



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 91 OF 2017**

**VICTORIA NAIYANOI KIMINTA.....PLAINTIFF**

**VERSUS**

**GLADYS KIMINTA PRINSLOO.....DEFENDANT**

**RULING**

1. This case came up for hearing on 14/12/2017. The plaintiff testified and closed her case. The court set down the case for defence hearing on 5/1/2018. On the appointed day, counsel for the plaintiff made an oral application seeking to re-open the plaintiff's case and to present one additional witness and additional documentary evidence. The court directed the plaintiff to canvass the application through a formal application.

2. On 31/7/2018, the plaintiff brought a notice of motion dated 24/7/2018 seeking to set aside the proceedings of 5/1/2018 (sic) and to re-open her case. Further, the plaintiff sought leave to amend her pleadings. The application was premised on the grounds set out in the plaintiff's notice of motion and in the plaintiff's supporting affidavit sworn on 24/7/2018. She contended that she had obtained a valuation report and receipts which she wished to rely on. She further contended that arising from the new evidence, there was need to amend her pleadings. She stated that she was unable to secure and present the evidence on time because she resided in the United States of America. She annexed a copy of the draft amended pleadings.

3. The defendant opposed the application through a replying affidavit sworn on 15/10/2018. She deposed that the application was an afterthought intended to delay the case. She added that the valuation report had been procured on instructions from the plaintiff's advocates after the plaintiff had already closed her case. She further deposed that the receipts which the plaintiff attached to her application related to service charges in respect of a plot in Embakasi owned by the applicant's son. She urged the court to dismiss the application.

4. The application was canvassed through written submissions. The plaintiff submitted that there were three principles that governed the jurisdiction to re-open a case and receive additional evidence: (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive; and (iii) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. Reliance was placed on the English case of **Ladd v Marshall (1954) 3 All ER 745** to emphasize this point. Reliance was also placed on the Supreme Court of Kenya decision in **Mohamed Abdi Mohammed v Ahmed Abullahi Mohamed & 3 others (2015) eKLR** in which the Court allowed the appellant to adduce additional evidence which had not been adduced in the trial court. The plaintiff submitted that she had satisfied the criteria for reception of new evidence.

5. The plaintiff further submitted that where new evidence can be adduced without causing prejudice to the other party, the court should allow the evidence. Reliance was placed on the holding in **Kipkemei Too v Hellen Tum (2014) eKLR** and **Daniel Otieno Awuor v Hardware Trading Stores Limited & Another (2016) eKLR**. Lastly, the plaintiff submitted that Order 8 Rule 3 of the Civil Procedure Rules permitted a party to amend pleadings at any stage of proceedings.

6. In response, the defendant submitted that the valuation report which the plaintiff intended to produce was procured as an afterthought. Reliance was placed on the case of **Samuel Kiti Lewa v Housing Finance Limited and another (2015) eKLR** where it was held that a prayer for re-opening a case would not be allowed if there was an unexplained delay. It was further submitted that the new evidence was likely to prejudice the defendant because it was intended to fill gaps in the plaintiff's case.

7. I have considered the application, the parties' rival affidavits, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues in this application. Two key issues fall for determination in the application. The first issue is whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-open a case and receive additional evidence. The second issue is whether the plaintiff has satisfied the criteria upon which leave to amend pleadings is granted. I will deal with the two issues sequentially in that order.

8. It is common ground that hearing of the plaintiff's case commenced and ended on 14/12/2017. What is pending is the hearing of the defendant's case. The present application was brought before hearing of the defendant's case commenced.

9. The first issue is whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-open a case and receive additional evidence. Both the Civil Procedure Rules and the Evidence Act do not have clear and express framework on how that jurisdiction is to be exercised. Section 146(4) of the Evidence Act generally grants the court powers to recall a witness. It provides thus:

***(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively***

10. Similarly Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined. It provides thus:

***10. The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.***

11. Over the years, courts in the Commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a trial court. First, the jurisdiction is a discretionary one and 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 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, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See **Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others (2018) eKLR**; **Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another (2015) eKLR**; and **Ladd v Marshall (1954) 3 All ER 745**).

12. In the present suit, the plaintiff closed her case but the defendant has not yet led her evidence. Secondly, the evidence which the plaintiff seeks to introduce relates to the value of the suit property which is jointly owned by the parties to this suit. The suit seeks, *inter alia*, an order directing sale of the suit property and division of the sale proceeds between the parties to this suit. It also seeks an order directing payment to the plaintiff of her share of the rental income.

13. In my view, although the valuation report was obtained after close of the plaintiff's case, it is a piece of evidence which may probably have a bearing on the effectual adjudication of the dispute in this suit. Secondly, the defendant has not tendered evidence and will have the opportunity to present controverting evidence should need arise. Taking the foregoing into account, it is my view that the notice of motion dated 24/7/2018 meets the criteria for re-opening of a closed case. I will therefore allow the plea for re-opening of the plaintiff's case.

14. The second issue is whether the plaintiff has satisfied the criteria for grant of leave to amend pleadings. This court's jurisdiction to allow amendments to pleadings is exercised in accordance with the framework in Order 8 Rule 3(1) of the Civil Procedure Rules which provides as follows:

***8 (3) (1) Subject to Order 1, rule 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise may be just and in such manner as it may direct, allow any party to amend his pleadings,***

15. The principle upon which that jurisdiction is exercised was summarized by the Eastern African Court of Appeal in the Case of **Eastern Bakery v Castellino [1958] EA 461**. The object and rationale behind this principle was outlined by the High Court in the case of **Institute for Social Accountability and Another v Parliament of Kenya and 3 others (2014) eKLR** as follows:

***The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally Eastern Bakery v Castellino (1958) EA 461; Ochieng and others v First National Bank of Chicago CA Civil Appeal Number 149 of 1991, Kenyatta National Hospital v Kenya Commercial Bank Limited & Another [2003] 2EA.***

***The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.***

16. I have looked at the draft amended plaint. Firstly, it seeks to capture the market value of the suit property as at 9/4/2018. Secondly, it seeks to amend the plaintiff's claim for 50% share of the rental income from Kshs 9,000,000 to Kshs 6,990,000. The parties to this suit are joint tenants. In my view, the proposed amendments will not occasion injustice or prejudice to the defendant. Secondly, the said amendments are necessary for the effectual adjudication of the dispute in this suit. Consequently, I will allow the plaintiffs' plea to amend the plaint in terms of the draft amended plaint.

17. The plaintiff also sought an order setting aside the proceedings of 5/1/2018. First, the plaintiff's case was heard on 14/12/2017. There was no hearing on 5/1/2017. Second, even if the plaintiff wanted to set aside the proceedings of 14/12/2017, no basis was laid to warrant the setting aside of the evidence tendered on 14/12/2017. The plea for a setting aside order is consequently rejected. The evidence already tendered will remain on record. The plaintiff who testified as PW 1 will be at liberty to take the witness box a second time.

18. Lastly, the present application was occasioned by the plaintiff. As a result, the defendant will be subjected to added hours in court principally because of the plaintiff's decision to re-open her case. To indemnify the defendant, I will condemn the plaintiff to pay the defendant throwaway costs of Kshs. 20,000.

#### **Disposal orders**

19. In light of the foregoing, the plaintiff's notice of motion dated 24/7/2018 is disposed in the following terms:

- a) The plaintiff is granted leave to amend her plaint in terms of the draft amended plaint attached to the affidavit in support of the application.*
- b) The plaintiff's case is re-opened and the plaintiff is allowed to lead additional evidence by herself and by any other witness.*
- c) The defendant shall have leave to file additional witness statements and documentary evidence.*
- d) The plaintiff's plea to set aside the proceedings of 5/1/2018 is rejected.*
- e) The plaintiff shall pay the defendant throwaway costs of Kshs 20,000 before the next hearing date.*

DATED, SIGNED AND READ AT NAIROBI ON THIS 3RD DAY OF JULY 2019.

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Gladys Kiminta Prinsloo the defendant

Court Clerk - June Nafula

*1) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.*

*2) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to use or intended to be sued.*

*3) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaintiff or counterclaim, he could have sued.*

*4) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*