



Continental Credit Finance Limited (in Liquidation) v Wanjohi & 2 others (Environment and Land Case Civil Suit 339 of 2011) [2022] KEELC 15177 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 339 OF 2011**

SO OKONG'O, J

DECEMBER 7, 2022

(FORMERLY H.C.C.C. NO. 209 OF 2005)

BETWEEN

CONTINENTAL CREDIT FINANCE LIMITED (IN LIQUIDATION) PLAINTIFF

AND

ISAAC GATHUNGU WANJOHI 1ST DEFENDANT

IGAINYA LIMITED 2ND DEFENDANT

PRINCIPAL REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1 What is before the court is the Plaintiff's Notice of Motion Application dated 2nd July 2021 brought under section 1A,1B, 3 and 3A of the [Civil Procedure Act](#), Section 38, 40,59, 60 (1) (O), 85, 86 of the [Evidence Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#) in which the Plaintiff is seeking the following orders:

1. That the court be pleased to grant leave for the Plaintiff/Applicant to re-open the Plaintiff/Applicant's case.
2. That court be pleased to admit on record the Plaintiff/Applicant's Supplementary List of Documents dated 21st June 2021 annexed to the application.
3. That court be pleased to grant an order dispensing with the need for a witness statement and/or oral evidence in relation to the document in the said Supplementary List of Documents dated 21st June 2021.
4. That costs of the Application be provided for.



2. The application is brought on the grounds set out on the face thereof and on the affidavit of the Senior Assistant Official Receiver, Ms. Diana Mumo sworn on 2nd July 2021. The Plaintiff/Applicant has averred that having called witnesses and presented its evidence in support of its claim, it closed its case on 5th December 2019. The Plaintiff/Applicant (hereinafter referred to only as “the Plaintiff”) has averred that the Official Receiver came on record on behalf of the Plaintiff through a Notice of Change of Advocates dated 7th December 2020. The Plaintiff has averred that prior to the Official Receiver taking over the conduct of the matter, the Plaintiff was being represented by the firm of M/s D. Njogu & Co. Advocates. The Plaintiff has averred that it has come across new evidence that is crucial to its case. The Plaintiff has averred that the new evidence is a Gazette Notice by the Registrar of Companies published in the Kenya Gazette of 16th January 1998. The Plaintiff has averred that the said Gazette Notice which is a public document is relevant in that it relates to the transaction through which the 1st and 2nd Defendants/Respondents are alleged to have come into possession of the suit property. The Plaintiff has averred that the omission to include the said Gazette Notice in the Plaintiff’s initial list of documents was inadvertent and that the document is not intended in any way to prejudice the Defendants/Respondents’ case. The Plaintiff has averred that the new evidence will assist the court to conclusively determine the matter. The Plaintiff has contended that the Defendants will not suffer any prejudice if the application is allowed. The Plaintiff has urged the court to allow the application in the interest of justice.
3. The application is opposed by the 1st and 2nd Defendants/Respondents through a replying affidavit sworn by their advocate Ms. Wambui Njogu on 22nd July 2021. The 1st and 2nd Defendants/Respondents (hereinafter referred to only as “the Defendants”) have contended that the application lacks merit, has no legal basis, is an abuse of the process of the court and should be dismissed with costs. The Defendants have averred that neither the application nor the supporting affidavit discloses a legal basis on which the court can exercise its discretion to reopen the Plaintiff’s case. The Defendants have contended that the Plaintiff was represented by an advocate from the inception of the suit and was so represented at the time it closed its case.
4. The Defendants have contended that there is nothing new in the Gazette Notice that the Plaintiff wishes to produce since the Gazette Notice was issued 23 years ago and should have been produced by the Plaintiff before it closed its case. The Defendants have contended that the Plaintiff is a department under the Office of the Attorney General which is the author and custodian of the said Gazette Notice. The Defendants have averred that the said Gazette notice that has been in existence for over 23 years does not qualify to be referred to as new evidence.
5. The application was argued by way of written submissions. In its submissions dated 4th May 2022, the Plaintiff has submitted that during the preparation for the hearing of the Defence case in this matter, the Official Receiver noted a critical omission in the Plaintiff’s case that may have been inadvertently overlooked by the previous advocate for the Plaintiff. The Plaintiff has submitted that the said omission is failure on the part of the Plaintiff to produce Gazette Notice No. 150 dated 16th January 1998 in evidence.
6. The Plaintiff has submitted that the said Gazette Notice was for general information that the companies listed therein had been incorporated in Kenya during the period of 1st February to 28th February 1997 and among the companies listed therein is Jamu Impex Enterprises Limited. The Plaintiff has submitted that the said Gazette Notice is relevant to the Plaintiff’s case. The Plaintiff has submitted that the 1st and 2nd Defendants have contended in paragraph 4 of their Defence that after Alfa Investments Limited failed to settle the debt that was owed to the Plaintiff, the Plaintiff in exercise of its statutory power of sale sold the suit property, L.R. No. 209/8161 by way of public auction through



Triple-One Auctioneers Limited on 19th September 1990 to Jamu Impex Enterprises Limited for a sum of Kshs. 4,000,000/=.

7. The Plaintiff has submitted that according to the Gazette Notice sought to be produced, Jamu Impex Enterprises Limited did not exist as at the date of the alleged auction and as such did not have capacity to enter into a contract of sale at the alleged auction. In support of this submission, the Plaintiff cited *Mobamed Abdi Mahamud v. Ahmed Abdullahi Mobamed & 3 Others* [2018] eKLR. The Plaintiff submitted that the Official Receiver took over the conduct of the suit on 7th December 2020 when it realized that crucial evidence had not been submitted to court by the Plaintiff's former advocates which evidence shows non-existence of the company that allegedly purchased the suit property at a public auction.
8. On the issue of whether this court should dispense with the need for the Plaintiff to call a witness to produce the said Gazette Notice, the Plaintiff has submitted that being a public document, the Gazette Notice speaks for itself.
9. The Plaintiff has submitted further that the Defendants would not be prejudiced in any way if the application is allowed since the Defence hearing is yet to begin. The Plaintiff has submitted that the Defendants will have a chance to respond to the new evidence sought to be tendered by the Plaintiff. In support of this submission, the Plaintiff has cited *Susan Wavinya Mutavi v. Isaac Njoroge & Another* [2020] eKLR.
10. In their submissions in reply dated 25th March 2022, the 1st and 2nd Defendants (the Defendants) have argued that a decision whether to allow a party to reopen its case and adduce additional evidence is at the discretion of the court. In support of this submission, the Defendants have relied on *Hannah Wairimu Ngethe v. Francis Ng'ang'a & Another* [2016] eKLR. The Defendants have submitted that the Plaintiff has not shown that after exercising due diligence, the so called new evidence was not within its knowledge for over 23 years. The Defendants have submitted that the Gazette Notice in question was always available and in the Plaintiff's custody and ought to have been produced in evidence before the close of the Plaintiff's case. The Defendants have relied on *David Kipkosgei Kimeli v. Titus Barmasai* [2017] eKLR and have submitted that there are no compelling reason to persuade this court to exercise its discretion to reopen the Plaintiff's case as the Plaintiff has failed to provide reasons or a justifiable basis for the court to exercise its discretion.
11. The Defendants have submitted that the Plaintiff was required to meet the criteria upon which the court's discretion to reopen a civil case is exercised. The Defendants have submitted that since the Plaintiff has failed to do so, this court should dismiss the application. The Defendants cited *Susan Wavinya Mutavi v. Isaac Njoroge & Another* (2020) eKLR in support of this submission.

Analysis and determination:

12. The Plaintiff was at all material times represented in this suit by M/s D. Njogu & Co. Advocates until 7th December 2020 when the Official Receiver took over the conduct of the case on behalf of the Plaintiff. The Official Receiver took over the conduct of the Plaintiff's case after the close of the Plaintiff's case but before the start of the Defence case. The same position obtains to date. The defence case is yet to start. The Plaintiff's application has been brought on the ground that since the close of the Plaintiff's case, the Plaintiff has come across new evidence which is crucial to its case. The new evidence is a Gazette Notice No. 150 published in the Kenya Gazette of 16th January 1998. In the Gazette Notice, the Registrar of Companies notified the general public of the companies that were incorporated in Kenya between 1st February 1997 to 28th February 1997. Among the companies that were listed in the said Gazette Notice to have been incorporated during that period was Jamu Impex



Enterprises Limited. The Plaintiff has contended that in their defence, the Defendants have contended that the said Jamu Impex Enterprises Limited purchased the suit property at a public auction that was held on 19th September 1990 at Kshs. 4,000,000/-. The Plaintiff has contended that in view of the information in the said Gazette Notice, Jamu Impex Enterprises Limited was not in existence as at 19th September 1990 and as such could not have purchased the property. The Plaintiff has contended that the Gazette Notice would assist it to rebut the Defendants' claim that Jamu Impex Enterprises Limited purchased the suit property, L.R. No. 209/8161 on 19th September 1990.

13. As I have mentioned earlier, the Defendants have contended that the Plaintiff's application lacks merit, has no legal basis and is an abuse of the process of the court. It is also the Defendants' case that the Plaintiff has not given any justifiable cause or basis on which the court can exercise its discretion to reopen this case.
14. I have considered the Plaintiff's application together with the supporting affidavit. I have also considered the Defendants' replying affidavit. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. In *Samuel Kiti Lewa v. Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, Kasango J. stated:

- “17. Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karubanga & 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.”

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.”

15. Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is common ground that the court has the discretion to reopen a case that has been closed. What is disputed is whether the Plaintiff has established valid grounds that warrants the exercise of that discretion. As stated in the cited case, the court’s discretionary powers must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

16. From the affidavit evidence placed before the court and submissions by the parties, I am satisfied that the Plaintiff has made out a case for reopening of its case. The Plaintiff has explained why it did not produce the evidence in respect of which leave has been sought in the present application before it closed its case. The Plaintiff has explained that its case was conducted and closed by the firm of M/s D. Njogu & Co. Advocates. The Plaintiff has explained that the Official Receiver took over the conduct of its case from the said firm of advocates after its case had been closed and that it was while the Official Receiver was preparing for the hearing of the Defence case that it was realized that the Gazette Notice in question was not produced by the Plaintiff in evidence. The Plaintiff has demonstrated that the said Gazette Notice is material and relevant to its case. There is also no dispute that the Plaintiff brought the present application at the earliest opportunity upon realizing that the said document was not produced in evidence. The Plaintiff has also demonstrated that the Defendants would not be prejudiced by the reopening of the Plaintiff’s case. The Defence case is yet to commence and the defendant will have an opportunity to interrogate the Gazette Notice in question once it is produced and also to respond to the same while conducting its defence. I am unable to see any prejudice or injustice that will be occasioned to the Defendants if the Plaintiff’s case is re-opened for the purposes of taking further evidence from the Plaintiff. I have noted that the Gazette Notice sought to be produced by the Plaintiff falls under what are referred to as “Public documents”. I am of the view that having found that the document is relevant to the issues before the court and that no prejudice would be occasioned to the Defendants by taking further evidence in relation thereto, it would amount to suppression of evidence if I was to decline the request by the Plaintiff for the reopening of its case. To level the playing field, I will grant corresponding leave to the Defendants to file further or additional list and bundle of documents and/or witness statements if necessary.
17. A part from the order for the reopening of its case, I am not persuaded that the Plaintiff is entitled to the other orders sought. Once its case is reopened, the Plaintiff will have to produce the Gazette Notice in the normal way in which evidence is produced in court. I am not convinced that a party intending to rely on a public document in support of its case is not required to attend court and produce the same. That said, since the additional evidence would be restricted to the Gazette Notice whose contents is self-explanatory additional witness statement may not be necessary.



Conclusion:

18. In conclusion, I hereby make the following orders;

1. The Plaintiff is hereby granted leave to re-open its case and to adduce further evidence in relation to the documents in its supplementary list and bundle of documents dated 21st June 2021.
2. The Plaintiff's supplementary list and bundle of documents dated 21st June 2021 are admitted as part of the Plaintiff's documents filed in this matter.
3. The Defendants are granted leave to file additional list and bundle of documents and/or witness statements if necessary.
4. The costs of this application to be borne by the Plaintiff/Applicant.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF DECEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Githumo h/b for Ms. Mumo for the Plaintiff

N/A for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Ms. J. Omondi -Court Assistant

