



**Samoei v National Housing Corporation & another (Civil Suit  
E008 of 2020) [2023] KEHC 17919 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E008 OF 2020  
RN NYAKUNDI, J  
MAY 23, 2023**

**BETWEEN**

**WILLIAM CHERUIYOT SAMOEI ..... PLAINTIFF**

**AND**

**NATIONAL HOUSING CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**TIMON KIPKOECH TOO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 The applicant approached this court vide an application dated February 28, 2023 seeking the following orders;
  1. Spent
  2. Spent
  3. The honourable court be pleased to set aside the directions given on February 7, 2023 and on February 14, 2023.
  4. The honourable court be pleased to re-open the defence case and allow the 1<sup>st</sup> defendant to tender their viva voce evidence.
  5. Costs of this application be in the cause.
- 2 The application is premised on the grounds set out therein and the contents of the supporting affidavit of Kennedy Nyariki.

**Applicant's Case**

- 3 The applicant contends that this matter came up for mention for directions on February 7, 2023 whereby parties agreed the suit to proceed by way of written submissions. The parties were



directed to file the same and the matter be mentioned to confirm filing of the same on February 14, 2023. He stated that the 1<sup>st</sup> defendant filed submissions dated February 10, 2023 but the plaintiff did not. Further, that on February 14, 2023, the plaintiff successfully made an application to give viva voce evidence and he testified.

- 4 The applicant stated that its advocate mistakenly closed the defence case and the matter was fixed for filing of submissions on March 7, 2023. He urged that it is in the interest of justice that the defence case be re-opened so that the 1<sup>st</sup> defendant be granted a chance to tender their evidence so that this suit can be determined on merit. Further, that the directions issued on 7<sup>th</sup> and February 14, 2023 be set aside and the matter be fixed down for defence hearing in the interest of justice as a party should not be punished because of the mistake of an advocate.

### **Respondent's Case**

- 5 Learned counsel for the respondent opposed the application vide a grounds of opposition dated May 16, 2023. He urged that the application was untenable in law and an abuse of the court process. Further, that the court is functus officio in so far as the said directions are concerned and, that the orders can only be set aside pursuant to Order 45 of the *Civil Procedure Rules* 2010.
- 6 Counsel contended that during the pretrial conference pf December 6, 2022it was settled and agreed by al parties concerned that the only issue for determination was whether the in duplum rule applies to the 1<sup>st</sup> defendant. The arrears in respect of the outstanding loan are not in dispute. He urged that the court directed the matter be determined by way of witness statements, affidavits on record and directed parties to file written submissions. The plaintiff testified in respect to the interlocutory judgement entered against the 2<sup>nd</sup> defendant and it was a formal proof hearing. He stated that given the circumstances there is no reason for viva voce evidence and consequently, he prayed the court dismiss the application.

### **Analysis & Determination**

- 7 The following issue arises for determination;

#### **Whether the defence case should be reopened for hearing**

- 8 The applicant contends that the advocate on record mistakenly closed the defence case is the main ground for seeking the reopening of the defence case. I have perused the record of the court and it is evident that the parties were directed by the court to determine the matter by way of witness statement, affidavits and documents on record. The trial then proceeded and the defence closed its case after the plaintiff had given viva voce evidence in terms of formal proof. I am at pains to reconcile what amounts to mistake of the advocate in this case. There should be a line drawn between mistake and negligence. It is my considered view that the defendant's advocate was well aware of the directions and closed its case knowing the implications of the same. counsel was at liberty to make an application to have the defendant testify and elected not to. Therefore, the present application is an afterthought and an abuse of the court process. Further, the matter being set down for formal proof, the documentary evidence tendered subject to the directions of the pre-trial directions is sufficient to determine the matter on merit.
- 9 In this I am bolstered by the cases of *Wavinya Mutavi v Isaac Njoroge & another* (2020) eKLR the court in disallowing an application similar to this one 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."

- 10 Similarly, in *Smith v New South Wales* (1992) HCA 36 , (1992) 176 CLR 256 where it was held: " If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."
- 11 Sequence of events in this litigation does not inspire confidence for this court to exercise discretion to re –open the proceedings as urged by the applicant. The guidelines in the above cases shuts the door for the Applicant to proceed further to adduce evidence in support of his case.
- 12 I am of the considered view to also invoke the doctrine of estoppel for there is a season to commence proceedings and a season to terminate. Proceedings are not to be conducted ad infinitum. This is a formidable armoury against the applicant's motion. I am guided by the wise words of Bosire, J.A in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2007] eKLR where he stated as follows:  
This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down."
- 13 I am of the view that the present circumstances do not merit the allegation that there was mistake of advocate. Forgetting that there is a witness who is to testify is not a mistake as during pre-trial, the requisite documents are filed and this always includes a list of witnesses. The present application is an attempt to delay the matter and the court shall not participate in the delay of justice.
- 14 In the premises I decline to grant the orders sought and dismiss the application with costs to the respondent.

**DELIVERED, VIA MAIL DATED AND SIGNED AT ELDORET ON THIS 23<sup>RD</sup> DAY OF MAY 2023**

**R. NYAKUNDI**

**JUDGE**

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