018** that was delivered on 27th September 2019. Its said application was supported by the Affidavit of its advocate, Mwangi Wahome, that was sworn on 30th June 2020.
2. The 2nd Defendant averred that prior to filing the suit herein, the Plaintiff filed a complaint with the Medical Practitioners and Dentists Board (hereinafter referred to as “the Board”), a fact she alluded to in her Plaintiff. It pointed out that it closed its case on 8th October 2019 and that the matter was pending confirmation of filing of its Written Submissions.
3. It added that on 8th June 2020, by which time it had already closed its case, it discovered that the aforesaid complaint was dismissed on the ground that the Plaintiff did not prove her case. It averred that the Plaintiff neither disclosed this fact nor waited for the said decision to be delivered before filing the suit herein.
4. It was its contention that it was necessary for the case to be re-opened so that it could be granted leave to produce the said Ruling of the Board as evidence in the case herein for the reason it related to the subject matter of the suit herein, that it was delivered by professionals in the medical field and hence, had a lot of weight in this case. It contended that it was in the interest of justice that the orders it had sought in its application be allowed as prayed.
5. In opposition to the said application, the Plaintiff swore a Replying Affidavit on 8th July 2020. She pointed out that she disclosed about the proceedings that were before the Board but that the said Board never called or advised her of the same. She contended that she heard of the said Ruling for the first time when the 2nd Defendant filed the present application. It was her averment that the 2nd Defendant never applied for a stay of the proceedings herein and that in any event, the said Ruling was not binding because the Board was subordinate to this court.
6. She stated that there had been inordinate delay in filing the present application and that the re-opening of the case was for the 2nd Defendant to fill the gaps of its case. It was her averment that it was not in the interest of justice for the case to be re-opened as she was still unemployed and was going through untold extreme hardship to fend for the children.
7. She swore a Supplementary Affidavit on 16th December 2019 in which she indicated that she filed proceedings in the Judicial Review Division to challenge the Ruling of the Board. She thus urged this court to dismiss the present application with costs to pave way for the Judgment herein.
8. The 2nd Respondent relied on the cases of **Joseph Ndungu Kamau vs John Njihia [2017] eKLR** and **Standard Chartered Financial Services & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited) & 2 Others [2016] eKLR** to support its argument that the decision to re-open a case was a discretionary one but that such discretion had to be exercised sparingly to avoid injustice and miscarriage of justice.
9. It submitted that the decision that would be delivered by this court was going to have far reaching consequences on many women regarding the issue of tubal ligation and that it was best that its said application be allowed as sought.

10. On its part, the Plaintiff placed reliance on the case of Simba Telecom vs Karuhanga & Another [2014] UGHC 98 which was cited with approval by Kasango J in the case of Samuel Kiti Lewa vs Housing Finance Co of Kenya Limited [2015] eKLR where the holding was that even where a case has been re-opened, the court retains its discretion whether or not to admit that piece of fresh evidence.

11. She submitted that she would be prejudiced if the evidence was adduced as she would not have the chance to rebut the same. She added that she had filed her Written Submissions based on the evidence that was adduced during the trial. She was emphatic that the case of Joseph Ndungu Kamau vs John Njihia (Supra) was distinguishable from the facts of this case as the 2nd Respondent never indicated its intention to rely on the said proceedings by the Board despite her having disclosed that she had filed a complaint before the said Board.

12. She also relied on the cases of Michael Kiplangat Cheruiyot vs Joseph Kipkoech Kotit [2019] eKLR, Shami Deshpal Wadhwa vs Habib Abu Mohamed & 4 Others [2020] eKLR and Odoyo Osodo vs Rael Obara Ojuok & 4 Others [2017] eKLR where the courts therein dismissed applications where the applicants had sought the re-opening of the cases after witnesses had testified.

13. Notably, the cases that were decided by the High Court and Environment and Land Court were not binding on this court as they were courts of equal and competent jurisdiction. What was of concern to this court was that it presented with two (2) opposing positions that were taken by the Court of Appeal regarding the re-opening of cases.

14. A perusal of the case of Shami Deshpal Wadhwa as legal representative of the Estate of Deshpal Omprakash Wadhwa vs Habib Abu Mohamed & 4 Others (supra) that was relied upon by the Plaintiff herein was distinguishable from the facts of this case. In the said appeal, the appellants therein had sought for orders staying the further hearing of the main suit and further proceedings.

15. In the case of Standard Chartered Financial Services & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited) & 2 Others (Supra) that was referred to by the 2nd Defendant herein, the Court of Appeal set aside the judgment and with all consequential orders and directed that the matter be heard afresh as there was an element of public interest in resolving the issue.

16. This was a more relevant case in the circumstances of the case herein as it showed that even when a case has been heard, judgment could still be set aside and/or vacated and directions given for the case to be heard afresh on appeal. Indeed, under Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya), an appellate court has power to grant different reliefs including taking of additional evidence and also ordering that a case be referred back to the lower court for retrial.

17. The said Section 78 of the Civil Procedure Act stipulates as follows:-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- a. to determine a case finally;**
- b. to remand a case;**
- c. to frame issues and refer them for trial;**
- d. to take additional evidence or to require the evidence to be taken;**
- e. to order a new trial.”**

18. Indeed, ordering a new trial envisages that evidence will have to be taken afresh and that the judgment delivered therein, as was in the case of Standard Chartered Financial Services & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited) & 2 Others (Supra) can be set aside and/or vacated.

19. This court addressed the issue of a retrial to demonstrate that even at the appellate stage, the appellate court can order parties to go for a retrial of their case. If for example this court was to disallow the 2nd Defendant’s present application and proceeded to deliver its judgment herein and the 2nd Defendant was successful on appeal, one of the options the Court of Appeal could exercise would be to order that the case be heard afresh. The possibility of recalling witnesses after judgment is not therefore a remote possibility and is in fact anticipated by the law.

20. In addition, the power of the appellate court to order that additional evidence to be taken after judgment is also well set out in Section 78 (d) of the Civil Procedure Act.

21. Going further, courts also have power to recall witnesses to tender evidence before judgment is delivered. There is no type of case where such recall cannot be done. Indeed, Section 146 (4) of the Evidence Act Cap 80 (Laws of Kenya) states that:-

“The court may in all (emphasis court) 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.”

22. It was for that reason that this court took the view that re-opening of a case was not a matter of life and death as the opposing party would still be given an opportunity to rebut the evidence that had been adduced through re-examination as stipulated in Section 146(4) of the

Evidence Act be it in circumstances relating to taking of additional evidence or retrial.

23. Notably, when considering an application to re-open a case, a court must have at the back of its mind that Article 50(1) of the Constitution of Kenya, 2010 provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

24. As no party should be shut out from fully presenting its case in the best way it knows how and bearing in mind that there were safety nets to protect the Plaintiff’s interests through re-examination after a recall of witnesses, this court was therefore not persuaded that she would be prejudiced and not have a chance to rebut the evidence if the case was re-opened.

25. In any event, evidence that is adduced during trial is not necessarily admissible or relevant. The court has the discretion to admit fresh evidence as was acknowledged in the case of **Samuel Kiti Lewa vs Housing Finance Co of Kenya Limited** (Supra). It has to consider its weight, admissibility and relevance before determining that it has assisted one party and not the other and vice versa.

26. Having said so, re-opening of cases is not as a matter of course. A court must consider each case on its own merits. As was held in the cases of **Joseph Ndungu Kamau vs John Njihia** (Supra) and **Standard Chartered Financial Services & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited) & 2 Others** (Supra), the decision to re-open a case is a discretionary one. The rider is that such discretion must only be exercised sparingly to avoid injustice and miscarriage of justice.

27. The circumstances of this case showed that neither the Plaintiff nor the 2nd Defendant were aware of the delivery of the decision of the Board on 27th September 2019 by the time the 2nd Defendant closed its case on 8th October 2019. The 2nd Defendant would not have intimated to the court that it would rely on the said Ruling as it was unaware of the same.

28. As it was the Plaintiff’s complaint, it was onerous to have expected the 2nd Defendant to have known the outcome of the same and/or apply for the staying of the proceedings herein while awaiting the decision of the Board. Indeed, the onus was more on the Plaintiff to have followed up the complaint whether she had been called by the Board or not.

29. The court noted that her complaint was dismissed by the Board. She was aggrieved by the decision of the Board and had in fact filed Judicial Review Proceedings to wit **Application No E 1090 of 2020 Gladys Wakiuru Nyota vs Medical Practitioners and Dentists Council & 2 Others** seeking leave to institute judicial proceedings for orders of *certiorari*, *mandamus* and *prohibition* in respect of the said decision.

30. The Plaintiff could not be faulted for having failed to follow up her complaint for the reason that she was not obligated to tender in evidence the decision of the Board. However, as the said decision of the Board was important both to her and the 2nd Defendant herein and they were both unaware of the delivery of the same, it was the considered view of this court that it was in the interests of justice that the 2nd Defendant be granted leave to adduce whatever evidence it deemed necessary to assist its case.

31. It was better that the conclusion of a case be delayed for a little while longer for all the evidence to be taken and the party aggrieved by the court’s decision to have its appeal heard on merit as opposed to shutting out a party and the matter be referred back to this court for retrial or for the taking of fresh evidence on the ground of not having allowed a party to tender in evidence after a case had been closed. This would ideally cause more delays to parties who would wish to have their matter heard and determined at the earliest time possible.

32. In a case such as this, courts should ideally consider compensating the party that has been dragged backwards in the hearing of its case due to delays caused by re-opening of the case. Having said so, this court found and held that this would not be a suitable case to condemn the 2nd Defendant to pay the Plaintiff throw away costs as the Ruling was delivered after both parties had closed their cases and they were both unaware of the delivery of that Ruling.

33. In any event, save for losing time, this court did not see the prejudice the Plaintiff would suffer if it ordered the re-opening of the case herein. Indeed, the Plaintiff still had an opportunity of filing Further Submissions on the issues raised following the tendering in evidence of the Ruling by the Board. If she had suffered any prejudice, then she did not demonstrate the same to the satisfaction of this court. Her unemployment and economic hardships of feeding her children were not good and sufficient reasons to deny the 2nd Defendant an opportunity to re-open the case so that it could fully enjoy its right under Article 50(1) of the Constitution of Kenya.

DISPOSITION

34. For the foregoing reasons, the upshot of this court’s decision was that the 2nd Defendant’s Notice of Motion application dated 30th June 2020 and filed on 1st July 2020 was merited and the same is hereby allowed in terms of Prayers Nos (2) and (3) therein. Costs of the application will be in the cause.

35. It is hereby directed that fresh dates for the hearing of the case be taken at the Registry.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of December 2020

J. KAMAU

JUDGE