



Titan Limited v Qi Ye Limited & another (Environment & Land Case 524 of 2013) [2022] KEELC 13259 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 524 OF 2013**

BM EBOSO, J

OCTOBER 3, 2022

BETWEEN

TITAN LIMITED PLAINTIFF

AND

QI YE LIMITED 1ST DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
DEFENDANT**

RULING

1. The plaintiff initiated this suit through a plaint dated May 3, 2013. The plaint was subsequently amended on June 9, 2014. The case of the plaintiff was that it owned land reference number 3734/23 while the 1st defendant owned land reference number 3734/ 22. The two parcels of land are located in Lavington, Nairobi county and abut each other. The plaintiff contended that the 1st defendant had commenced development of apartments on its parcel of land in contravention of the legal requirements relating to environmental impact study and licensing, physical planning, and land use. Among other reliefs, the plaintiff sought an order for demolition of the 1st defendant's structures. Further, the plaintiff sought an order annulling the Environment Impact Assessment Licence [EIA licence] issued to the 1st defendant by the 2nd defendant.
2. Hearing of the case proceeded before me at Milimani Environment and Land Court station on June 12, 2019. The plaintiff called one witness, Wangare Murugu [PW 1]. Ms Miya who identified herself as appearing for the 1st defendant cross-examined the plaintiff's witness. She did not, however, lead evidence on part of the 1st defendant. She indicated to the court that the 1st defendant would not. Consequently, the court marked the parties' cases as closed and gave directions on filing and exchange of written submissions.



3. In the period that followed, it emerged that the 1st defendant had been deregistered on April 10, 2018 through gazette notice 3641. Indeed, on May 5, 2020, Ms Dave, counsel for the plaintiff, informed the court that they had filed an application in the High Court seeking restoration of the 1st defendant's name in the register of companies. On October 14, 2021, counsel for the plaintiff informed the court [Mbugua J] that the High Court had restored the 1st defendant's name in the register of companies through gazette notice No 4167 dated April 27, 2021. The file was subsequently forwarded to me to give directions relating to the judgment that was pending at the point when the issue of deregistration cropped up.
4. The 1st defendant subsequently brought an application dated January 26, 2022, seeking an order re-opening its case and allowing it to file documents and lead evidence. The application was supported by the affidavit of Jia Ping Zhang. It was canvassed through written submissions dated March 15, 2022, filed through M/s Njenga Mbugua & Nyanjua Advocates.
5. The plaintiff opposed the application through a replying affidavit sworn on February 22, 2022 by Wangari Murugu and written submissions dated February 25, 2022, filed by M/s LJA Associates.
6. I have considered the application, the response to the application, and the parties' respective submissions. Were it not for the discovery, the disclosures, and the developments that happened in this suit between the day when the parties' cases were marked closed and the time the application under consideration was brought, the only question that would have fallen for determination in this application would have been whether the 1st defendant has satisfied the criteria upon which our trial courts exercise jurisdictions to re-open a civil trial. However, the discovery, the disclosures, and the new developments that happened in this suit have given rise to an issue that was perhaps not contemplated by the parties and the court.
7. The discovery that happened is that the court discovered that the 1st defendant did not exist. Counsel for the plaintiff subsequently made a disclosure to that effect, citing gazette notice No 3641 of 10/4/2018 through which the 1st defendant was deregistered. The subsequent developments that took place are that proceedings were initiated in the High court and the 1st defendant was restored to the register of companies.
8. Consequently, the unanticipated issue which this court must inevitably answer relates to the fate of the trial proceedings that took place against the 1st defendant at a time when the 1st defendant did not exist as a legal person and did not have the legal capacity to be a defendant in any civil suit. In my view, those proceedings were a nullity in their entirety and are to be set aside suo motto and as a matter of law.
9. Were it not for the above fate of the trial proceedings, I would have considered the merits of the 1st defendant's application upon the criteria outlined in *Susan Wavinya Mutai v Isaac Njoroge and another* [2020] where I noted 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. See (i) *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamud and others* [2018] eKLR; (ii) *Samuel Kiti Lewa v Housing Finance Company of Kenya Ltd* [2015] eKLR. (iii) *Ladd v Marshall* [1954] 3 ALL 745; *Reid v Brett* [2005] VCS 18; (v) *Smith v New South Wales Bar Association* (1992) 176 CLR 256; and *EB v CT (No 2)* [2008 QSC 306”.

10. However, having come to the conclusion that the trial proceedings in this suit are a nullity by dint of the fact that the 1st defendant had been deregistered at the time the trial proceedings took place, I will not venture into the question as to whether the applicant has satisfied the criteria upon which our trial courts exercise jurisdiction to re-open a party’s case. Suffice it that the ill fated proceedings are to be set aside *ex debito justitiae*.
11. This file will be returned to Milimani [Nairobi] Environment and Land Court station for fresh hearing before a judge of the said station. mention before the deputy registrar at Milimani Environment and Land Court on October 18, 2022.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Dave for the Plaintiff

Ms Wambui for the 1st Defendant

Ms Muyai for the 2nd Defendant

Court Assistant: Sydney

