



**IKO v JON (Civil Suit E088 of 2022) [2025] KEHC 8819 (KLR) (Family) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT E088 OF 2022  
CJ KENDAGOR, J  
JUNE 5, 2025  
(ORIGINATING SUMMONS)**

**BETWEEN**

**IKO ..... PLAINTIFF**

**AND**

**JON ..... DEFENDANT**

**RULING**

1. The parties herein got married to each other on 11<sup>th</sup> December, 2010 but their marriage was later dissolved vide Divorce Cause No. 1026 of 2019. The Applicant then filed the Originating Summons dated 16<sup>th</sup> December, 2022 seeking division of Matrimonial Property. The matter was heard, both parties testified before this Court, and it was reserved for judgment on 7<sup>th</sup> April, 2025. However, before the judgment could be delivered, the Applicant brought the instant application dated 22<sup>nd</sup> January, 2025 and filed to this Court on 12<sup>th</sup> February, 2025 seeking to arrest the Judgment and leave to adduce more evidence.
2. The Applicant sought the following orders;
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to grant leave to the [Applicant] to reopen the Plaintiff's case limited to production of the Certified Bank statement from Co-operative Bank dated 15<sup>th</sup> January, 2025 and letter from the National Bank dated 14<sup>th</sup> January, 2025.



4. That upon orders herein sought being granted the Plaintiff's/Applicant's Complied list of documents dated 22<sup>nd</sup> January, 2025 be deemed duly filed admitted and properly on record, and duly served upon payment of requisite Court filing fees.
5. That costs of this Application be in the cause.
3. The grounds are set out on the face of the application and in a supporting affidavit by the Applicant sworn on 22<sup>nd</sup> January, 2025. The Applicant averred that subsequent to the close of her case, she has obtained documents from National Bank and Co-operative Banks. She deponed that these newly obtained documents contain vital evidence to prove her case that she directly made a financial contribution to the purchase and development of the subject matrimonial property. She deponed that she was not in a position to obtain and/or produce the said documents during the trial.
4. She stated that she had, prior to closing her case, attempted to procure the evidence now sought to be produced, but the Banks could not supply the documents at that time. She stated that the banks had informed her that they needed more time to retrieve the hard copies because they had changed their systems. She averred that the evidence has since become available. She stated that the documents to be produced are a letter from National Bank dated 14<sup>th</sup> January, 2025 and certified statement of accounts from Co-operative Bank dated 15<sup>th</sup> January, 2025. She stated that the absence (on record) of the evidence contained in the discovered documents will jeopardize her case against the Respondent.
5. The Respondent filed a replying affidavit sworn by him dated 28<sup>th</sup> April, 2025. He stated that the application should not be allowed. He stated that the Applicant's attempt to reopen the case and recall her witnesses is a strategic move to rectify evidentiary gaps at a late stage. He also averred that the additional evidence that the Applicant now wishes to introduce is not unique, was not out of reach, and should have been obtained before the institution of this suit. He deponed that the Applicant waived her rights by failing to present the said evidence at the time of filing the suit, and should not be granted an additional opportunity to delay the administration of justice.
6. The Applicant filed a supplementary affidavit sworn by her dated 5<sup>th</sup> May, 2025. She stated that it can be discerned from the subject documents that they were not available when she instituted the matter and proceeded to hearing. She averred that she could not have produced the said documents at the material time because they were not within her possession or the Banks'. She also averred that the Respondent has not demonstrated how the subject documents will occasion injustice once they are admitted on record. He stated that the Respondent will not suffer any prejudice because he continues to have exclusive occupation and enjoyment of the matrimonial property since 2018.
7. The Application was canvassed by way of written submissions. I have carefully considered the submissions and arguments by the parties.

### **Issues for Determination**

8. Having considered the application, the several affidavits, and the arguments by the parties, the only issue for determination is whether the Applicant has satisfied the criteria upon which the court can exercise its discretion to re-open the case for purposes of adducing new evidence.
9. In making a determination on this issue, I shall first restate the legal principles guiding the admission of additional evidence in a trial. The Supreme Court in *Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others* [2013] eKLR had this on reception of additional evidence.

“The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and



relied upon. If it is small and limited so that the other Party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the Court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence .....

10. Similarly, the Court in *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* (2015) eKLR set out the principles to be considered in an application to re-open a case. It 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. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

11. In addition, the Court in *Skair Associates Limited v Kenya Methodist University (Civil Suit 2 of 2017)* [2024] KEHC 5550 (KLR) (8 May 2024) faced a similar question and had this to say;

12. The Applicant’s conduct offends the cardinal tenets of the overriding objectives under Section 1A and B of the *Civil Procedure Act* on the efficient and expeditious manner of finalization of matters. However, the court notes from the record that the documents sought to be filed are not amongst those initially filed with the statement of defence. This court is minded that in order to determine the real issues in controversy and dispense substantive justice to the parties, it must allow all the evidence to be adduced so that a party is not heard to say that it was condemned unheard.

13. In the interest of justice, therefore, this court will exercise its discretion in favour of the Applicant, and allow its application. In order to cure any prejudice that may be occasioned on the Respondent, this court will make the necessary order for costs, and in the long run, the Respondent will have an opportunity to test the newly filed evidence during cross examination.

12. Guided by the above authorities, this Court is being invited to determine whether the Applicant has satisfied the criteria upon which the Court can exercise its discretion to re-open the case for purposes of adducing new evidence.

13. I have seen the two documents sought to be introduced. One of them, Marked IKO-3, is a letter from the National Bank dated 14<sup>th</sup> January, 2025 and addressed to the Applicant. In the correspondence, the Bank states that the Applicant had written to them earlier requesting to be supplied with the documents in question. The Bank did not state when the Applicant wrote to them making the said request. The Applicant herself stated that she had sought the details from the Bank but she too did not state the date when she first wrote to the Bank seeking the said documents.

14. In my view, the Applicant should have disclosed to this Court the exact date when she wrote to the Bank. She did not disclose to this court the exact date when she wrote to the Bank seeking the documents in question.

15. That information would have helped this Court in determining whether her application is a mere afterthought or a genuine desire to achieve a fair determination of this dispute.

16. Nonetheless, in the interest of justice, this Court is persuaded that this is a proper case where it should exercise its discretion in favour of the Applicant and allow the application. This Court will make the necessary order for costs in order to cure any prejudice that may be occasioned to the Respondent.



Additionally, the Respondent will have the opportunity to test the newly filed evidence during cross-examination.

17. Courts have issued conditions on which the new additional evidence should be adduced. Most of the conditions are designed to ensure that the leave to re-open the case is not open-ended, and thus prevent potential prejudice on the opposing party. In *Wadhwa* (as the legal representative of the Estate of *Deshpal Omprakash Wadhwa*) v *Mohamed & 4 others* (Environment & Land Case 51 of 2012) [2022] KEELC 13771 (KLR) the Court observed as follows;

“ 31. ... here is no doubt that the prejudice towards the defendants will increase if the plaintiff’s application is allowed open ended.

32. I... therefore allow the application in the interest of justice to allow the plaintiff to file only the presentation book, the plaintiff’s case be re-opened only for purposes of having PW2 produce the presentation book for the Kilifi Land Registry; the defendants be corresponding leave to file further documents in relation to the presentation book if need be. The plaintiff to pay the defendants Kshs 20,000/- being thrown away costs before the next hearing date failure to which the order lapses.”

18. The Court appreciates that this is a family dispute between former spouses. Generally, the Court would be hesitant to award costs in such disputes, except where there are special and unique circumstances. In my view, this qualifies as one of such instances where an order for costs is merited. The Applicant’s conduct offends the cardinal tenets of the overriding objectives under Sections 1A and B of the *Civil Procedure Act* on the efficient and expeditious manner of finalization of matters as she did not disclose when she wrote to the bank.

19. The Applicant will pay the Respondent throwaway costs of 30,000/=.

### **Disposition**

20. In the end, I allow the Applicant’s Application dated 22<sup>nd</sup> January, 2025 on the following terms;

- a. The Applicant is allowed to file only the Bank statement from Co-operative Bank dated 15<sup>th</sup> January, 2025 and letter from the National Bank dated 14<sup>th</sup> January, 2025.
- b. The Plaintiff’s case is to be re-opened only for purposes of having PW1 produce the 2 documents stated in (a) above.
- c. The Defendant is given corresponding leave to file any further documents in relation to the two documents stated in (a) above, if need be.
- d. The Applicant to pay the Respondent Kshs.30,000/= being throwaway costs before the next hearing date, failure to which the order lapses.
- e. Mention on 18<sup>th</sup> June, 2025.

21. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**C. KENDAGOR**



**JUDGE**

In the presence of:

Court Assistant: Beryl

