REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 174 OF 2018

DR. SELINA VUKINU AMBE.....PLAINTIFF/RESPONDENT

VERSUS

CYLLUS GODFREY ONYANGO.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 16th December, 2019 lodged by the defendant/applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The following are the orders being sought therein:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to re-open the defendant's/applicant's case for purposes of allowing him to take the stand and tender evidence in support of his case in response to the allegations of defamation by the plaintiff/respondent.

(iv) THAT this Honourable Court be pleased to make any such order or further orders it may deem fit, fair and just in the circumstances and in the interest of justice.

(v) THAT the cost of the application be in the cause.

2. In his affidavit, the applicant stated that when the matter came up for defence hearing on 12th November, 2019, neither he nor his advocates were present in court at the time the matter was called out for the reason that on the said date, all roads leading to Milimani Law Courts were closed at 8.30 am to pave way for the presidential convoy to pass, thereby resulting in heavy traffic jam.

3. The applicant further stated that by the time he and his advocate arrived in court at 9.45 am they discovered that this court had already called out all matters appearing on the cause list for the day and had ordered the parties herein to file written submissions on the case.

4. It is the assertion of the applicant that their lateness in court on the material date was not deliberate and that it would be in the interest of justice that his case be re-opened to enable him testify.

5. The plaintiff/respondent put in her replying affidavit to oppose the Motion by stating that both parties were well aware of the hearing date hence it fell upon the applicant to ensure his timely attendance of the same and that on her part, she was able to arrive in court in good time.

6. The respondent asserted that this court properly exercised its discretion in closing the applicant's case by reason of his absence in court and that the applicant has therefore not demonstrated any sufficient cause for the re-opening of his case.

7. The Motion was dispensed with through the filing of written submissions. On his part, the applicant submitted that he has given a reasonable explanation for the delay in arriving in court for hearing on the material date and urged this court to consider the following analysis made in the case of **Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR:**

"Quite clearly the issue for the court to determine in the instant matter is whether the defendants have provided a reasonable and justifiable basis for the court to exercise its discretion to allow them to re-open the case for the defence which they had closed and parties have filed their final submissions on the basis of the evidence adduced at the trial. The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the court to exercise its discretion. In the present case the question for the court to answer is whether the defendants have satisfied the threshold by providing a rational basis for the court to allow the reopening of the

defence case and calling of further evidence."

8. The applicant further urged this court to consider his constitutional right to be heard in exercising its discretion in his favour.

9. It is also the argument of the applicant that the respondent does not stand to be prejudiced in any manner since she had an opportunity to present her evidence against the applicant, whereas he has not had such an equal opportunity. The applicant referred this court to *inter alia*, the case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR** whereby the court rendered that the discretion of the court in determining whether to re-open a party's case should not be exercised in a manner that embarrasses or prejudices the opposing party.

10. The applicant contends that there has been no inordinate delay in bringing the application which would hinder this court from exercising its discretion in his favour.

11. In reply, the respondent on her part reiterated the averments made in her replying affidavit and submits that the applicant had failed to show sufficient cause to convince this court to exercise its discretion in his favour. To further define the term 'sufficient cause,' the respondent cited the case of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR** in which the High Court appreciated that:

> ***"Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. Therefore, that the defendant must demonstrate that he was prevented from attending court by a sufficient cause."***

12. According to the respondent, the matter was called out past 10 am on the material date thereby countering the averment of the applicant that he arrived in court by 9.45 am.

13. It is the argument of the respondent that should this court find that the applicant has given sufficient reason for the re-opening of his case, then it would be proper to hold that the applicant lacks a triable defence and therefore decline the order on that basis.

14. I have duly considered the grounds as presented in the Motion, the facts deponed in the supporting and replying affidavits, and the competing written submissions together with authorities cited.

15. The guiding principles in determining whether to re-open a party's case were discussed in the case of **Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo [2019] eKLR** in the manner hereunder:

> ***"…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 part's case does not embarrass or prejudice the opposite party…the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant."***

16. It is clear from the above that courts retain the discretionary power to decide whether the circumstances presented before them are appropriate for the re-opening of the case. It is also clear that such discretion ought to be applied in a judicious manner, as held in the case of **Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR** cited by the applicant.

17. Having established the above, I will first consider the issue to do with whether the application has been brought without unreasonable delay. The record shows that the matter was scheduled to come up for defence hearing on 12th November, 2019 while the present application was filed on 18th December, 2019. From my observation, though there was a delay of about one (1) month in bringing the application, I do not find the same to be inordinate in nature.

18. This brings me to the issue touching on whether sufficient reason has been given by the applicant for his non-attendance to defend his case. Guided by the record, I note that when the matter came up for defence hearing on 12th November, 2019 only the plaintiff's advocate was in attendance. I also note that the aforesaid date was taken in court on 17th October, 2019 by consent of the parties and that on which date the respondent's advocate sought for an adjournment.

19. Upon considering the explanation offered by the applicant, I find it strange that there is no indication that his advocate made any attempts to have a colleague hold his brief and bring his tardiness to the attention of the court, which is essentially what ought to have happened in the circumstances. As it stands therefore, there is nothing to show that either the applicant or his advocate attended the court premises on the material date.

20. In tandem with the above is the issue concerning the prejudice; if any; which will be visited on the respondent should the case be re-opened. Upon considering the arguments presented by the parties, I note on the one part that the respondent did not demonstrate the prejudice she stands to suffer in the premises. On the other part, I find the applicant's explanation on prejudice to be reasonable since the record shows that the respondent testified and closed her case while the applicant has not had a chance to present his evidence in support of his defence. In the circumstances, I am convinced that there is no indication of prejudice or embarrassment that will befall the respondent.

21. From the foregoing, I am of the view that whereas the applicant did not bring any credible evidence to support his explanation on his absence from court on the date of hearing, the interest of justice requires me to consider the impact of locking his evidence out of the case, taking into account the fact that the claim by the respondent is of a defamatory nature. Having done so, I am of the view that in the interest of substantive justice and in realization of the applicant's constitutional right to a fair hearing, I will exercise my discretion in granting the applicant an opportunity to defend his case.

22. The upshot is that the Motion is allowed in terms of prayer (iii) and the order made on 12th November, 2019 closing the defendant's/applicant's case is hereby set aside and is substituted with an order re-opening his case. Parties to set down the suit for defence hearing at the earliest possible date.

Costs of the application assessed at Kshs. 10,000/= are awarded to the respondent. The same to be paid within 14 days from the date of this ruling.

Dated, Signed and Delivered at Nairobi this 16th day of July, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

…….. for the Plaintiff/Respondent

…….. for the Defendant/Applicant