



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 37 OF 2007**

**SAMUEL KITI LEWA..... PLAINTIFF**

**V E R S U S**

**HOUSING FINANCE CO. OF KENYA LTD**

**JAMES M. KAGETE..... DEFENDANTS**

**RULING**

1. The Plaintiff Samuel Kiti Lewa filed this case on 26<sup>th</sup> October 2007, now over 8 years ago.
2. In the initial plaint the Plaintiff alleged that the 1<sup>st</sup> Defendant, Housing Finance company of Kenya failed to issue him with statutory notice before selling his charged property namely L.R. SUB-DIVISION NO. 9763 (ORIGINAL NUMBER 9677/85) OF SECTION 1 MAINLAND NORTH. Plaintiff pleaded fraud on the part of the 1<sup>st</sup> Defendant by alleging the 1<sup>st</sup> Defendant failed to issue statutory notice to the Plaintiff; transferred the property at a value which was below the current market value; by failing to inform the Plaintiff that the property had been registered in the name of the 2<sup>nd</sup> defendant, James M. Kagete.
3. It is to be noted that the 2<sup>nd</sup> Defendant charged the property to Savings and Loan Kenya Limited, after purchasing it from the 1<sup>st</sup> Defendant when the 1<sup>st</sup> Defendant exercised its statutory power of sale.
4. The Plaintiff's prayer in that Plaint was for declaration:
  - a. **that the transfer of the property into the 2<sup>nd</sup> Defendant's name was null and void;**
  - b. **that the charge by 2<sup>nd</sup> Defendant, of the property, to Savings and Loan Kenya Limited was null and void; and**
  - c. **a permanent injunction restraining the Defendants from dispossessing the Plaintiff or interfering with the Plaintiff's quiet possession of the property.**
5. Plaintiff on 12<sup>th</sup> March 2010 filed an Amended plaint which amendment introduced a paragraph which alleged that the sale of the property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, by private treaty, at a value below the market value of the property was "harsh, oppressive, unwarranted and uncompromising". In the final prayers of the plaint the Plaintiff by his said amendment sought for compensation for the full market value of the property, as an additional prayer.
6. Plaintiff on 15<sup>th</sup> August 2010 filed Re-Amended plaint. In that re-amended plaint Plaintiff pleaded:

**“The Plaintiff further states that the charged Document dated 11<sup>th</sup> June 1998 is null and void ab inito and the money purportedly secured therein is irrecoverable.”**

That charge to which the above paragraph referred to was the charge between the Plaintiff and the 1<sup>st</sup> Defendant. In the final prayer’s of the re-amended plaint the Plaintiff sought declaration that the charge instrument referred to above was null and void and the money which was secured by it was irrecoverable

7. This case was partly heard by Justice Mohamed Ibrahim (as he then was, now a Supreme Court Judge). The Plaintiff testified on 7<sup>th</sup> September 2009. Plaintiff witness number two was a valuer who testified on 25<sup>th</sup> November 2009. On that date the Plaintiff closed his case. It is clear from the above that the Plaintiff testified and closed his case before amending his pleadings as set out in previous paragraphs above. The Plaintiff did not seek at that early stage to re-open his case.
8. The 2<sup>nd</sup> defendant testified on 25<sup>th</sup> November 2009 and the first witness for 1<sup>st</sup> Defendant testified on 24<sup>th</sup> February 2010.
9. The case thereafter was adjourned severally until 25<sup>th</sup> November 2014 when I received the evidence of the second witness of the 1<sup>st</sup> Defendant.
10. That second witness of the 1<sup>st</sup> Defendant was the advocate, Sally Mahihu, who prepared the charge instrument between the Plaintiff and the 1<sup>st</sup> Defendant. That witness produced the original copy of the registered charge instrument. At the conclusion of her evidence defence closed its case.
11. The Plaintiff by his Notice of Motion application dated 3<sup>rd</sup> December 2014 seeks to re-open his case with a view to recall the Plaintiff and to call the Land Registrar, Coastal Registry to testify in this case. In the Plaintiff’s supporting affidavit to that application the Plaintiff gave the reason why he seeks to re-open his case as.

**“THAT on 25<sup>th</sup> November 2014 I was in Court and heard the testimony of the 3<sup>rd</sup> Defence witness one sally Mahihu Advocate.**

**THAT from what the said witness said it is imperative that my Case which already closed be reopened so that I can recant what the said 3<sup>rd</sup> witness stated in her testimony.**

**THAT I also wish to ask this Honourble Court to issue Witness Summons to the Land Registry in charge of the defunct Coastal Land Registry Mombasa to appear in Court and to produce in Court the Respective file on the Suit Property.**

**THAT my request to reopen my Case and the testimonies to follow therefrom will greatly assist this Honourable Court to adjudicate and conclusively decide on all issues in contention in this Matter.”**

12. The application was opposed by the Defendants. The Defendant argued that the Plaintiff had waited too long before making the application. According to the defendants the Plaintiff found himself in the present predicament due to what Defendants termed as Plaintiff’s advocates mistake. To support that argument Defendants relied on the case **OMWOYO Vs. AFRICAN HIGHLANDS & PRODUCE CO. LTD [2002] 1KLR.**

### **ANALYSIS**

13. The Plaintiff as stated before testified in chief and was cross examined. In so doing he did not produce any document in evidence. Indeed the only document produced on behalf of the Plaintiff is the valuation report of the property.

14. As stated before the Plaintiff amended its pleadings and the one of the additional pleadings in those amendments referred to the charge instrument where it was pleaded it was null and void. No particulars were given in the pleading on that alleged illegality of the charge. Further the Plaintiff did not at all testify on the alleged illegality of the charge.

15. That notwithstanding the Plaintiff by his applications seeks to re-open his case, and as submitted by his Learned counsel the purpose of re-opening is to demonstrate that the charge instrument submitted in evidence by Sally Mahihua Advocate on behalf of the 1<sup>st</sup> Defendant is dissimilar to the one he filed as part of his proposed document in this case. He however did not submit that filed charge in evidence.

16. The Plaintiff when he testified in chief had an opportunity to submit evidence in support of his pleading that the charge instrument was null and void. He did not take up that opportunity when he testified. Nor did he produce in evidence the charge instrument, which he alleged was null and void.

17. Uganda 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 –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256** where it was held:

**“If an application is made to reopen 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 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 reopen should be exercised.”**

18. The Ugandan Court in the case **SIMBA TELECOM (supra)** held thus:

**“I agree with the holding in the case of Smith Versus 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.”**

19. The Plaintiff in seeking to reopen his case, other than saying that he wished to testify further and wished to call the Land Registrar did not explain why he did not sufficiently testify when he initially gave evidence and why the Land Registrar is to be called to testify after the Defendants had closed their case.

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.

21. In this case Plaintiff’s counsel stated that the Plaintiff if allowed to re-testify would show that the charge document, which he did not produce in evidence, was diametrically different to the one produced by 1<sup>st</sup> Defendant’s witness, in evidence. In my view if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence.

That would be prejudicial to the defendants. But more importantly the Plaintiff did not submit in evidence a charge instrument to be compare to the one produced by 1<sup>st</sup> Defendant.

22. The Plaintiff also slept on his rights to apply to re-open his case. He should have made that application in August, 2010, when he obtained leave to re-amend his plaint. Having slept on his rights, the unexplained delay defeats his prayer.

23. In the end the Plaintiffs application dated 3<sup>rd</sup> December 2014 is dismissed with costs to the Defendants.

24. At the reading of this Ruling parties will be given a date for purpose of submitting either in writing or orally before judgment is delivered.

25. It is so ordered.

**DATED and DELIVERED at MOMBASA this 25<sup>TH</sup> day of JUNE, 2015.**

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**C/A Kavuku**

**For the Plaintiff:**

**For the Defendants:**

**Court**

**Ruling delivered in their presence/absence in open court.**

**MARY KASANGO**

**JUDGE**