



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 150 OF 2008

ANNE K. KIMATHI.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....DEFENDANT

Consolidated with

ELC CASE NO. 151 OF 2008

SUSAN MWALUDA.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....DEFENDANT

Consolidated with

ELC CASE NO. 152 OF 2008

EMMY CHEPKEMOI BUNEL.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....DEFENDANT

Consolidated with

ELC CASE NO. 153 OF 2008

HELLEN WESUTSA.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES....DEFENDANT

Consolidated with

ELC CASE NO. 154 OF 2008

MARY JEPKOECH CHEPYATOR.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES...DEFENDANT

Consolidated with

CAROLINE MUMBI NJEIGA.....PLAINTIFF

=VERSUS=

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES..DEFENDANT

RULING

1. Hearing of the above consolidated causes commenced before me on 25/1/2021. The plaintiffs led evidence by two witnesses and closed their cases on the same day. The defendant led evidence by one witness and closed their case on the same day. Parties were directed to file and exchange written submissions. The matter was given a mention date, for the purpose of fixing a date for judgement. In the intervening period, the defendant brought a notice of motion dated 12/3/2021, seeking the re-opening of the defence case. The said application is the subject of this ruling.

2. The application was premised on the ground that the defendant had obtained new evidence, previously not within its possession, and the new evidence would enable the court to satisfactorily adjudicate the issues in the consolidated suits. The application was supported by the affidavit of Peter K Rotich in which he deposed that the plaintiffs had in their evidence during trial denied having been served with completion notices yet the notices were duly served upon them. He added that prior to the hearing of the case, the defendant was unable to trace the said completion notices because the advocates who acted for them in the relevant transactions, M/s Kale Maina & Bundotich Advocates, were not able to trace the completion notices despite reminders from the defendant's advocates on record. He further deposed that upon closing the defence case, the said advocates were able to trace the completion notices. He exhibited a signed witness statement by **Esther Onsembe**, the counsel who purportedly handled the transactions. The defendant filed a supplementary affidavit by the same deponent, in which he deposed that the instant application was served on the plaintiffs in March 2021 prior to the filing of submissions by the plaintiffs.

3. The application was canvassed through written submissions dated 5/7/2021, filed through the firm of **M/s Mwaura & Wachira Advocates**. Counsel submitted that the issue of completion notices only arose during trial on 25/1/2021 when the plaintiffs denied service of completion notices. Counsel cited the 2020 High Court decision in the case of **Rain Drops Limited V County Government of Kilifi (2020) eKLR** in which the court outlined the principles upon which a trial court's jurisdictions to re-open a party's case is exercised. Counsel submitted that there was no prejudice to be suffered by the plaintiffs because service of completion notices was a matter of fact. Counsel added that the intended re-opening of the defendant's case was not intended to fill gaps in the defendant's case. Counsel further submitted that the defendant brought the application promptly and had demonstrated through evidence that the evidence they intended to adduce was not available to them despite exercise of reasonable diligence. Counsel contended that the applicant had satisfied the criteria for re-opening of a party's case.

4. The 1st and 4th plaintiffs opposed the application through grounds of opposition dated 5/6/2021 in which they contended that they stood to be prejudiced if the defendant was allowed to re-open their case. They filed written submissions dated 29/6/2021 through the firm of **Okubasu, Munene & Kazungu LLP**, in which they identified the key issue in this application to be the question as to whether the application sufficiently merited issuance of the orders sought. Counsel submitted that the new evidence which the defendant sought to introduce will impose an extra burden on the plaintiffs and would be prejudicial. Counsel cited, inter alia, the decision of the Supreme Court of Kenya in **Raila Odinga & 5 others v I E B C & 3 others, SCK Presidential Petition [2013]eKLR** and urged the court to reject the application.

5. The 2nd defendant opposed the application through a replying affidavit sworn on 14/6/2021. She deposed that DW1 had during his testimony stated that completion notices were not served. She added that re-opening the defendant's case would be prejudicial to the plaintiffs who had already closed their cases and would be an affront to the objective of expeditious dispensation of justice.

6. The 2nd, 3rd, 5th and 6th plaintiffs filed written submissions through the firm of **M/s Letangule & Co. Advocates**. Their counsel submitted that the single issue falling for determination was whether the orders sought in the application should be granted. Counsel emphasized that during cross-examination, DW1 testified that there was no completion notices issued, contrary to the Law Society of Kenya Conditions for Sale. Counsel added that re-opening the case would be prejudicial to the plaintiffs. Urging the court to dismiss the application, counsel relied on the decision in **Johana Kipkembo Too v Hellen Tum [2014] eKLR**.

7. I have considered the application together with the responses thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in this application is whether the application satisfies the criteria upon which our trial courts exercise jurisdiction to re-open a party's case in a civil trial.

8. Both the Civil Procedure Rules and the Evidence Act do not have clear and express framework on how jurisdiction to re-open a party's case and receive additional evidence is to be exercised. **Section 146(4)** of the **Evidence Act** generally grants the court powers to recall a witness. It provides thus:

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

9. Similarly **Order 18 rule 10** of the **Civil Procedure Rules** grants the court powers to recall any witness who has been examined. It provides thus:

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. Over the years, our courts and courts in the Commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a 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 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. (See **Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others (2018) eKLR**; **Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another (2015) eKLR**; and **Ladd v Marshall (1954) 3 All ER 745**).

11. The present application was brought after parties had closed their respective cases and after the court had given directions on the filing of submissions. None of the parties had filed written submissions at the time the application was filed. The applicant contends that the evidence they wish to place before court was not available at the time they led evidence because the advocates who handled the transactions giving rise to the disputes in these consolidated causes, M/s Kale Maina & Bundotich Advocates, could not trace and avail the said documentary evidence. This contention has not been controverted through evidence by the plaintiffs.

12. The documentary evidence which the defendant wishes to place before court relates to the question of whether or not completion notices were issued to the plaintiffs. That question is relevant to the just and fair adjudication of the dispute in these consolidated causes. The plaintiff will have the opportunity to interrogate the said evidence through cross-examination.

13. The plaintiffs contended that DW1 had categorically denied service of completion notices. I have looked at the record. When asked whether the defendant issued rescission notices, DW1 responded thus:

“I do not know if we gave notice of rescission.”

14. It is therefore not correct that DW1 categorically denied issuance of completion notices. He testified that he did not know if the notices were issued.

15. Taking the foregoing into account, it is the view of this court that justice will best be served if the said evidence is received and considered alongside what is already before court. The additional costs to be suffered by the plaintiffs will be indemnified through an award of costs.

16. Consequently, I allow prayers 2, 3 and 4 of the notice of motion dated

12/3/2021. The defendant will pay each law firm on record for the plaintiffs a sum of Kshs 20,000 as costs, payable within 30 days from today.

17. Because I am no longer stationed at Milimani ELC, I direct that the proceedings in this file be typed forthwith. The Milimani ELC Deputy Registrar shall list the file for directions before the relevant Judge at Milimani ELC. Appropriate directions will be given by the Judge after hearing presentations from the parties on how they wish to proceed to conclusion of the consolidated causes, noting that I am no longer based at Milimani ELC Station. On my part, I will give this matter a mention date before the Deputy Registrar at Milimani at the time of reading this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Munene for the 1st and 4th Plaintiffs

Ms Nduta for the 2nd, 3rd, 5th, and 6th Plaintiffs

Court Assistant: Lucy Muthoni

NOTE:

The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court

Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE