



Kerengwa v County Government of Vihiga & another (Environment and Land Appeal E006 of 2024) [2025] KEELC 1315 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

**E ASATI, J
MARCH 13, 2025**

BETWEEN

ALFRED MALENGA KERENGWA APPELLANT

AND

COUNTY GOVERNMENT OF VIHIGA 1ST RESPONDENT

GANGO ENTERPRISES COMPANY LIMITED 2ND RESPONDENT

JUDGMENT

1. Vide the Memorandum of Appeal dated 26th March, 2024, the Appellant challenges the ruling dated 14th March, 2024 in Vihiga MCL&E Case No.42 of 2019 on the grounds that: -
 - a. The learned Magistrate erred in both law and fact when she failed to consider the Appellant's submissions dated the 10th January, 2024 and filed on 16th January, 2024 when determining the Appellant's application dated 3rd October, 2023.
 - b. The learned Magistrate erred in both law and fact when she held that the Appellant had unreasonably delayed in making the application dated 3rd October, 2023 and that he had not explained the delay.
 - c. The learned Magistrate erred in law and fact when she totally disregards the fact that no prejudice would have been occasioned upon the Respondent whose defence had not been heard and would have time to cross-examine the additional witness.
 - d. The learned Magistrate was totally misdirected when she overlooked the fact that the 1st Respondent had tendered no objection against the Appellant's application to re-open his case in order to call an additional witness.
 - e. The trial court erred when it made a conclusion that the Appellant intended to re-open his case in order to fill gaps in evidence when the evidence on record indicated otherwise.



2. The Appellant seeks for orders that the appeal be allowed, the ruling delivered on 14th March, 2024 be set aside and be replaced with orders allowing the application dated 3rd October, 2023 and that the costs of the appeal be awarded to the appellant.
3. A brief background of the appeal is that vide the plaint dated 5th September, 2019, the Appellant sued the Respondents claiming for damages for property destroyed on his land as the Respondents expanded a road under a project known as Ondeyo Pag Water Supply (Siloya Road).
4. After the appellant had testified and closed his case and in the pendency of the defence case, the appellant brought an application dated 3rd October, 2023 seeking for an order that his case be re-opened for purposes of calling a land Surveyor to testify as his additional witness in the matter and that he be permitted to file Land Surveyor's report and/or Surveyor's witness statement. The Appellant also sought for an order that the costs of the application be in the cause.
5. The application was opposed by the 2nd Respondent. The record shows that the application was heard and ruling delivered on 14th March, 2024. The court found that the application lacked merit and dismissed it with costs to the 2nd Respondent.
6. The Appellant was aggrieved by the Ruling hence the appeal herein.

Submissions

7. The appeal was disposed of by way of written submissions.

Appellant's Submissions

8. It was submitted on behalf of the Appellant that the Appellant's only intention for re-opening the case is for the purpose of bringing on board the evidence of a crucial witness whose testimony will help the court to do justice in the trial. That it is to allow the Appellant to bring forth all the evidence he wishes to rely on. Counsel relied on the case of Tedibiz Limited -vs- Royal Media Services Limited (2021)eKLR where it was held that re-opening the case is in the interest of justice so that all the evidence available to the parties can be put before the court for consideration.
9. That the evidence of the Surveyor is crucial. That the Appellant was not intending to fill the gaps of his case.
11. Counsel submitted further that no prejudice will be occasioned upon the 2nd Respondent who will have time to cross-examine the Land Surveyor.
12. That the application was made without delay.

Submissions for the 1st Respondent

13. It was submitted on behalf of the 1st Respondent vide the written submissions dated 13th January, 2024 that the Appellant had ample time to file the Surveyor's report. That the application was filed more than one year six months after the Appellant had closed his case hence there was inordinate delay. That the 1st Respondent will be prejudiced as it had already formulated its defence based on the Appellant's suit.
14. Counsel relied on the cases of B.D. Joshi -vs- J.C. Patel [1952] 19 EACA 48 and Bhari -vs- Khan (1965) EA 95 and Justa Wawira Kiura -vs- Multi Media University & Another [2019]eKLR where courts declined to re-open cases.



15. Counsel submitted that the Appellant's intention is to introduce an inconsistent cause of action which will substantially alter the Appellant's case which has been heard and closed. That allowing the re-opening of the case will be akin to allowing an amendment of the Appellant's case which would substantially affect the 1st Respondent's pleading.
16. Counsel further relied on the case of Susan Wavinya Mutavi -vs- Isaac Njoroge and Another [2020]eKLR where the court cited the principles which guide the exercise of the court discretionary jurisdiction to re-open case and the case of Samuel Kiti Lewa -vs- Housing Finance Co. Kenya Ltd & Another [2015]eKLR which was also relied upon by the Appellant.
17. Counsel submitted that the application dated 3rd October, 2023 was an afterthought and that the Appellant deliberately neglected to call the witness before close of his case.
18. Counsel urged the court to dismiss the appeal.

Submissions for the 2nd Respondent

19. On behalf of the 2nd Respondent, written submissions dated 14th January, 2025 were filed by the firm of Ben Oduol Nyanga & Co. Advocates. Counsel submitted that the survey report that the Appellant is seeking to rely on is dated 25th November, 2023 which was one month after making the application.
20. That the actions of the Appellant are geared towards wasting the court's time and filling the gaps in his case.
21. Counsel relied on the case of Samuel Kiti Lewa -vs- Housing Finance Co. of Kenya Ltd and Another [2015]eKLR which was also relied on by the other parties.
22. Counsel submitted that the Appellant had not given a plausible reason for the inordinate delay in making the application for re-opening of the case. That allowing the appeal will be prejudicial to the 2nd Respondent. That none of the Respondents was informed of or participated in the survey exercise.
23. Counsel urged the court to dismiss the appeal with costs to the 2nd Respondent.

Issues for Determination

24. From the grounds of appeal and the submissions filed, the sole issue for determination is whether or not the trial court erred in disallowing the Appellant's application to re-open his case and produce additional evidence.

Analysis and Determination

25. This is a first appeal and the court has a duty to re-examine and analyse the evidence placed before the trial court. The record shows that the Appellant who is the Plaintiff is the suit filed the suit on 9th September, 2019 vide the plaint dated 5th September, 2019. Filed together with the plaint was a list of documents and list of witnesses as required by law. One of the witnesses listed to be called was the Land Surveyor and one of the documents listed to be produced, the Surveyor's report. No copy of Surveyor's report was however annexed to the list of documents as required by Order 3 Rule 2 Civil Procedure Rules that all suits be accompanied by, inter alia, copies of documents to be relied on at the trial.
26. The record shows that the Appellant testified, called 3 witnesses and closed his case on 28th June, 2022.
27. The explanation given in the application for not calling the Surveyor before the Plaintiff's (Appellant's) case was closed was that it was due to an oversight on the part of the Appellant's Counsel.



28. As agreed by all the parties, the principles for re-opening of cases are as laid down in the case of Samuel Kiti Lewa -vs- Housing Finance Co. of Kenya Ltd & Another [2015]eKLR where it was held inter alia quoting the Uganda court in the Case of Simba Telcom that;

“The court retains the discretion to allow re-opening of a case. That the 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”.

29. The discretion to allow or decline an application to re-open a case should be exercised judiciously, meaning not on whims or caprice or sympathy but on sound reason.

30. The essence of the requirement in Order 3 Rule (2) is that the Plaintiff should be able to lay his entire case before the court and the adversary from the inception of the case so as to enable the adversary to have time to prepare adequately and sufficiently to avoid trial by ambush and to enable fair hearing and to achieve the overriding objective of the Civil Procedure.

31. The Respondents aver that, they filed their response to the Appellant’s claim on the basis of the material filed at the inception of the suit. That they will be prejudiced by evidence created after the Plaintiff closed his case and after a delay of one and half years from the date of closing the case and after the application for re-opening the case.

32. It was explained that failure to produce the Surveyor’s report was by oversight on the part of Counsel for the Appellant.

33. A reading of the plaint shows that appellant’s claim is based on the tort of trespass. A surveyor’s report is crucial in adjudicating on a claim of trespass. From the inception of the case, the appellant had shown the intention to call the surveyor as a witness and to adduce a surveyor’s report as exhibit by including them in the list of witnesses and list of documents respectively.

34. In the case of Raila Odinga & 5 Others vs IEBC and 3 Others (2013) eKLR the Supreme Court while dealing with an issue of admission of documents outside the stipulated timeliness stated that:

“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.”

35. In the present case though, the plaintiff had closed his case, the Defendants were yet to testify hence they have a chance and the liberty to call evidence to counter the appellants additional evidence.



Secondly the evidence sought to be produced is simply a report by the Surveyor a copy of which has already been availed to the other parties vide the appellant's Supplementary Affidavit sworn on 12th January 2024. I find that it is in the interest of justice that the appeal be allowed. The Respondents can be given the chance to call such evidence as they may require to counter the appellant's additional evidence.

36. The appeal is therefore hereby allowed as follows: -

- i. The ruling of the trial court delivered on 14th March 2024 is set aside and replaced with an order allowing the appellant's application dated 3rd October 2023.
- ii. Costs of the appeal to the 2nd Respondent as the 1st Respondent did not oppose the application before the trial court.

37. Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 13TH DAY OF MARCH 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

Malanda h/b for Luvayi for the Appellant.

No appearance for the 1st Respondent.

Willie for the 2nd Respondent.

