REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 25 OF 2016

RAI PLYWOODS (KENYA) LIMITED..PETITIONER

-VERSUS-

SUB-COUNTY COOPERATIVE OFFICER, TURBO & SOY..........1ST RESPONDENT

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT..........2ND RESPONDENT

ATTORNEY GENERAL...3RD RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **21 December 2018.** It was filed by the Petitioner pursuant to **Articles 50 and 159** of the **Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A** and **63(e)** of the **Civil Procedure Act, Order 51(1)** of the **Civil Procedure Rules**, and all enabling provisions of the Law. It seeks the following orders:

> **[a]** Spent
>
> **[b]** Spent
>
> **[c]** That the Petitioner's case closed on **5 December 2018** be re-opened;
>
> **[d]** That upon grant of Prayer **[c]** above, the Petitioner's witness, **Mr. Philip Varghese,** be recalled to testify to introduce a new document that will assist in the determination of this case;
>
> **[e]** That costs be in the cause.

[2] The application is premised on the grounds that when the matter proceeded for hearing of the Petitioner's Case on **5 December 2018**, it transpired that an important document had been inadvertently left out; and that there is need to introduce it on record. The said document is a Resolution to Sue and Authority to **Mr. Philip Varghese** to testify for and on behalf of the Petitioner and Instructions to **M/s Nyairo & Company Advocates** to act for the Petitioner in this matter, which had not been placed on record at the time; and therefore the witness did not have an opportunity to refer to and produce the same.

[3] It was further averred that no prejudice will be suffered by the Respondent if the orders sought are issued; and that the application has been promptly brought and is intended to serve the interest of justice. The foregoing grounds were explicated in the supporting Affidavit, sworn by **Mr. Philip Varghese** on **21 December 2018** and filed therewith, and the document sought to be introduced was annexed to that affidavit as **Annexure "PV 1".** It was further averred that failure to attach the document was not deliberate, but was due to an oversight; and that the orders sought are necessary to enable the Court deal with the real issues in question.

[4] The Respondents opposed the application and filed their respective Grounds of Opposition. According to the Respondents, the application is incompetent, untenable, frivolous and devoid of any merit as the Supporting Affidavit is full of falsehoods, misrepresentation of facts and inconsistencies specifically tailored to mislead the Court; and that it is intended to patch up the Petitioner's case with a view of sealing gaps exposed during cross-examination. It was further the contention of the Respondents that the application is an afterthought since this matter came up on diverse dates during which the Petitioner intimated that it had fully complied with **Order 11** of the **Civil Procedure Rules**; and therefore that they stand to suffer grave prejudice should the Petitioner be allowed to re-open its case and introduce fresh documents.

[5] The application was urged on **12 February 2019** by **Ms. Odwa** on behalf of the Petitioner, while **Mr. Yego** and **Mr. Wabwire** appeared for the Respondents. **Ms. Odwa** reiterated the Petitioner's assertion that the failure to file the Resolution was innocent and inadvertent; and that the omission was not noted until **5 December 2018**. She added that no prejudice will be suffered if the application is allowed, considering that the Respondents are yet to adduce their evidence. She relied on **Joseph Ndungu Kamau vs. John Njihia [2017] eKLR; Leo Investments Ltd vs. Trident Insurance Co. Ltd [2014] eKLR** and **Bogani Properties Ltd vs. Fredrick Wairegi Karuri [2015] eKLR** in urging the Court to allow the application. She also pointed out that the factual averments in the Supporting Affidavit stand uncontroverted, granted that the Respondents opted to file Grounds of Opposition instead; and therefore no affidavit has been filed demonstrating the prejudice that they Respondents will suffer should the application be allowed.

[6] Mr. Yego, Learned Counsel for the 1st Respondent underscored their assertion that the application is an afterthought, noting that whereas the Petition was filed in **2016**, it took the Petitioner until **December 2018** to file the present application, after the Petitioner had closed its case. He further submitted that no explanation at all was given for that inordinate delay; or for the delay between **5 December 2018** when the omission allegedly came to the attention of the Petitioner and **24 January 2019** when the instant application was filed. He also urged the Court to note that the Petitioner backdated the application to **21 December 2018** and yet the truth was that the application was prepared and filed on **24 January 2019;** which, in his view is a clear act of deception that would disentitle the Petitioner to the Court's discretion.

[7 It was also the submission of **Mr. Yego** that the application has simply been brought to patch up the gaps exposed in the Petitioner's case by the Respondents' cross-examination of **5 December 2018**. He therefore contended that the application has been brought in bad faith to achieve ulterior motives, given that the Petitioner's witness did not indicate, in his evidence, that there was a resolution in existence when the Petition was filed. He pointed out that the Respondents will be prejudiced because to allow the application would be for the Court to aid the Petitioner in stealing a march on them. He submitted that the cases relied on by the Petitioner are all distinguishable in that, in the case of **Joseph Ndungu Kamau vs. John Njihia [2017] eKLR,** the evidence was not available while in this case, it is the contention of the Petitioner that the Resolution was all along available but was not filed due to inadvertence. As for the case of **Leo Investments Ltd vs. Trident Insurance Co. Ltd** (supra), Counsel submitted that it was in respect of ratification; which is not the case in this instance. He therefore prayed that the application be dismissed.

[8] Mr. Wabwire, Learned Counsel for the 2nd and 3rd Respondents similarly opposed the application positing that the Petitioner/Applicant has not met the parameters to warrant the re-opening of its case. He pointed out that no new matter had been brought to the attention of the Court which was not available on **5 December 2018**. He further pointed out that the issue of the Resolution was pleaded by the 2nd and 3rd Respondents in their Response to the Petition filed on **4 May 2018**; and that although the Petitioner filed a lengthy affidavit in **July 2018**, there was no specific response to the issue therein or in the Supplementary Affidavit filed thereafter. He therefore postulated that the application has been brought at this point in time for the sole purpose of patching up the Respondent's case, granted that **PW1** was explicit in his testimony that there was no resolution. He was also of the posturing that the authorities relied on by Counsel for the Petitioner are distinguishable as ratification can only be done prior to close of pleadings. He prayed that the application be dismissed.

[9] I have carefully considered the application in the light of the pleadings filed and proceedings herein. I have also considered the submissions made herein by Learned Counsel for the parties in respect of the application and the authorities cited. The essence of the said application is the question whether or not the Court should exercise its discretion in favour of the Petitioner by allowing it to re-open its case and adduce additional evidence. In particular, the Petitioner seeks to produce a Resolution of its Board of Directors dated **2 December 2016**, by which it sanctioned the filing of this Petition; authorized Mr. Varghese to testify for and on its behalf in connection with this Petition; and appointed the law firm of **M/s Nyairo & Company Advocates** to act for it herein.

[10] Doubtless, the Court has powers to grant the orders sought. In particular **Section 63(e)** of the Civil Procedure Act to grant necessary orders for the ends of justice. It states that:

> **"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed...make such other interlocutory orders as may appear to the court to be just and convenient."**

[11] Accordingly, in **Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Limited & Another [2015] eKLR** it was held by **Hon. Kasango, J.** 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 in ordinate and unexplained delay**."

[12] Thus, a consideration of the record shows that this is a Petition that was filed on **15 December 2016** on behalf of a limited liability company. The Petitioner did not file a resolution of the Company for **purposes of Order 4 Rule 1(4)** of the **Civil Procedure Rules**; and whereas it is now settled that such a resolution need not be filed at the time of institution of the suit provided it is filed before the suit is fixed for hearing, no such resolution was filed by **5 December 2018** when the Petitioner closed its case. It is noteworthy that the Petitioner proceeded to close its case without having the said resolution, notwithstanding that the 2nd and 3rd Respondents had raised the issue at Paragraph 4 of their Response to the Petition filed on **24 May 2018**; and notwithstanding that the issue had been raised in cross-examination of **PW1**.

[13] Whereas the Petitioner explained that failure to file the resolution was not deliberate, but due to inadvertence, no explanation was given as to why it took over two years to have the anomaly corrected; granted that the issue had been pleaded by the 2nd and 3rd Respondents. In the **Samuel Kiti Lewa Case** (supra), the Court cited with approval the Australian Case of **Smith vs. New South Wales [1992] HCA 36** in which it was held that:

> **"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..."**

[14] It is also noteworthy that, even after the proceedings of **5 December 2018**, there was no eagerness on the part of the Petitioner to have the default rectified; for the instant application was not filed until **24 January 2019**. Again, no explanation was proffered for the lapse of time between **5 December 2018** and **24 January 2019.** It is also inexplicable, if indeed the application was ready for filing on **21 December 2018** as purported, why it was not filed immediately.

[15] For the foregoing reasons, I am not persuaded that the Petitioner is deserving of the Court's discretion. To the contrary, it evident that the Petitioner's application is indeed an afterthought and is therefore devoid of merit. In the premises, I would dismiss the same with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH 2019

OLGA SEWE

JUDGE