



**Nyamu v Royal Capital Partners Limited & 3 others (Commercial Case 49 of 2017)  
[2025] KEHC 10046 (KLR) (Commercial & Admiralty) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL CASE 49 OF 2017**

**PM MULWA, J**

**JULY 10, 2025**

**BETWEEN**

**DR. PETER MURITHI NYAMU ..... PLAINTIFF**

**AND**

**ROYAL CAPITAL PARTNERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSHUA KAGIA ..... 2<sup>ND</sup> DEFENDANT**

**CATHERINE A. ADUNDO ..... 3<sup>RD</sup> DEFENDANT**

**THOMAS MAURICE ODOUR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed the Notice of Motion dated 14<sup>th</sup> November 2022 under Article 50 of *the Constitution* of Kenya, Sections 1A & 3A of the *Civil Procedure Act* and Section 76 of the *Evidence Act*. The application seeks orders that the Plaintiff be granted leave to re-open its case to produce an investment agreement dated 3<sup>rd</sup> June 2013, and that the costs of the application be provided for.
2. The application is supported by the grounds on its face and the supporting affidavit sworn by the Plaintiff on 14<sup>th</sup> November 2022. The Plaintiff avers that its case was closed on 15<sup>th</sup> February 2022 and that the subject investment agreement, which forms a critical part of the Plaintiff's case, was misplaced during a house move and only recently traced. The Plaintiff contends that the agreement is foundational to the issues in contention and is referenced in other agreements already on record. It is argued that no prejudice will be occasioned to the Defendants, as they will have the opportunity to cross-examine the Plaintiff on the new evidence.
3. The 2<sup>nd</sup> Defendant, Mr. Joshua Kagia, swore a replying affidavit dated 19<sup>th</sup> December 2022 on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Defendants oppose the application on the basis that it is an



afterthought brought at the eleventh hour, on the eve of the defence hearing. They contend that the delay in tracing the document has not been satisfactorily explained and that the reopening of the Plaintiff's case will occasion prejudice to the Defendants, as it may require amendments to their pleadings and lead to further delay in a matter that has been pending for over five years. they contend the application is brought under the wrong provision of the Evidence Act

4. The parties agreed to canvass the application by way of written submissions. The Plaintiff filed submissions dated 5<sup>th</sup> July 2024 and 14<sup>th</sup> February 2025, while the Defendants filed submissions dated 30<sup>th</sup> September 2024.

### **Analysis and determination**

5. I have considered the application which is the subject of this Ruling, the response thereto, the submissions made on behalf of the parties and the authorities cited. the sole issue is whether the plaintiff has satisfied the criteria upon which the Court exercises jurisdiction to re-open a case and receive additional evidence.
6. The power to re-open a party's case is a discretionary one, grounded in the Court's inherent jurisdiction under Section 3A of the Civil Procedure Act and the broad constitutional obligation to administer justice fairly under Articles 50(1) and 159(2)(d) of the Constitution. However, such discretion must be exercised judicially, not capriciously or arbitrarily.
7. The guiding principles in determining such an application are well settled. In *Odoyo Osodo v Rael Obara Ojuok & 4 others* {2017} eKLR,  

“The Court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.”
8. Similarly, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court reiterated that:  

“Extension of time or discretion to allow a party to do something out of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the Court.”
9. The purpose of re-opening proceedings is not to afford a litigant a second bite at the cherry, nor to permit curing of evidentiary gaps or weaknesses that were within a party's power to address during trial. See *Gichi T/A Gichi Manufacturers v Kenya Power & Lighting Co. Ltd* [2018] eKLR,
10. In applications of this nature, the pivotal consideration is whether the proposed re-opening will cause prejudice to the adverse party in a manner that would affect the fairness of the trial.
11. 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 (see *Samuel Kiti Lewa v Housing Finance Company Limited & Another* {2015} eKLR).
12. The guiding criteria in such applications are well established. The applicant must demonstrate: that the evidence was not available despite the exercise of reasonable diligence, that the evidence is material and may influence the outcome of the case, that the application is made in good faith and without unreasonable delay, and that the evidence sought to be introduced is credible and not merely repetitive.



These principles were aptly summarized in *Mombasa Cement Limited v Speaker of the National Assembly & Another* [2018] eKLR and echo the long-standing common law standards for admitting additional evidence.

13. Applying the foregoing principles to the present case, I find that the Plaintiff has not offered a satisfactory or credible explanation as to why the investment agreement dated 3<sup>rd</sup> June 2013, executed well before the commencement of this suit, was not produced earlier, or why it was omitted from the Plaintiff's trial bundle despite its alleged centrality to the issues in dispute. The reason advanced by the Plaintiff, that the document was misplaced during a house relocation is not satisfactory. This explanation, in my view, falls well below the threshold of reasonable diligence required in matters of this nature.
14. Moreover, the Court notes that the agreement in question was drafted by the firm of Githinji, Kimamo & Co. Advocates, a professional law firm that presumably retained a copy of the executed agreement in its records. No explanation has been provided as to whether any attempts were made by the Plaintiff to request a copy from the said law firm. The absence of such efforts further undermines the credibility of the Plaintiff's assertion that the agreement was truly unavailable at the material time. The conduct suggests a lack of seriousness or candour in the presentation of this application.
15. I am further persuaded that permitting the re-opening of the Plaintiff's case at this stage, when the defence hearing is imminent, would prejudice the Defendants, potentially necessitate amendment of pleadings, and further delay the fair determination of a suit that has already endured for more than five years.
16. This Court is also mindful that a pre-trial conference was duly conducted, and the parties committed to relying on their respective trial bundles and witness statements. The introduction of additional evidence at this stage undermines the integrity of the case management framework under the Civil Procedure Rules.
17. On the whole, I am not satisfied that the Plaintiff has met the threshold for the exercise of this Court's discretion in its favour. The application is characterized by unexplained delay, lack of diligence, and potential prejudice to the Respondents. The evidence sought to be introduced is not new, not inaccessible, and not decisive to the determination of the real issues in controversy.
18. The consequence of the foregoing is that the application dated 14<sup>th</sup> November 2022 is bereft of merit and is consequently dismissed. Costs to the defendants

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Mutemi h/b for Mr. Thimba for Plaintiff/Respondent

Mr. Oguye h/b for Mr. Kimani for Defendant/Applicant

Court Assistant: Carlos

