



**Skair Associates Limited v Kenya Methodist University (Civil Suit 2 of 2017) [2024] KEHC 5550 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL SUIT 2 OF 2017  
EM MURIITHI, J  
MAY 8, 2024**

**BETWEEN**

**SKAIR ASSOCIATES LIMITED ..... PLAINTIFF**

**AND**

**KENYA METHODIST UNIVERSITY ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> December 2022, brought under Article 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Order 18 Rule 10, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, Section 146 (4) of the Evidence Act and all other enabling provisions of the law, the Applicant seeks that:
  1. This Honorable court be pleased to grant the Defendant/Applicant herein leave to file a further List of Documents, Further List of Witnesses and Further Witness statements out of time within twenty one (21) days.
  2. This Honorable court be pleased to re-open the Plaintiff's case for fresh hearing to allow them an opportunity to address the new evidence to be adduced by the Defendant.
  3. The costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supported by an affidavit sworn by Njeri Mbugua, the Applicant's advocate and legal officer. He avers that the Plaintiff filed this matter on 3/2/2017 and in turn the Defendant filed its defence on 8/3/2017. During this period when this matter was filed, the Defendant was undergoing a massive and extensive overhaul of its key personnel due to the dire financial constraints which it was experiencing and is now slowly recovering from. This overhaul led to the exit of many of the employees of the Defendant who were not only directly involved in the transactions with the Plaintiff, but were also signatories and custodians of the documentation over the projects being undertaken by the Plaintiff. As a consequence



of the above, the Defendant has experienced great difficulty in tracing the witnesses and documents required for this matter. Despite the Defendant filing its documents on 6/6/2019, it continued with its attempts to trace the bulk of its documentation relating to this matter. Thereafter on 14/11/2019, this matter proceeded for hearing and the Plaintiff presented their case and proceeded to close it. The matter was to come up for defence hearing on 27/2/2020 but the same did not proceed as the Defendant was unable to procure the attendance of their witness in court. The Defendant has finally been able to trace several of its financial records relating to the transactions with the Plaintiff and it was able to reconcile its bank records. It is that reconciliation that led to the discovery of the undisputed sum of Ksh. 5,348,450, which the Defendant fully paid to the Plaintiff vide a consent dated 17/8/2022. The Defendant is now desirous to adduce these newly traced and reconciled financial records as part of its evidence. He is advised by their advocates that the orders sought will enable the court to adequately and fairly determine the substantive merits and the real questions or issues in controversy between the parties. He is further advised that the new evidence sought to be adduced is relevant and material to the facts in issue and it will aid the court in its adjudication. He avers that no prejudice that cannot be compensated by way of reasonable costs shall befall the Plaintiff in the event the orders sought are granted. He urges that unless the orders sought are granted, the Defendant will be condemned unheard and denied an opportunity to present all its evidence in this matter which will be prejudicial to it. In any event, the Plaintiff will have an opportunity to interrogate the new evidence and address it during the hearing of its case. The application has been brought without unreasonable delay and this court has unfettered discretion to grant the orders sought.

3. The Respondent opposed the application vide a replying affidavit sworn by Kairima Magambo, its director on 30/3/2023. He avers that this is an old case that has been pending in court since 2017 due to the Defendant's failure to defend it. The bank statements annexed to the Defendant's supporting affidavit were issued in 2011 and 2012 and there cannot be any justification to seek to rely on such reconciliation more than 10 years later. The inordinate delay in reconciling the accounts has not been explained in whichever manner. The Applicant has not satisfactorily explained the nature of the challenges it had in tracing its documentation, and the application is instituted in bad faith with the aim of dragging the matter in court without consideration of the nature of the commercial transaction that remains in issue to date.

## Submissions

4. The Applicant urges that it has a reasonable explanation for the delay in adducing the new evidence, and cites *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR, *Nicholas Kiptoo Arap Korir Slat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, *Benjamin Shikuku Iloke v Abdi Ali* [2020] eKLR, *Joseph Ndungu Kamau v John Njibia* [2017] eKLR. It reiterates that upon tracing the new financial records and reconciling them with the bank records, it acted in good faith and proceeded without any prompting from either the Plaintiff or the court to pay the Plaintiff the discovered sum of Ksh. 5,348,450. It urges the court to exercise its unfettered discretion and allow the application.
5. The Respondent urges that no witness statement or the alleged new evidence has been tabled and the inordinate delay has not sufficiently been explained, and cites *Gulf Energy Limited v East African Safari Air Express Limited* [2020] eKLR, *Walter Joe Mburu v Abdul Shakoob Sheikh & 3 Others* [2015] eKLR and *Japheth Pasi Kilonga & 8 Others v Mombasa Autocare Limited* [2015] eKLR. It accuses the Applicant of epitomizing the definition of obstruction of justice through undue delay and urges the court to dismiss the application with costs.



## Analysis and Determination

6. The 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.
7. There can be no doubt that there has been inordinate delay in bringing this application after the Respondent closed its case way back in 2019. The question that then begs is whether that delay was deliberate and unexplained.
8. The documents the Applicant seeks to file as new evidence, have varied dates spanning from July 2011 to March 2013, save for those received by the Applicant on 17/3/2022. The Applicant cites the difficulty in tracing those documents following the overhaul of its key personnel, as the reason for the delay. On its part, the Respondent faults the Applicant for failing to explain either the nature of the challenges it faced in tracing the documentation or the cause of the delay in reconciling the accounts.
9. Order 18 Rule 10 of the [Civil Procedure Rules](#) provides that:

“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.”
10. Order 50 Rule 6 of the [Civil Procedure Rules](#) provides for the power to enlarge time as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
11. The principles to be considered in an application to re-open a case were set out in [Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another](#) (2015) eKLR, where the court (Mary Kasango J.) rendered thus:

“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.”
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.

### **Orders**

14. Accordingly, for the reasons set out above, this court allows the Applicant's application dated 8/12/2022 in the following terms:-

1. The Respondent's case is hereby re-opened for purposes of filing the new documents.
2. The Applicant is hereby granted leave to file a further List of Documents, Further List of Witnesses and Further Witness statements out of time within 21 days.
3. The costs of the application shall be borne by the Applicant.
4. Mention for directions as to hearing on 19<sup>th</sup> June 2024.

Order accordingly

**DATED AND DELIVERED THIS 8TH DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

**M/S Wambugu & Muriuki Advocates for the Plaintiff.**

**M/S Patrick Law Associates Advocates for the Defendant.**

