Watu Nominees Company Limited & another v Omboga (Civil Appeal E535 of 2024) [2025] KEHC 13129 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E535 OF 2024

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

WATU NOMINEES COMPANY LIMITED ..... 1ST APPELLANT

ANTHONY MUSEMBI ..... 2ND APPELLANT

AND

CYRUS MAKORI OMBOGA ..... RESPONDENT

(Being an appeal from the Ruling of the Honourable R.L. Musiega (Magistrate) delivered on 12.04.2024 in Nairobi Chief Magistrate's Court in CMCC No. 2187 of 2023)

JUDGMENT

1. This is an appeal from the Ruling of the Honourable R.L. Musiega Magistrate delivered on 12th April 2024 in Chief Magistrate's Court in Nairobi CMCC No. 2187 of 2023. The trial court declined to reopen the case and allow the appellants to recall witnesses and allow the appellant to do likewise.
2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal on the 09.12.2024. The appeal is on the trial court's finding on ruling on the application and is based on five grounds, that is:
    a. That the trial court erred in law and fact in failing to consider the application holistically.
    b. That the Honourable trial magistrate erred in law and in fact in dismissing the application despite making the observation that it raised weighty issues and which issues could only be interpreted to infer the fraud set out in the application.
    c. That the Honourable trial court erred in law and in fact to consider and apply the principles for re-opening cases.

d. That the Honourable trial magistrate erred in law in failing to judiciously exercise its discretion and thus rendered a ruling that sanctioned fraud.

e. That the Honourable trial court erred in law and fact in failing to critically and holistically consider the application and the submissions in support of the application.

3. The Appellant prayed for orders that the ruling of the Honourable trial court of 12.04.2024 dismissing the application dated 11.10.2023 seeking to reopen the Respondent's and Defendant's case be and is hereby set aside. The court was invited to reverse the order and to allow the application dated 19.08.2022.

4. The Appellant lodged an application dated 11.10.2023 wherein he stated that he sought to reopen the case and witnesses be recalled to adduce evidence. The application was based on the ground that the case closed on 26.09.2023. He stated that he came into knowledge upon investigation report by Lintech Consult that the suit herein is fraudulent. They averred that alleged accident never took place and that the respondent sought to benefit from a non-existent claim.

5. He stated that the Respondent was indeed admitted at Kenyatta National Hospital on 3.04.2022 but not for road accident. They averred that the medical patient's correspondence was a forgery as it did not emanate from the hospital.

6. He stated that the 2nd Appellant was a stranger to the appellant as he was not involved in the subject road accident but rather he operated a motor cycle via online platform Bolt and operated from Saika bodaboda stage. He stated that the evidence could not have been attained with reasonable diligence at the time. He asked that it was in the interest of justice that they call their witnesses and tender evidence. They also asked that the proceedings of 25.07.2023 and 26.09.2023 be set aside which if not will aid fraud.

7. The Respondent lodged a Replying Affidavit wherein he stated that the application was a futile process aimed at frustrating the outcome of the case. He contended that the threshold to be met to reopen a case has not been satisfied herein and thus it ought to be dismissed. He further stated that the application was not made timeously and has not been explained and neither has this new evidence been shown to have been out of the reach of due diligence. He stated that this new evidence was to fill gaps in his case. He denied fraud on his part and stated that an allegation of fraud cannot be raised lightly.

8. The application was disposed via written submissions where the Appellant submitted that they were not filing gaps but that the injuries as reported by the Respondent vis-à-vis those they collected from the hospital showed two different injuries to wit, that the letter from Kenyatta National Hospital indicated that the Respondent was admitted with acute burns in the burn unit. They stated that the Respondent wrongly claimed that his limb was cut off after extensive treatment at Kenyatta National Hospital.

9. In respect thereof, the Appellant relied on the cases of Samuel Kiti Lewa vs Housing Finance Co Kenya Ltd & another [2015] eKLR; Mzee Waujie & 93 others vs AK Saikwa & 3 others (1982-88) 1 KAR; Raindrops Limited vs County Government of Kilifi [2020] eKLR; and John Joel Kanyali vs SBM Bank (Kenya) Limited [2019] eKLR.

10. The Respondent submitted that the case cannot be reopened having given a background leading up to the application. He relied on the cases of Samuel Kiti Lewa vs Housing Finance Co Kenya Ltd & another [2015] eKLR; and Cyrus Shakhalakhwa Jirongo vs Soy Developers. The learned magistrate held that there were indeed weighty issues raised but dismissed the same as the alleged report that had this weighty evidence was made on 14.08.2023 whereas the trial was closed on 26.09.2023 and thus could not say it was new evidence. This resulted in the instant appeal.

Analysis

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. However, given that the matter was determined by affidavits, then the duty of this court is the same as the lower court. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

13. The sole issue for determination is whether the application met the threshold of reopening a case. The case must then be determined on the evidential threshold and the principles for re-opening of cases. In the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] KEELC 8 (KLR), the Court held that:

> "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 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 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, 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."

14. The Supreme Court has guided on this aspect of admitting new evidence. In the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others (2018) eKLR, they set out the principles governing allowing additional evidence as follows:-

> " We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> (a) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e) The evidence must be credible in the sense that it is capable of belief;
>
> (f) ...;
>
> (g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
>
> (h) ....
>
> (i) ...
>
> (j) ....
>
> (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

15. Kasango, J addressed a similar issue in the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR as follows:

> 20. 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 in ordinate and unexplained delay.

16. The Appellant submitted that new evidence had come to light, warranting the reopening of the case. It was the Appellant's contention that the Respondent had committed fraud, as the hospital records in the Appellant's possession differed from those supplied by the Respondent.

17. The records revealed inconsistencies in the treatments indicated. They state that the Record of Appeal demonstrates, at page 10, that the Respondent was treated for burns at the burns unit, and not for injuries arising from a road traffic accident. Further, a letter dated 02.08.2023 confirms this position. Additionally, page 14 of the Record of Appeal contains an investigation report dated 14.08.2023, prepared by the Applicant, which establishes that the Respondent indeed attended hospital on the said date but was treated for injuries unrelated to a road traffic accident.

18. What stands out and what the keen trial noted is that the trial court proceedings ended on 26.09.2023 and that the report that raised the weighty allegations of fraud came into possession barely a month before the date the case was closed. The said report was not available at the beginning of trial. It is thus new evidence.

19. The lower court was clearly wrong when he stated that there was undue delay. The test set forth by the Supreme Court in Mohamed Abdi Mahamud V Ahmed Abdullahi (supra) was thus met. The question of fraud is a serious one. The same goes to the very root of litigation. There was no earlier point that the application could have been made. The court finds that the case is a proper one for allowing. The court did not exercise its discretion judiciously in declining to allow the impugned application. There was no loss as the matter had not been concluded in terms of delivery of judgment.

20. The court has a duty to protect the integrity of the proceedings. However, the court will not set aside the proceedings. The court will only allow adduction of primary evidence showing fraud and re-examining the plaintiff in respect of those documents. The respondent will have a limited chance to offer rebuttal evidence. The court will thus re-open the case for adduction of evidence submitted without new evidence except that the respondent has a right to tender rebuttal evidence. The appellant and respondent's main witnesses shall be recalled for further cross examination on the new evidence, in addition to a requisite proper witness tendering the new evidence in strict compliance with rules of evidence.

21. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

22. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

23. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

24. The appellant was at fault for not being very diligent. They could have done better than they did. In the circumstances, each party will bear its own costs for the appeal and the application dated 11.10.2023.

Determination

25. In the upshot, I make the following orders:-

    a. The appeal is allowed as follows:

        i. An order is hereby issued reopening the plaintiff's case and the plaintiff's witnesses be recalled to adduce evidence.

        ii. An order is hereby issued reopening the defendant's case and the defendant is allowed to call their witnesses and/or to tender evidence in support of their case, and the plaintiff's advocates be at liberty to cross-examine the defence witnesses.

        iii. The defendant is granted leave to file a list and bundle of documents.

    b. Each party will bear its own costs for the appeal and the application dated 11.10.2023.

    c. The matter be mentioned on 22.10.2025 before the trial court to take directions.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

G & G Advocates for the Appellants

ANO Adovocates for the Respondent

Court Assistant – Michael