



**Soy Developers Limited v Kenagri Products Ltd & 4 others (Environment & Land Case 132 of 2015) [2023] KEELC 20839 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20839 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 132 OF 2015  
OA ANGOTE, J  
OCTOBER 19, 2023**

**BETWEEN**

**SOY DEVELOPERS LIMITED ..... PLAINTIFF**

**AND**

**KENAGRI PRODUCTS LTD ..... 1<sup>ST</sup> DEFENDANT**

**DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATORS OF POST BANK CREDIT LIMITED) ..... 2<sup>ND</sup> DEFENDANT**

**ASL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**CYPERR PROJECT INTERNATIONAL LTD ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion application dated July 4, 2023, the 3<sup>rd</sup> defendant seeks the following orders:
  - a. That this honourable court be pleased to grant leave to the 3<sup>rd</sup> defendant/applicant to reopen its case and recall its witness, Kartik Patel, to produce and place on the record the following additional evidence:
    - i. The letter dated April 27, 2005 from T.R. Consult Ltd to the 3<sup>rd</sup> defendant.
    - ii. The letter dated May 16, 2005 from T.R. Consult to T/S Kimani & Michuki Advocates and copied to the 3<sup>rd</sup> defendant.
  - b. That this honourable court be pleased to grant any other orders it deems fit, just and expedient.
  - c. That the costs of this application be in the cause.



2. The application is supported by the Affidavit of Kartik Patel, the 3<sup>rd</sup> defendant's Director, who deponed that during the hearing on June 20, 2023, he was referred to his witness statement where he had indicated that the 3<sup>rd</sup> defendant learnt the suit property was being sold from T.R. Consult Limited and that he was cross examined on how T.R. Consult communicated this information to the 3<sup>rd</sup> defendant.
3. It was the evidence of the 3<sup>rd</sup> defendant's director that the said T.R. Consult Limited sent a letter dated April 27, 2005 to the 3<sup>rd</sup> defendant and another one dated May 16, 2005 to the 2<sup>nd</sup> defendant and copied to the 3<sup>rd</sup> defendant and that he had indicated in his witness statement the role played by T.R. Consult and none of the parties contested or raised any issue regarding the position.
4. According to the 3<sup>rd</sup> defendant's director, the said letters from T.R. Consult Limited confirm that T.R. Consult Ltd was in communication with both the 3<sup>rd</sup> and 2<sup>nd</sup> defendants' Advocate and that the letters will assist the court reach a just determination about the dispute.
5. The plaintiff opposed the application *vide* a Replying Affidavit of Sammy Boitt Kogo sworn on September 19, 2023, where he deponed that the Supreme Court in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR laid down the criteria for production of additional evidence and that after a lengthy hearing, the matter was closed and any attempts to re-open it without any sufficient cause is contrary to the overriding objectives that abound to the litigation process.
6. It was deponed by the plaintiff's director that the request for the production of the letters emanated from the cross-examination of the 3<sup>rd</sup> defendant's witness and thus the 3<sup>rd</sup> defendant's intent is to seal the loopholes created during cross-examination and that having initially testified that communication from T.R. Consult was verbal, the letters are of utmost suspicion and their production should equally be viewed as suspect.
7. The plaintiff further stated that the 3<sup>rd</sup> defendant had conceded that the letters were easily available to them and in their exclusive possession, hence failure to present them was wilful and deliberate; that allowing them to be produced after the close of the trial would give the 3<sup>rd</sup> defendant an unfair advantage and that even if allowed, the evidence would have faint to no impact on the honourable court's verdict.
8. The plaintiff deposed that the 3<sup>rd</sup> Defendant's proposal that the Plaintiff may recall its witnesses is contrary to the principle of expeditious disposal of cases; that re-opening and re-calling witnesses would alter the course of the proceedings to the prejudice of the Plaintiff and that the application is a waste of the Court's time and further an abuse of the court process.
9. The plaintiff also filed grounds of opposition dated September 19, 2023 in which it averred that the documents were inadmissible under section 3(3) of the [Law of Contract Act](#) and section 71 of the [Evidence Act](#) with respect to attestation of instruments pertaining to disposition of interests in land and that they were also incompetent and inadmissible because the 3<sup>rd</sup> defendant did not seek to present an attesting witness who was present when the instruments were drawn.
10. The Plaintiff further averred that the 3<sup>rd</sup> defendant has not identified which of the six (6) witnesses that testified on behalf of the Plaintiff made reference to the documents; that in fact, none of them referred to the said documents and the 3<sup>rd</sup> defendant's proposal to call the plaintiff's witnesses would make the case indeterminate; and lastly that the 3<sup>rd</sup> defendant never produced the documents in the plaintiff's notice to produce and the trial proceeded on the basis that the documents were not available.



11. The application was also opposed by the 1<sup>st</sup> and 5<sup>th</sup> defendants vide an affidavit sworn by Shakalaga Khwa Jirongo sworn on September 20, 2023, who deponed that the application was an attempt to fill up gaps in a hotly contested issue in a manner that is prejudicial to the hearing of the suit.
12. The 1<sup>st</sup> and 5<sup>th</sup> defendants' director deponed that the documents were not shown to the other relevant witnesses to establish their relevance or nexus with the suit property; that the existence of T.R. Consult Limited is not a matter of general knowledge or law from which can be presumed to establish any nexus between the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant in the purported purchase of the suit property; and that the authenticity and custody of the documents sought to be produced cannot be established or verified as they do not constitute part of any public record.
13. The 1<sup>st</sup> and 5<sup>th</sup> Defendant's Director deponed that the re-opening of the 3<sup>rd</sup> Defendant's case would in fairness call for re-opening of their entire case for examination on the issue that the property was under-valued in the sale and cross-examination on the contents of the letters; that the said T.R. Consult is an alien to the other parties and does not seem to have had any role and that the 3<sup>rd</sup> Defendant's reference to it does not shine any light on the opaqueness of the alleged sale by private treaty.

### Submissions

14. Counsel for the 3<sup>rd</sup> defendant submitted that the application was brought under section 146 of the *Evidence Act* as well as order 18 rule 10 of the *Civil Procedure Rules*; that the corresponding party can cross examine the witness which would cure whatever prejudice would be occasioned by the re-call and that the decision of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR is distinguishable because in that case, the Supreme Court was dealing with a second appeal where factual issues are not allowed.
15. It was submitted that this being a trial court, the test is different; that the court should allow the witness to produce the evidence that was not produced; that the 3<sup>rd</sup> defendant had a right to expedient determination of the dispute and to put everything on the record and that the 3<sup>rd</sup> defendant was not filling in gaps as alleged.
16. Counsel submitted that the issue of the weight of the evidence will be dealt with by the court; that they did file an answer to the Notice to Produce but they did not produce the two documents; that the documents were produced in Nairobi ELC Case No 24 of 2008, *Darelle Limited Plaintiff v ASL Limited & 2 others* [2015] eKLR and that they are not new documents as alleged.
17. Counsel for the 1<sup>st</sup> and 5<sup>th</sup> defendants, in opposing the application, submitted that the re-call of the witnesses was prejudicial to them because other than the fact that they had raised issues of possible collusion, the documents sought to be produced were never shown to the other witnesses who have already testified.
18. On behalf of the plaintiff, it was submitted that the documents the 3<sup>rd</sup> defendant wanted to produce were inadmissible under section 3(3) of the *Law of Contract Act*, which requires that all instruments for disposition of land must be in writing, signed by all parties and attested and that the 3<sup>rd</sup> defendant's reasons to produce the documents is because the plaintiff's witness referred to the letter, but in his opinion, calling the plaintiff's witness will be prejudicial. Parties also filed their respective list of authorities and case digests in support of their submissions.



## Analysis and Determination

19. The background of this Application is that this case was fully heard between March 23, 2022 and June 20, 2023, on which date the 3<sup>rd</sup> defendant's witness, Kartik Patel, testified as DW8. Upon the closure of the 3<sup>rd</sup> Defendant's case, the court directed parties to file and exchange written submissions.
20. The court fixed the matter for mention on September 21, 2023 for the purpose of confirming the filing of written submissions, with a view of fixing a date for judgment. Before that date, however, and prior to parties filing submissions as earlier directed, Counsel for the 3<sup>rd</sup> defendant filed the instant application to re-open the 3<sup>rd</sup> defendant's case and recall DW8 to produce two letters.
21. The application is filed under section 146 of the Evidence Act. Section 146(4) is what grants the court powers to recall a witness. It reads 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.”

22. The application has also been brought under order 18 rule 10 of the Civil Procedure Rules which also grants the court powers to recall a witness who has already testified. The said order provides as follows:

“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.”

23. Although neither the Evidence Act nor the Civil Procedure Rules have a clear and express framework on how the jurisdiction to re-open a case is to be exercised, courts have over the years culled out from case law the principles as the test for re-opening a case and adducing additional evidence. In Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR, the court explained the principles as follows:-

“10. Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil 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 part'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. (See (i) *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; (ii) *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; (iii) *Ladd v Mashall* (1954) 3 All ER 745; (iv) *Reid v Brett* [2005] VSC 18; (v) *Smith v*



*New South Wales Bar Association* (1992) 176 CLR 256; and (vi) *EB v CT* (No 2) [2008] QSC 306.”

24. In the case of *Mzee Waujie & 93 others v A K Saikwa & 3 others* (1982-88) 1 KAR Hancox, JA (as he then was) had this to say on the issue of admitting new;

“But I am not persuaded either that these proposed instances of additional evidence, if ordered to be taken, would be likely to affect the result of the suit, or that such evidence, was not available by the exercise of reasonable diligence before and during trial (indeed the contrary would appear to be the case). Both these conditions have in my opinion to be established by the applicant before he can succeed under rule 29(1)(a). In *Cooley v Edwards* [1982] NLJ 247, the English Court of Appeal, in dealing with the more strict provisions of RSC Order 59, r 10(2) said;

“It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court’s decision.”

25. Again in *Sudan Relief Rehabilitation Association also known as Sudan Relief Rehabilitation Commission & 3 others v Citi Bank* NA [2015] eKLR, Gikonyo J, while citing the case of *Mzee Wanje & 93 others v A K Saikwa & 3 others* (*supra*) held as follows:

“The Applicant must adduce cogent reasons as to why the pleadings should be re-opened to admit new evidence by showing that; 1) the new evidence could not have been obtained with reasonable diligence for use at the trial; and 2) that it was of such weight that it was likely in the end to affect the court’s decision. I should add that the Applicant must also show that the re-opening is not to enable the party to seal a loophole in his case but rather to attain substantive justice.”

26. Finally, in the recent case of *Raindrops Limited v County Government of Kilifi* [2020] eKLR, the High Court at Malindi held that:-

“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.

- (1). Whether the evidence, if it had been properly tendered, would probably have altered the Judgment and



(2). Whether the evidence could have been discovered sooner had the party applied reasonable diligence.”

27. From the foregoing, it would appear that the following limbs need to be satisfied before an application to re-open a case and produce additional evidence is allowed: The application must be brought without inordinate and unexplained delay on part of the applicant; the evidence must be such that, if admitted, it would probably have an impact on the result of the case, though it need not be decisive; whether the evidence could have been discovered sooner had the party applied reasonable diligence and if the proposed re-opening is intended to fill gaps in the evidence of the applicant.
28. The question this court must ask itself then is whether the 3<sup>rd</sup> Defendant has satisfied all these limbs to entitle it to the orders sought. The issue of the legality of the sale by private treaty has been raised, which understandably could be the reason why the 3<sup>rd</sup> Defendant wants the two letters produced in court.
29. One of the letters, titled “INFORMATION” dated April 27, 2005 only gives the details of the property and the price at which it was offered. The second letter dated May 16, 2005 directed the firm of Kimani & Michuki Advocates, the 2<sup>nd</sup> defendant’s Advocate, to forward the Agreement for Sale of the suit property to the firm of Iseme Kamau & Maema, who were acting for the 3<sup>rd</sup> defendant.
30. These documents however do not show how the 2<sup>nd</sup> defendant actually reached the decision to sell the property by private treaty. To this end, and without going into the merits of the case, the relevance and/or probative value of the two documents is not that high as to influence the result of the case.
31. However, even if that was not the case, no reason has been given why the two letters were not filed with the other documents before the 3<sup>rd</sup> defendant’s director testified and closed its case. Clearly, the decision not to file the two documents before hearing of the 3<sup>rd</sup> defendant’s testimony was deliberate.
32. I say so because it was deponed by the Applicant that that the said documents had been filed in an earlier suit involving the suit property, where the 3<sup>rd</sup> Defendant was a party, that is Nairobi ELC Case No. 24 of 2008, *Darelle Limited Plaintiff v ASL Limited & 2 others* [2015] eKLR.
33. No reason has been given as to why the 3<sup>rd</sup> Defendant and its counsel did not deem it fit to produce the two letters in this matter if indeed they were so important as to influence the decision of this court. In *Nakuru Automobile House Ltd v Lawrence Maina Mwangi & another* [2017] eKLR, the court was of the opinion that:-
- “Other 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. Reopening will not normally be allowed if failure was deliberate.”
34. In the case of *Raindrops Limited v County Government of Kilifi* (*supra*), the court further held that:-
- “Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care...Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel.”
35. Considering that the two letters were always in the possession of the 3<sup>rd</sup> Defendant, and in the absence of reasons why the same were not produced, I disallow the application. Further, in the Supporting Affidavit of the 3<sup>rd</sup> Defendant’s Director, the deponent who also happens to be the witness sought to be re-called, avers at paragraph 2 and 9 as follows:



- (2) That in the course of the hearing on June 20, 2023, I was referred to the statement at paragraph 3 of my witness statement dated June 12, 2017 in which I had indicated that the 3<sup>rd</sup> Defendant learnt that the suit property was being offered for sale from T.R. Consult Limited and asked how T.R. Consult Limited communicated that information to the 3<sup>rd</sup> Defendant...
- (9) That the 3<sup>rd</sup> defendant had not produced the said documents prior to June 20, 2023 since the question of the manner in which it communicated with T.R. Consult Ltd was not disputed. That issue was raised for the first time on June 20, 2023.
36. It is clear from the above extracts that the reason why the 3<sup>rd</sup> Defendant's instant application was made is to fill the gaps which emerged after the 3<sup>rd</sup> defendant's witness had testified and cross-examined. What the 3<sup>rd</sup> defendant wants to do is lead additional evidence to seal the loopholes in its case, and not because it has chanced upon or discovered new or additional evidence that could not be availed upon the exercise of reasonable diligence before or during trial as required.
37. For those reasons, the 3<sup>rd</sup> defendant's application dated July 4, 2023 is dismissed with costs to the Plaintiff, the 1<sup>st</sup> and 5<sup>th</sup> defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**O. A. ANGOTE**  
**JUDGE**

