REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 539 OF 2008

DANIEL KAIRU KIARAHO……..……..……1ST PLAINTIFF

SAMUEL MIRIEGACHATHI……2ND PLAINTIFF

Versus

MOYEZBHANJI……...1ST DEFENDANT

GREENWOODS LTD……2ND DEFENDANT

RULING

Re-opening of proceedings

[1] The Defendants have applied through application dated 14th April 2015 for;

1. **Leave of the Court for the Defendants to re-open these proceedings in order for the Defendants to produce CR-12 dated 18th December 2014.**
2. **Corresponding leave to the Plaintiff's to put in their response.**
3. **Any such other or further orders as the Court may deem fit to grant; and**
4. **Costs of this application to be in the cause.**

[2] The application is expressed to be brought under Sections 1A, 1B,3A and 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Article 159(2)(d) of the Constitution and all other enabling provisions of the law. It is premised upon the grounds set out in the application as well as thee supporting affidavitsworn on 14th May 2015. The best argument by the Applicant is:

> a) That the Applicants seek to produce in evidence a CR-12 copy dated 18th December 2014. The said document shows the correct position and shareholding of the Defendants. The Applicant contended that they made an application to the Registrar of Companies on 29th October 2014 requesting for a CR-12 but a copy was received only on 18th December 2014 after the close of pleadings on 5th November 2014. The Applicants attributed their failure to produce the said document to the delay by the office of the Registrar of Companies in furnishing the document to them. According to the Applicants, the CR-12 filed by the Plaintiff's dated 28th May 2014 did not represent the correct position of the Defendants'

shareholding. They therefore beseeched the Court to allow them to re-open the case and be allowed to tender the said document in evidence.

[3] The Applicant insisted that it would be in the interest of justice that the said CR-12 document is allowed in evidence in order for the Court to arrive at a just and fair decision. Further, it was deposed to that the CR-12 document dated 28th May 2014 did not reflect the correct position of the Defendants' shareholding, and that the appropriate remedy would be for the Court to allow for the re-opening of the pleadings in order to tender the CR-12 dated 18th December 2014 in evidence. The submissions dated 21st May 2015, urged that the Court had the power within its inherent jurisdiction, and in consideration of the overriding objective of ensuring to re-open the case and allow further evidence to be tendered in order to meet the ends of justice. They appealed to the court to move away from the vicissitudes of procedural technicalities and determine the substantive issues in a matter. They relied upon the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**.

The Plaintiffs opposed application

[4] The Plaintiffs in opposing the application filed their Replying affidavit sworn on 27th April 2015. They averred that the Defendants had all along been aware of the CR-12 dated 28th May 2014 that had been presented and relied upon by the Plaintiffs since its filing sometime in June 2014. Further, they asserted that the Defendants were not incapacitated in any manner from challenging the said document, but they chose not to object to its inclusion in the list of documents by the Plaintiffs. they should not, therefore, be allowed to later come to court after the close of pleadings and seek to impeach the CR-12 dated 28th May 2014 through another CR-12. It was contended that, by their conduct, the Defendants waived the opportunity to challenge the said document. To them, the instant application is a waste of valuable judicial time and offends the spirit of Order 11 of the Civil Procedure Rules.

[5] In their submissions dated 19th May 2014, the Plaintiffs cited the cases of **Hasan HashiShirwa v Swalahudin Mohamed Ahmed [2011] eKLR** and **Mzee Waujie& 93 Others v A K Saikwa& 3 Others (1982-88) 1 KAR**to support the position they have taken on the Defendants' request to re-open the case. This is a last minute rush which falls short of the threshold; they have not shown that the document they now seek to bring before the Court could not have by reasonable diligence be adduced before the Court, or that it is of such probative value that it would influence the outcome of the case or that it is credible document. They termed the application as one brought in bad faith and should be disallowed.

DETERMINATION

[6] This application is seeking to re-open the case and allow the Plaintiff to tender further evidence in the form of CR-12 Form on shareholding and directorship of the company herein as at 18th December 2014. From the outset, let me state that the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others** (supra) relied upon by the Defendants is inapplicable to the circumstances of this case. The appropriate test is as was set out in the case of **Mzee Waujie & 93 Others v A K Saikwa& 3 Others** (supra) where it was held that in order for the Court to consider admitting new evidence, it has to be shown that the evidence which the parties seek to be admitted was not or could not have been obtained by reasonable diligence at the time of the trial, or it has an influence on the outcome of the case, or that it must be presumed to be credible. See the decision by Hancox, JA (as he then was) in the above cited case on the issue of admitting new evidence under Rule 29(1) of the Court of Appeal Rules which offers insightful dents inter alia;

> **"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 RSCOrd 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."**

I consider that the same test should be applied under our rules, for otherwise it would open the door to litigants to leave until an appeal all sorts of material which should properly have been considered by the Court of trial."

[7] Similarly in **Hassan HashiShirwa v Swalahudin Mohamed Ahmed** (supra), it was held that;

> **"Re-opening a case is not an impossibility, but there must be cogent reasons for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case."**

[8] In order for the Court to consider re-opening a case that has been heard, the test as enunciated by Hancox, JA in **Mzee Waujie& 93 Others v A K Saikwa& 3 Others** (supra) must be satisfied. The Applicant must adduce cogent reasons as to why the pleadings should be re-opened to admit new evidenceby 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.

[9] I will apply the above test. I have considered the application, arguments by the parties and the applicable law. I take the following view of the matter. In this case, the CR-12 form dated 28th May 2014 was filed in court by the Plaintiffs filed on 12th June 2014through a Supplementary List of Documents. This was pursuant to leave granted by the court on 15th May 2014 upon request by Mr. Ojiambo for the plaintiff. Mr. Kithialso informed the court that he is prepared to have the CR-12 to be filed by the Plaintiff admitted in evidence by consent. The CR-12 Form dated 28th May 2014 is in respect of shareholding and directorship of the company as revealed in the annual returns by the company dated 18th June 2008, while the one dated 18th December 2014 is in relation to shareholding and directorship of the company as revealed in the annual returns dated 30th October 2013. The latter CR-12 Form does not relate to the relevant period of the agreement in question which is 16th April 2008. The CR-12 Form dated 18th December 2014 does not even show the shareholding and directorship of the company as at 28th May 2014 or before. Therefore, the CR-12 Form dated 18th December, 2014 is completely irrelevant as it deals with a period after the agreement in issue herein. Relevance of evidence is critical when questions of admissibility arise. See the Evidence Act that evidence will be refused admission if it is irrelevant. It is not, therefore, possible to say that the new evidence is of such weight that it is likely in the end to affect the court's decision. In any event, it was not shown that the new evidence could not have been obtained with reasonable diligence for use at the trial. The Applicants were aware of CR-12 Form dated 28th May 2014 and had been admitted in evidence. They did not even seek to call or enlist the help of the court in summoning the Registrar of Companies as a witness on the shareholding and directorship of the company herein at the time material to the suit. I find, therefore, that the reasons adduced by the Defendants are not, in the circumstances, cogent to warrant the exercise of the Court's inherent jurisdiction to re-open the case. They had ample opportunity to apply for a CR-12 from the Registrar of Companies, but they waited until the matter was at its tail end to apply for it. It cannot be said that they exercised reasonable diligence in obtaining the document, but failed or that the document is of such character as to influence the

outcome of the suit.For those reasons, I reject the request to re-open the case for purposes of allowing the tendering in evidence of the CR-12 Form dated 18th December, 2014. Even a magnanimous leaning on Article 159(2) (d) will not help this application. Accordingly, the application dated 14th April 2015 is hereby dismissed with costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 19th day of June 2015.

F. GIKONYO

JUDGE