



REPUBLIC OF KENYA



**Shelly Engineering Works v Maruru (Environment & Land Case
335 of 2015) [2022] KEELC 15182 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15182 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 335 OF 2015
NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

SHELLY ENGINEERING WORKS PLAINTIFF

AND

ABDALLA HAMISI MARURU DEFENDANT

RULING

1. The application is dated June 6, 2022 pursuant to section 3,3A,63(e) of *Civil Procedure Act* chapter 21 section 146(4) of the *Evidence Act* chapter 80 laws of Kenya, order 18 rule 10 of *Civil Procedure Rules* 2010 and article 159 of the *Constitution* 2010 seeking the following orders;
 1. That this honourable court be pleased to order the plaintiff case to be re-opened and heard for the purposes of adducing further evidence in regard to the fraudulent registration documents produced by the plaintiff in their list of documents.
 2. That this honourable court be pleased to recall the plaintiff witness being the surveyor and the defendants witness being Abdalla Hamisi Maruru for further examination in chief, further cross examination and reexamination.
 3. That cost of this application be in the cause.
2. It is based that the plaintiff/respondent admitted fraudulent documents to this honourable court to be relied on as evidence in support of their case. That the plaintiff is not a registered company and should not have instituted the said proceedings having no interest in the parcel of land. That the plaintiff has not come to this court with clean hands and ought not to be heard by this honourable court. That there are sufficient facts and grounds to warrant and to reinstate and recall all witnesses for the interest of justice. That this application is made timeously and any delay occasioned is inadvertent and explainable. That it is only in the interest of justice, fairness and equity that this application be allowed as prayed. That there is no prejudice sufferable by the respondent should this application be allowed as prayed.



3. The plaintiff/respondent submitted that the surveyor does not appear as one of the witnesses and that the report was pursuant to a court order and cannot be recalled and reexamined. That the plaintiff's list of documents were filed way back in 2015 and the defendant has been in possession of the same. That counsel for the defendant proceeded to file final submissions to the suit without raising the issue and now wants to have the matter reopened to cross examine a witness on documents that have been in their possession since 2015.
4. This court has considered the application and submissions therein. In the case of *Samuel Kiti Lewa vs Housing Finance Co of Kenya Ltd & another* (2015) eKLR, the court while considering a similar application where the plaintiff sought to have his case reopened so that he could recant the evidence adduced by one of the defence witnesses, the judge in dismissing the application stated 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."

In the case the judge went on to observe 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."

5. In the case of *Hannah Wairimu Ngethe vs Francis Ng'ang'a & another* (2016) eKLR, the court declined to allow a petitioner in a succession cause to reopen the case to adduce further evidence. The court stated that;

This court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case."

6. In the instant case I see no new evidence that has been discovered except for the allegation that the documents are a forgery the defendants/applicants would like to recall and re-examine the witnesses. The defendants/applicants were represented by counsel throughout the trial who cross examined the witnesses. Secondly the documents were in the applicant's possession since 2015. In the premises and for all the above reasons, I find no merit in the defendants' application dated June 6, 2022 and the same is dismissed with costs to the plaintiff. As the defendant has already filed their final submissions in this matter, the court will give a date for delivery of the judgment.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

