



**Chebbi v Chesire (Environment & Land Case 81 of 2013)  
[2023] KEELC 21183 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 81 OF 2013  
EO OBAGA, J  
NOVEMBER 2, 2023**

**BETWEEN**

**PHILIP C CHEBII ..... PLAINTIFF**

**AND**

**JOSEPH K CHESIRE ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 5.4.2023 in which the Plaintiff/ Applicant seeks the following orders:-
  1. That the Plaintiff's case be re-opened and the Plaintiff be allowed to testify further and to adduce additional evidence in the matter.
  2. The Plaintiff be granted leave to file a supplementary list of witnesses, list documents and bundle of documents.
  3. That costs of this application be in the cause.
2. This case was filed on 4.1.2000. The case is yet to be concluded 23 years later. On 21.2.2018, the Plaintiff testified and closed his case. The defence case began on 24.9.2018. on 23.6.2021 the defence was given a last adjournment. On 18.10.2021 this court declined to grant the defence any further adjournment. The defence case was closed and the court directed that parties do file written submissions.
3. On 17/11/2021, the Defendant filed an application seeking to have the defence case which was closed to be re-opened to enable the Land Registrar to testify. This application was allowed vide ruling delivered on 19/5/2022. On 20/1/2023 a Land Registrar from Uasin Gishu County began testifying. The witness was stood down after she produced a document from the file held at the Lands office. M/



- s Odwa for Plaintiff applied that the Land Registrar be stood down to enable her consult her client regarding a list of allottees which had been produced as defence exhibit 6.
4. On 21/3/2023 when hearing was supposed to resume, M/s Odwa orally applied that the Plaintiff's case be re-opened so that he could produce documents in support of his case. Counsel for the defendant insisted that the Advocate for the Plaintiff makes a formal application for re-opening the Plaintiff's case. This is what informed the filing of the present application.
  5. The Applicant contends that he had proceeded and closed his case on the basis of documents which had been filed then but that it has now become necessary to re-open his case to enable the Land Registrar to vail the parcel file and correspondence file in respect of LR. No. Uasin Gishu/Kipkabus Settlement Scheme/670.
  6. The Applicant contends that the Land Registrar who was testifying had indicated that she did not have the parcel file or correspondence file and that this was deliberate collusion to disadvantage him. He further contends that the documents which were produced had not been filed and served upon him in advance and that their production was an ambush and that his advocate had protested to their production but the court overruled the objection.
  7. The Applicant's application was opposed by the Defendant/Respondent based on a replying affidavit sworn on 13.4.2023. The Respondent contends that the Applicant is guilty of delay in that the application for re-opening of the case was made after five years since he closed his case. He further states that the parcel file which the Applicant seeks to be produced is lost and cannot be traced as the Land Registrar stated while testifying on 20/1/2023.
  8. The Respondent further contends that the Applicant's application is an afterthought which is meant to fill the gaps in the Applicant's case. He further argues that the Applicant has not demonstrated that the evidence which he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case and further that the evidence he now seeks to adduce could not have been adduced earlier on.
  9. The Respondent also contends that the Applicant has not demonstrated that the evidence he intends to adduce could influence the result for the case and that in any case, the application seeks to embarrass the Respondent.
  10. The parties were directed to file written submissions. The Applicant filed his submissions on 29/5/2023. The Respondent filed his submissions on 2.6.2023. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties as well as the authorities cited therein. The main issue for determination is whether the Applicant has met the threshold for grant of an order for re-opening of his case. The other issue is on whether the Applicant should be allowed to file additional list of witnesses and bundle of documents.
  11. I am aware that issue of whether or not to allow re-opening of a case is a matter within the discretion of the court. This discretion has however to be exercised judiciously based on the circumstances of the case. The principles upon which the court should exercise the discretion were aptly summarised by Justice Eboso in the case of *Susan Wavinya Mutavi -Vs- Isaac Njoroge & another* (2020) eKLR as follows:-

“Over the years, Kenya's Superior Courts and courts in the commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial. First, the jurisdiction is a discretionary one and it is to be exercised



judiciously. In exercising that discretion, the court is duty bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the Applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, evidence must be such that, if admitted, it would probably have an important influence on the result of the case, although it need not be decisive. Lastly, the evidence must be apparently credible though it need not be incontrovertible”.

12. In the instant case the Applicant is seeking to have the Land Registrar called to come and produce the parcel file as well as the correspondence files. The reason is that the Land Registrar in collusion with the Respondent deliberately avoided to avail the parcel and correspondence file. It is important to note that the Land Registrar was stood down before she could conclude her evidence. The reason why she was stood down is that she had produced a certified copy of the member's register in respect of those who had been allotted plots at Kipkabus Settlement Scheme.
13. The Land Registrar had stated that in accordance to the list of members which the Lands office had, the allottee of parcel 670 was Lila Sielei and that the name of Harry B. Kiptoo did not appear in the list. This Lila Sielei testified on 23/6/2021 and produced the letter of allotment which she was given on 2.11.1998. The Land Registrar had not stated whether the parcel file and correspondence file were missing as alleged in the replying affidavit of the Respondent. It is infact M/s Odwa who during objection to production of the extract of the members' register who indicated from the bar that she had talked to the Land Registrar before she testified and that the Land Registrar informed her that she did not have the parcel file in court.
14. The Land Registrar having been stood down, it is premature for the Applicant and the Respondent to allege that there was collusion in failure to produce the parcel file or that the parcel file is lost. The Land Registrar would clarify all these allegations when she concludes her evidence. The Applicant has not given any indication on the additional evidence which he intends to adduce or the additional statements which he wishes to file and the nature of documents he intends to file. Without any disclosure on the nature of additional evidence to be adduced on the part of the Applicant and the court having observed that the Land Registrar is yet to conclude her evidence, there is no basis upon which the Applicant's case can be re-opened.
15. The Applicant has all along known that it is his title which was under attack. He was aware that he ought to have exercised due diligence to ascertain that whoever sold him the suit property had all the requisite documents and that he should have availed the same at the time of hearing of his case. The Applicant made this application five year after closure of his case. He has not explained why the application was brought after five years. The fact that he became aware of the extract of the members' register when it was produced on 20.1.2023 does not offer him any help. This is a document which he would have easily accessed had he exercised due diligence.
16. *In re-estate of Kombo Mulinge* (2021) eKLR the court held as follows:-

“ A party who, as a result of the evidence adduced, realises that based thereon his case might not go the direction he intended, applies for adduction of further documents will not be allowed to do so particularly where the case has been closed as to do so may well give the case



a completely different complexion from what was pleaded. It may also prejudice a party to the suit. Cases ought not to be prosecuted in instalments.”

17. In the case of *Samuel Kiti Lewa –Vs- Housing Finance Company Limited & Another* (2015) eKLR it was held 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.” [Emphasis added]

18. It is clear that the Applicant was jolted by the production of defence exhibit 6 and he now wants to fill the gaps which have been brought to the fore. From the above analysis, I find that the Applicant’s application is devoid of merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

M/s Odwa for Plaintiff/Applicant.

Mr. Osewe for Defendant/Respondent

