



**Steyn v Nsense (Environment & Land Case E002 & E008 of 2022
(Consolidated)) [2025] KEELC 3693 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E002 & E008 OF 2022 (CONSOLIDATED)
LC KOMINGOI, J
MAY 5, 2025**

BETWEEN

HERMAN STEYN PLAINTIFF

AND

FRANCIS NAWE NSENSE DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 14th March 2024 brought under: Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 35, 48 part III and 83 of the [Evidence Act](#), Article 159 of the [Constitution](#), and all other enabling provisions of Law. It seeks orders:
 - i. That the Honourable Court be pleased to set aside the Ex-parte proceedings of 6th March 2024 that led to the close of the Defence case.
 - ii. That the Honourable Court be pleased to re-open the Defence case and the land registrar Kajiado North be allowed to testify and produce documentary evidence.
 - iii. That costs of the Application be provided for.
2. The grounds are on the face of the application. It is supported by the Affidavit sworn by Valerie Kerubo Mong'are, Advocate for the Applicant. Counsel sought reopening of the Defendant's / Applicant's case which was closed by an order of Court on the 6th March 2024 on grounds that she faced technical challenges which caused her non-attendance and this should not be visited on her client. She averred that she communicated her predicament with Counsel for the Respondent as well as the ELC Registry. She indicated that it was crucial for the Land Registrar Kajiado to testify and produce documentary evidence regarding the suit properties, because if the said documents which speak to the ownership of the suit properties are not produced, it would be prejudicial to the Applicant.



3. The Respondent through his son and Donee of General Power of Attorney Martin Richard Steyn contested this application on the grounds that the Defence hearing had on several occasions been adjourned at the behest of the Defendant/Applicant, and on 14th June 2023, the Applicant was given a last adjournment notice. The matter was scheduled for 20th July 2023 but did not proceed due to Court's unavailability. When it came up for hearing on 25th September 2023, the Applicant indicated that they had filed an application seeking reopening of the case so that the Court could issue summons to the District Land Registrar Kajiado to testify. Counsel for the Respondent did not contest the application and the matter proceeded for hearing with the defence calling its witness. The hearing was however adjourned to 6th November 2023 for the Applicant to avail more witnesses. On the 6th November 2023, the hearing did not proceed on the basis of unavailability of the defence witness. Hearing was rescheduled to 19th December 2023 and once again it did not proceed due to unavailability of the Defendant's witness and the Court granted the Applicant a last adjournment.
4. The matter was given a further hearing date of 6th March 2024 and when it was mentioned virtually, counsel for the Applicant was not present. Counsel for the Respondent and Applicant had an exchange of messages where counsel for the Applicant was informed that the matter was allocated hearing time at 10.00am. In her response she indicated that she was on her to Court and so was the Land Registrar. Unfortunately, when the matter was called out for hearing at 10.45am neither was Counsel for the Applicant nor the Registrar present in Court. The Defendant's case was then marked as closed.
5. The Respondent claimed that closing the case was not injurious to the Applicant because it was not in dispute that the Plaintiff and the Defendant were registered owners of the suit properties and the nature of the ownership was not in dispute and while the Land Registrar was the custodian of the lands register, he could not testify to the intention of the parties. Therefore, any evidence that would be adduced by the Registrar was already on record.
6. The Respondent went on to question the said difficulties incurred by Counsel for the Applicant stating that the said difficulties were not communicated using the proper channels and also pointing out that the Applicant had been given several opportunities to produce the said witness and this was not adhered to.
7. The Respondent also claimed that the application was not properly before court and should be struck out. This is because it was drawn and filed by E Valerie Advocates while the notice of change of advocates dated 29th May 2023 indicated the firm of Kilomenn Advocates as the advocates on record for the Applicant/Defendant.
8. He prays that the application be dismissed.
9. This application was canvassed by way of written submissions.

Submissions of the Defendant/Applicant

10. On whether the Applicant had satisfied the threshold for reopening of defence case, counsel submitted that while it is in the discretion of Court, the discretion should be exercised in a manner that does not result to an injustice citing *Shah vs Mbogo* [1979] EA 116 at 123B and *Samuel Kiti Lewa vs Housing Finance Company Kenya Ltd* [2015] eKLR. Counsel submitted that on the day the matter came for hearing, she arrived in Court at 11.15am instead of 10.30am and her lateness although inexcusable should not be visited on the Applicant and the Respondent can be awarded throw away costs. Counsel also submitted that while the documents communicate the intentions of the registered proprietors, the Court would benefit from the Registrar's testimony as an expert witness pointing out that it was new evidence which had not been produced earlier citing *Smith vs New South Wales* [1992] HCA 36;



(1992) 176 CLR 256. It was therefore important to have the Registrar testify to help the Court arrive at a proper determination as was held in *Abdirahman Abdi also known as Adirahman Muhumed Abdi vs Safi Petroleum Products Ltd & 6 others*, *Kirori vs Kirori* [2023] KEELC 16058 (KLR), *Sofie Feis Caroline Lwangu vs Benson Wafula Ndote* [2022] eKLR and *Wavinya Mutavi vs Isaac Njoroge & another* (2020) eKLR.

11. Counsel also submitted on whether there existed a co-tenancy between the parties with reference to *Mukazitoni Josephine vs Attorney General Republic of Kenya* [2015] eKLR and *Kasera & another vs Richard* [2022] KECA 1025 (KLR) submitting that once they came on record, they discovered that the issue of co-tenancy had not been addressed and it was therefore imperative to call the Registrar to testify on the same.
12. On the issue of costs, counsel submitted that since costs follow the event, costs of the Application should be borne by the Respondent.

Submissions of the Plaintiff/Respondent

13. On whether the defence case should be reopened for hearing, counsel submitted that while reopening cases was anchored in law, it should be granted with cogent reasons and the discretion should be exercised judiciously with reference to *Hassan Hashi Shirwa vs Swalahudin Mohamed Ahmed* [2011] KEHC 3158 (KLR), *Odoyo Osodo vs. Rael Obara Ojuok & 4 others* [2017] eKLR, *Susan Wavinya Mutavi vs. Isaac Njoroge & Another* [2020] KEELC 8 (KLR) and *Michael Kiplangat Cheruiyot vs. Joseph Kipkoech Korir* [20L9] eKLR.
14. Counsel submitted that reopening of the case was not warranted and it was an abuse of the Court process meant to prolong the case with reference to the Applicant's conduct throughout the case including several adjournment opportunities. Counsel pointed out that the Applicant had earlier in July 2023 sought to reopen the case, and the Respondent accommodated the Applicant but despite this, the Land Registrar was never called and counsel should bear responsibility as held in *Odoyo Osodo vs. Rael Obara Ojuok* (*supra*). Counsel also submitted that on the 6th March 2024, the Applicant's counsel indicated that the said Registrar would be in Court only for the both of them to be absent in Court when the matter was called for hearing. Therefore, this was habitual and the Court should not be taken for a ride as was held in *Peter Ngigi vs. Francis Kigira* [2022] eKLR.
15. Counsel went on to add that parties are bound by their pleadings and reopening of cases needs evidence that the alleged new evidence could not have been obtained earlier with reasonable diligence which the Applicant had not shown. And that notwithstanding, he had been given more than enough time to produce evidence of the Lands Registrar but failed to do so time and again.
16. On the issue of co-tenancy submitted by Counsel for the Applicant, counsel for the Respondent indicated that it was not an issue for determination at this juncture and it was an attempt at diverting Court's attention from the discrepancies in the Applicant's pleadings. Therefore, anything that the Land Registrar ought to testify on was on record and the entries of the land register was not in dispute and reopening the case was the Applicant's attempt at filling gaps in their case with reference to *Cyrus Shakhlagakhwa Jirongo vs. Soy Developers Limited & 9 Others* [2020] eKLR.
17. Counsel also submitted that the application was filed by stranger who was not properly on record and should be struck out in limine with costs to the Respondent.



Analysis and determination

18. I have considered the Notice of Motion, the Affidavit in support, the Response thereto, the rival submissions and the authorities cited. I find that the issues for determination are:
- i. Whether the application is properly on record;
 - ii. Whether the application dated 14th March 2024 to reopen the Defendant's case is merited;
 - iii. Who should bear the costs of this application?
19. I will begin by addressing the issue pointed out by Counsel for the Respondent that Counsel for the Applicant/Defendant was not properly on record and this application having been filed by a stranger should be struck out.
20. From the Court Tracking System, it shows that this Application was filed by e Advocates on record, the Application was filed in March 2024 while the change of advocates as per the notice of change of advocates dated 29th May 2023 shows that the firm of Kilomenn Advocates was the firm representing the Defendant/Applicant. From the Court record, on 17th April 2023 Ms. Valerie Mong'are in presence of Mr. Busaidy for the Plaintiff and Mr. Kokonya for the Defendant, informed Court that she had received instruction from the Defendant to take over the matter from Kokonya & Co. Advocates and sought time to put in a Notice of Change of advocates. It would seem that this was not done. However, it is on record that Ms. Valerie Mong'are has been representing the Defendant/Applicant since then. It is also on record that the Respondent has been servicing their pleadings to E. Valerie Advocates.
21. I therefore find that striking out this application will not be in the interest of justice, but Counsel for the Applicant/Defendant is hereby ordered to regularise their status in this matter within 7 days of this Ruling.

Is the application to reopen the Defendant's case is merited?

22. It is common practice that courts have discretion to reopen cases but while the principle of a fair trial is a Constitutional right under Article 50 of the *Constitution*, this discretion must be exercised judiciously and in a manner that upholds the integrity of the judicial process. Lydia Achode J. (as she then was) in *Hannah Wairimu Ngethe v Francis Mungai Ng'ang'a & another* [2016] KEHC 7330 (KLR) held:
- “...Indeed the reopening of a case is not a new or novel thing but cogent reasons must be advanced for asking the court to do so. As stated in Malindi HCCC No. 56 of 1999 (supra) that:
- “...re-opening a case is not an impossibility but there must be urgent 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...”
23. Counsel for the Applicant sought the reopening of her client's case, which closed pursuant to this Court's order issued on 6th March 2024. Counsel argue that her absence was occasioned by unforeseen challenges beyond her control, which ought not to be visited upon her client. She further contended that the testimony of the Land Registrar, Kajiado, was indispensable to the just determination of the matter, as his evidence, coupled with the production of crucial documentary records, would shed light on the ownership of the suit properties. She emphasized that the failure to adduce such evidence would occasion grave prejudice to the Applicant, potentially undermining the integrity of the proceedings and the Applicant's right to a fair hearing.



24. Counsel for the Respondent vehemently opposed the reopening of the Applicant's case, arguing that the Defence hearing had been repeatedly adjourned due to the persistent unavailability of the Land Registrar, the Defendant's intended witness. He submitted that, in 2023, the Plaintiff's case had similarly been marked as closed. However, in the spirit of fairness, the Defendant indulged the Applicant, allowing the case to be reopened to facilitate the summoning of the Land Registrar to testify. Despite this concession, the matter had since been adjourned on two separate occasions due to the continued absence of the said witness. Ultimately, the case was closed when both the witness and the Applicant's Counsel failed to appear at the scheduled hearing, further demonstrating a pattern of delay that, in the Respondent's view, warranted the court's refusal to grant the present request.
25. Is the evidence to be produced by the said witness so critical or crucial that it would prejudice the Applicants? And is the evidence to be produced new evidence which could not be procured before? I find not. The Land Registrar can only testify regarding the veracity and authenticity of the documents issued by their office and the records they hold. The issue of the type of tenancy in which the parties entered into, which counsel for the Applicant submitted on at length was not an issue the Land Registrar could speak on. And this, is an issue that can be determined based on evidence on record.
26. While the court retains the discretion to reopen the case, such discretion should be exercised cautiously. The Defendant must demonstrate exceptional circumstances justifying the reopening, including evidence of genuine efforts to secure the Land Registrar's attendance and a clear explanation for previous failures to present evidence. It is also on record that the matter has been severally postponed due to the unavailability of the proposed witness.
27. Despite the numerous applications for adjournment, I reluctantly allow the Defendant's application in the following term:
- a. That the *Ex-parte* proceedings of 6th March 2024, that led to the close of the Defence case are hereby set aside.
 - b. That the Defendant/Applicant do reopen his case and that the Land Registrar Kajiado North be allowed to testify and produce documentary evidence.
 - c. That the Plaintiff be at liberty to reopen his case and adduce further evidence if need be.
 - d. That costs of this application be borne by the Defendant/Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF MAY 2025.

L.KOMINGOI

JUDGE

In the presence of:

For the Plaintiff/Respondent

For the Defendant/Applicant

Court Assistant: Mutisya

