



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 848 OF 2014

DAVID MAINA KANYORO.....PLAINTIFF/RESPONDENT

VERSUS

NELSON KARORI GATHIMA.....1ST DEFENDANT/APPLICANT

SOLOMON GATHIMA.....2ND DEFENDANT

MAHIRA HOUSING COMPANY LIMITED.....3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 11th November 2020 brought under order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, the inherent jurisdiction of the court and all other enabling provisions of the law.

2. It seeks orders:-

a. Spent.

b. That the honourable court be pleased to reopen the 1st defendant's case to enable the 1st defendant/applicant adduce additional evidence in terms of the list attached in this application.

c. That costs of the application be in the cause

3. The grounds are on the face of the application and are set out in paragraphs 1 to 12.

4. The application is supported by the affidavit of Nelson Karori Gathima, the 1st defendant/applicant herein sworn on the 11th November 2020 and a supplementary affidavit sworn on the 7th December 2020.

5. The application is opposed. There are grounds of opposition filed on behalf of the plaintiff dated 24th November 2020.

6. On the 16th December 2020 the court with the consent of the parties directed that the application be canvassed by way of written submissions. When the matter came up for mention on 10th February 2021 the defendants had not filed their submissions. There was no explanation. The court then reserved the matter for ruling on 10th June 2021. By the time of writing this ruling, the defendants had not filed their written submissions.

7. I have considered the notice of motion and the affidavits in support. I have considered the grounds of opposition, the written submissions filed on behalf of the plaintiff and the authorities cited. The issue for determination is whether this application is merited.

8. It is the 1st defendant's case that he is now in possession of the death certificate of Peter Githuka who passed away on 26th February 2015. That the said Peter Githuka had sworn a replying affidavit in response to the plaintiff's application for injunction. That the said Peter Githuka was then a director of the 3rd defendant. The 1st defendant wishes to reopen the case in order to produce the death certificate and the replying affidavit as part of his exhibits.

9. I note from the copy of the death certificate that the said Peter Githuka passed on, on 26th February 2015. This is about five years ago.

The said Peter Githuka is not a party to these proceedings. How will the replying affidavit sworn by the said Peter Githuka be tested on cross examination. The 1st defendant has no *locus standi* to produce the replying affidavit as he is not the deponent. In the case of **Samuel Kiti Lewa vs Housing Finance Co. Ltd & Another [2015] eKLR** J Kasango 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 reopening 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 also if such prayer for re-opening of the case will be defeated by inordinate and unexplained delay”.

I am guided by the above authority in finding that the application in the instant case has been brought after inordinate delay. The 1st defendant’s case was closed on 1st October 2020. They sought time to put in written submissions. The documents sought to be introduced were within the knowledge of the 1st defendant and his counsel as far back as 2014 and 2015. This is an attempt by the 1st defendant to fill the gaps in his evidence.

Allowing this application will occasion injustice to the plaintiff who closed his case on 27th January 2020.

10. In conclusion, I am not convinced that the reopening of the case will benefit any party. I find no merit on this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 10th day of June 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Thuku for the Plaintiff

Ms Tanui for Mr. Arusei for the Defendants

Phyllis - Court Assistant