



**Wambui v Frann Investment Limited (Environment and Land Case Civil Suit 207 of 2017) [2022] KEELC 15452 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15452 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 207 OF 2017**

**LL NAIKUNI, J  
DECEMBER 9, 2022**

**BETWEEN**

**JAMES MWANGI WAMBUI ..... PLAINTIFF**

**AND**

**FRANN INVESTMENT LIMITED ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The plaintiff/applicant filed a notice of motion application dated September 28, 2022 for its determination. It was brought under the provision of Order 51, rule 1 of the [Civil Procedure Rules](#), 2010, Sections 1, 1A and 3A of the [Civil Procedure Act](#), Cap. 21.

**II. The Plaintiff/Applicant's case**

2. The plaintiff/ applicant sought the following orders reproduced verbatim herein: -
  - a. That the honorable court be pleased to re - open the plaintiff/ applicant's case.
  - b. That the honorable court be pleased to allow the plaintiff//applicant to call upon one expert witness to testify in the manner and produce her report on the same.
  - c. That costs of the application be in the cause.
3. The application is based on the grounds, testimonial facts and the averments of the six (6) Paragraphed supporting affidavit of JAMES MWANGI WAMBUI - the plaintiff/ applicant herein sworn of the even date together with one (1) annexures Marked as "JWW – 1". He deponed on December 2, 2021, he testified in the suit and his advocates closed the case as they awaited for the defendants to begin their case. However, just before that happened, he now wished to re - open his case so to enable the plaintiff/



applicant to call upon an expert witness in order for the said expert produce a crucial report that would aid his case. He attached a copy of the report he intends to be produced Marked as “JWW – 1”. He averred that since the defendant/respondent had not as yet begun presenting his case that was slated for October 30, 2022 he would not be prejudiced in any way. He deposed that the application to re - open the plaintiff/ applicant case was the first made in court. He urged court to allow the application together with the prayers sought thereof.

### III. The opposition by the Defendant/Respondent

4. On May 25, 2022, during the proceeding of the suit, and upon the plaintiff/applicant making the application, the counsel for the defendant/respondent, Mr Gachie Advocate orally raised an objection to the said application. The counsel argued that the court should take cognizance to the fact that the matter was part heard and the same having been fixed for hearing on 15<sup>th</sup> March, 2022. He argued that, from that time to date the applicant ought to have applied indicating their intention to have this witness re – called or re -open its case. But to have waited until the hearing date, the plaintiff was not serious. Instead, he opined the plaintiff/applicant just wanted to waste the court’s time. He stressed that an application ought to have been filed immediately after close of plaintiff’s case.
5. Neither party filed submissions on the matter case who was not opposed by the defendant and no submissions were filed by the plaintiff / applicant.

### IV. Analysis and Determination

6. Having keenly read the application by the plaintiff/applicant, the pleadings filed thereof, the relevant provision of the Constitution of Kenya, 2010 and stature the honorable court wishes to make a determination around the following two (2) issues:-
  - a. Whether the notice of motion application dated September 28, 2022 by the plaintiff/ applicant herein and the prayers sought has any merit whatsoever.
  - b. Who bears cost of application

#### **ISSUE No. a). Whether the Notice of Motion application dated September 28, 2022 by the Plaintiff/ Applicant herein and the prayers sought has any merit whatsoever.**

7. The issue of re – opening cases which have already been heard and closed by a party and re – calling of witnesses thereof after they have testified is at the discretion of the court so long as the said right is exercised judicially and with prudent not to embarrass the other party whatsoever. The courts have deliberated in these issues extensively. The provision of Order 18 rule 10 of the Civil Procedure Rules, 2010 and section 146 (4) of the Evidence Act, Cap 80 of the Laws of Kenya makes these express provisions. Further to this, the honorable court wishes cite the case of:- “Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & Another [2015] eKLR, where the Honorable Lady Justice Mary Kasango stated thus: -

“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.”



8. She opined further that: -

“.....In my view if the plaintiff was allowed to re - open his case to so prove it (that a document produced by the defendant was different to the one he had) would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

9. Additionally, on the same issue, court refers to the Uganda High Court, Commercial Division in the case of: "*Simba Telecom v Karubanga & Anor* (2014) UGHC 98 had the occasion to consider an application to re - open the case for purpose of submitting fresh evidence. From this case, the court referred to an Australian case of:- "*Smith v New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to re - open 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.”

10. The court said thus in conclusion; -

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

11. This court has taken cognizance to the effect that the matter herein is a three (3) old case filed by the plaintiff/applicant in the year 2019. From a quick reference to the filed record, its indicative that the case has been occasioned to numerous adjournments at the behest of the plaintiff/applicant.

12. As it is provided for under the provision of section 3 of the *Environment & Land Court Act*, No 19 of 2011 and Article 159 (2) of the *Constitution* of Kenya, 2010 the new transformation and judicial progression all matters ought to be heard and determined expeditiously and without any further delay. This principles is informed by the legal Maxim “Justice delayed is Justice denied”. However, and luckily so, the plaintiff/applicant had make some strides and finally caused the case to be heard and finalized. For this the court recommends him profusely. The only recourse before the court is that upon the closure of its case, and in the interest of justice, the plaintiff/applicant has realized there would be great need to not only re – open its case but also re – call an expert witness to produce a certain crucial document already attached herein and marked as “JWW – 1” which would assist this court in arriving at a reasonable and fair decision in the long run.

13. Upon intensive consideration, this court finds this request plausible and satisfied to grant it for the following reasons. Firstly, based on the principles of natural justice, equity and conscience and the right to hear all before making the final determination. After all, the witness being re – called is only appearing to produce a document which is already in the knowledge of both the defendant/respondent and court and hence the issue of there being any ambush does not arise at all. The provisions of Order



18 rule 10 and section 146 (4) of the Evidence Act, Cap 80 provides for this allowance. Secondly, as the proceedings stand now, the defence has yet to present its case, and would suffer no prejudice if the plaintiff's case is re – opened its case and recall only this one witness to produce the said document. its case and recall the said witness.

#### **ISSUE No. b). Who will bear the costs of application?**

14. The issue of costs is discretionary. Costs is the award that is granted to a party at the conclusion of any process, proceedings and legal action in any litigation. The provision of section 27 (1) provides that costs follow the event. By event herein it means the outcome of any process, proceedings and legal action.
15. In the instant case, although the plaintiff/applicant has been successful in the prosecution of its application, the costs will be in the cause since the main suit is yet to be heard and determined.

#### **VI. Conclusion & Disposition**

16. Consequently, based on the analysis to the two (2) framed issues herein and on preponderance of probability, the honorable court finds that the plaintiff/applicant has made out a good case. Specifically, I now proceed to provide the following orders:-
  - a. That the notice of motion application dated September 28, 2022 by the plaintiff/applicant has merit and hence allowed.
  - b. That for expediency sake, this part heard matter should be heard and finalized within the next One Hundred and Eighty (180) days from this date of the delivery of this ruling on May 23, 2023 physically without fail.
  - c. That costs of the application to be in the cause.
17. IT IS SO ORDERED ACCORDINGLY

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022**

**HON. MR JUSTICE L.L NAIKUNI (JUDGE),**

**ENVIRONMENT & LAND COURT AT,**

**MOMBASA**

#### **In the presence of:-**

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Omondi Advocate holding brief for Mr. Gachie Mwaza Advocate for the Plaintiff/Applicant.
- c. M/s Ngugi Advocate holding brief for Mr. Njoroge for the Defendant/Respondent.

