



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 56 OF 2009

HASSAN HASHI SHIRWA.....PLAINTIFF

VERSUS

SWALAHUDIN MOHAMED AHMEDDEFENDANT

RULING

This matter had proceeded with the hearing of the plaintiff's case, where three witnesses testified for the plaintiff. The plaintiff closed its case and the matter then proceeded to hearing of the defence case and only one witness testified.

Immediately at the close of the defence case, the plaintiff's counsel applied to reopen plaintiff's case so as to call a witness by the name Mr. Gethi. Mr. Kiarie Kariuki, Counsel for the plaintiff explained, that he had all along thought the defence would call him, and he believed he was a crucial witness who would help clear the air.

This was opposed by Mr. Mutubia on behalf of the defence, saying if the plaintiff had wanted him as a witness, they had the opportunity to call him, before close of the plaintiff's case since the defence had never indicated their desire to call him and reopening the plaintiff's case at this point will be prejudicial to the defence.

Mr. Kiarie sought to rely on two decisions i.e **Michael Mutua Kiema v Hagginson Malindi Mwangemi HCCc no. 89 (Msa)** where the trial court allowed the plaintiff's counsel to re-open the case after both sides had closed their case and even made submissions, and what was pending was judgment. The basis for seeking to re-open the case was because the plaintiff's counsel realized he had not cross-examined the defence witness on a document which the defence had submitted.

The court relied on the **A.I.R. commentaries on the Code of Civil Procedure 8th Edition pg 359** that:

“A court has a duty to find out the truth, the fact that it is shrouded in mystery and the parties have allowed it to remain so, should not prevent the court from playing its part in guiding the parties to take such steps as may be necessary, to unearth the mystery and to ascertain the truth.”

On the strength of unearthing the truth, the court allowed reopening of the proceedings.

The other decision he cited was **Re Epicure Ltd (1960) EA pg 306** where it was held that a judge can re-hear an application even when an order has been made either by himself or any other judge, if the order has not been drawn up and signed by the Registrar.

In response to this, Mr. Mutubia submitted that **Re-Epicure case** was a decision under the Companies Act and relied on English Rules of the Supreme Court which counsel has not demonstrated as being related to our present Civil Procedure and that in any case, it related to a matter which had proceeded by way of affidavit and not *viva voce* evidence and that decision is not binding on this court.

Further that the decision was made after a formal application had been made to the court explaining why the case needed to be re-opened unlike the present situation.

I think, with all due respect to Mr. Mutubia, he has missed the boat, what I understand from the two decisions cited, is not the content of the arguments, but the principle – which is that a case can be re-opened for hearing even after parties have closed their arguments and made submissions. 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.

The only reason given by Mr. Kiarie as to why the plaintiff's case should be re-opened is that Mr. Gethi is a crucial witness who will clear the air. I wonder at what point that realization dawned on him. Surely defence had not indicated at any time their desire to call Mr. Gethi as a witness. The impression I get from Mr. Kariuki's application is that he now wishes to patch up the plaintiff's case and pull the rug from right under the defendant's feet.

I am keenly alive to the need of truth being unearthed and the duty of the court to find out the truth, yet in a rejoinder to AIR's commentaries I would say this:

“A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring that there is no rough tackle and offside play. Litigants are not in a game of chess where for every one move made, there must be a counter move and re-introduction of the checkmate. If the court allowed that, litigation would never end.”

My view is that in the present situation, allowing the application will not only be prejudicial to the defendant, but it amounts to an abuse of the court process and I decline to grant the prayer sought.

Costs of application borne by applicant.

Delivered and dated this 28th day of **March 2011** at Malindi.

H. A. Omondi
JUDGE