



**Chebii v Chesire (Environment and Land Appeal 81 of 2013)
[2022] KEELC 81 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 81 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 81 OF 2013**

EO OBAGA, J

MAY 19, 2022

BETWEEN

PHILIP C. CHEBII PLAINTIFF

AND

JOSEPH K. CHESIRE DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 17th November, 2021 in which the Defendant/Applicant seeks to have the defence case re-opened and the Land Registrar Uasin Gishu called to testify in this case. The Applicant contends that his case was closed by this court on 18th October, 2021 because the Land Registrar was not available. The Applicant contends that the evidence of the Land Registrar is crucial and will help this court in determining the dispute herein.
2. The Applicant contends that it was not his own making that the Land Registrar did not attend court. He states that reopening of the case will not prejudice the Plaintiff as the Plaintiff has all along known the nature of the evidence which the Land Registrar was going to give. He states that there were documents which were marked which ought to be produced and that he is not seeking to adduce any new evidence.
3. The Applicant's application was opposed by the Plaintiff/Respondent through a replying affidavit sworn on 19th November, 2021. The Respondent contends that the Applicant had been given a number of adjournments to enable him avail witness but he failed to do so. He was given at least two last adjournments and on 18th October, 2021 when he sought an adjournment, the court declined to do so and closed his case. The Respondent therefore argues that this court is *functus officio* and that in any case, what is being raised herein is not new as that was what was raised on 18th October 2021 and the same was rejected.



4. The Respondent contends that he has already filed submissions and that he is desirous of having this old case determined.
5. The parties were directed to file written submissions. The Applicant filed his submissions dated, 7th December, 2021. The Respondent filed his submission dated 14th December, 2021. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. The only issue for determination is whether the Defendant should be allowed to re-open his case for purposes of availing the Land Registrar to testify.
6. It is important to note that it is the court which ordered the defence case deemed as closed. This is after the court had rejected an application for adjournment. The Court therefore retains the discretion to either allow or reject the re-opening of the defence case. The discretion has to be exercised judiciously. The Respondent has submitted that this court is *functus officio* and relied on the case of [Telkom Kenya Limited -vs- John Ochando \(suing on his own behalf and on behalf of 996 former employees of Telkon Kenya Limited\)](#) (2014) eKLR
7. The Respondent also relied on the case of [Geeta Joshi -vs- Pandya Memorial Hospital](#) (2018) eKLR. The closure of the defence case was informed by the failure of the Land Registrar who was said to have been served by summons but decided to go for other official duties. The failure of the Land Registrar to be in court was not the Applicant's own making.
8. I have gone through the evidence which was adduced by the Applicant. There are documents which were marked for identification. These documents could only be produced by the Land Registrar. If the Court were to reject the application for reopening the defence case, this will greatly prejudice the Applicant's case.
9. The Applicant has relied on the decision of Justice Chemitei in the case of [Charles Anthony Ondiek & 3 others -vs- Thomas Adhiambo Nyonje & 6 others](#) Kitale HCCC No 63 of 2007 where the Judge stated as follows:-

“The documents in my view which were marked would help this court arrive at a fair conclusion of this matter. I do not think that the Defendants would suffer any prejudice or at all. They shall be at liberty to cross examine the Land Registrar. The application in my view has been made expeditiously and without any undue delay. I agree however that this matter has taken a long time the both parties have in one way or the other contributed to the delay.

The provisions of Article 159 of [the Constitution](#) I believe apply herein. The court is mandated to look substantive justice. The issues herein revolve around land and the Land Registrar being custodian of the records ought to shed more light.
10. The circumstances in the Charles Anthony Ondiek case (*Supra*) are on all fours with the present case. This court is therefore not *functus officio* in as far as it retains discretion to re-open a case where the Applicant has demonstrated that there is need to do so and that the re-opening of the case will not prejudice the Respondent.
11. The Applicant also relied on the case of [Joseph Ndungu](#) (2017) eKLR where Justice Ohungo quoted with approval the case of [Samuel Kiti Lewa -vs- Housing Finance Company of Kenya Ltd & another](#)



(2015) eKLR where Justice Kasango quoted a Ugandan case in *Simba Telecom -vs- Karubanga & another* (2014) UGHC 98 where it was held as follows:-

“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”.

12. Following the principles set out in the Simba Telecom case (*Supra*), I find that the re-opening will not prejudice the Respondent; it is not intended to fill gaps in evidence and that the application was expeditiously filed. I therefore allow the Applicant’s application with the result that the defence case which was ordered closed on 18th October, 2021 is hereby re-opened. The land Registrar is allowed to come and give evidence. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF MAY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Gemenet for Applicant.

Court Assistant –Albert

