



**Erdemann Property Limited v Safaricom Staff Pension Scheme Registered Trustees  
(Environment & Land Case 9 of 2019) [2025] KEELC 4829 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 9 OF 2019  
CA OCHIENG, J  
JUNE 24, 2025**

**BETWEEN**

**ERDEMANN PROPERTY LIMITED ..... PLAINTIFF**

**AND**

**SAFARICOM STAFF PENSION SCHEME REGISTERED  
TRUSTEES ..... DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated the 19<sup>th</sup> March, 2025 where it seeks orders the following Orders:
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court be pleased to review and set aside the orders of 15<sup>th</sup> October, 2025 marking the Plaintiff/Applicant's case as closed and re-open the hearing of the Plaintiff/Applicant's suit to the extent of allowing the testimony S.S. Jabbal, Chartered Quantity Surveyor.
  - e. That the Honorable Court be and is hereby pleased to issue any such consequential orders as may be necessary to give effect to prayer (d) above.
  - f. That the costs of this Application be in the cause.
2. The application is based on grounds on its face and on the supporting affidavit of Beatrice Ngumbau, Advocate, the Plaintiff's Legal Manager. She pleads with the court to exercise its discretion to re-open the proceedings of 15<sup>th</sup> October, 2024 and allow the Plaintiff's expert witness, one S.S. Jabbal,



- a Chartered Quantity Surveyor of Jabbal Limited to testify by producing the financial loss reports marked as the Plaintiff's 'MFI-7 & MFI8'.
3. She explains that the said witness was slated for a rescheduled hearing on 15<sup>th</sup> October 2024 when he was precluded from testifying on account of the order of this Court closing the Plaintiff's case despite the Plaintiff's Counsel having intimated the unavailability of the expert on 15<sup>th</sup> October 2024 and requesting that his testimony be taken on the subsequent hearing date, being 16<sup>th</sup> of October, 2024.
  4. She contends that amongst the orders sought by the Plaintiff in its amended Plaint dated the 25<sup>th</sup> April 2022 is an order of special damages in the tune of Kshs.324,886,296/= pleaded as a request for restitution on account of the destruction of its sewer line by the Defendant thus this court's orders marking the Plaintiff's case as closed adversely hampers its ability to pursue just compensation. Further, that the invitation for an order of permanent injunction pursued by the Plaintiff as prayer (a) in its amended Plaint would, if allowed, be insufficient as a just recompense for the destruction of its sewer line, as the Defendant already proceeded with the destruction of the said sewer line, when this Court vacated the temporary injunctive orders previously issued.
  5. She claims that the Plaintiff's request for amendment of Plaint to plead the particulars of loss suffered, was occasioned by loss suffered following destruction of its sewer line by the Defendant and contends that no prejudice will be visited on the Defendant in having a holistic resolution of the real issues in controversy as it will have an opportunity to cross-examine the expert witness.
  6. She avers that the Plaintiff does not contemplate to introduce new issues through the said witness and the application is filed without unreasonable delay, considering that the Plaintiff's advocate on record had been away on compassionate leave.
  7. The application is opposed by the Defendant vide Grounds of Opposition filed herein. It contends that the Plaintiff has not satisfied the conditions for review of a court order as set out under Order 45 of the Civil Procedure Rules. It argues that the instant application is a merit appeal against the order closing the Plaintiff's case disguised as a review application and that the court ought to reinforce the principle of finality in litigation.
  8. The Defendant also opposed the instant application vide the replying affidavit of Richard Gitahi, its Trust Secretary. He gives an outline of the history of the case and avers that on 10<sup>th</sup> February 2022, this suit was dismissed for non-attendance and want of prosecution on the part of the Plaintiff by Hon. Lady Justice C. Ochieng and an injunction order issued pending determination of the suit was vacated on the same date. He explains that following an application seeking to reinstate the suit, it was reinstated by Hon. Lady Justice C. Ochieng through a ruling delivered on 7<sup>th</sup> March 2022. He points out several instances when the suit was adjourned at the Plaintiff's own instance and contends that on 15<sup>th</sup> October 2024, PW2 testified in full and Counsel for the Plaintiff voluntarily closed the Plaintiff's case. Further, that on the following day, on 16<sup>th</sup> October 2024, DWI- DW3 testified in full, and the defence closed its case, after which directions on submissions were issued.
  9. He states that, thereafter this suit was mentioned severally to confirm filing of submissions and in all instances, there was no indication that the Plaintiff intended to re-open its case. Further, that on 24<sup>th</sup> March 2025, this court reserved a judgment date for 24<sup>th</sup> June 2025, thus there is inordinate delay in moving the court for the prayers now sought as the instant application was filed on 19<sup>th</sup> March 2025, a period of over five (5) months, since the close of the case. He contends that delay has not been explained and that there was no communication from the Plaintiff's Counsel about the advocate on record being on compassionate leave and in any case, any advocate from the law firm on record would have handled the matter.



10. He reiterates that the Plaintiff's Counsel closed the Plaintiff's case on his own volition and now intends to fill in gaps, to prove its case for special damages, which action will extremely prejudice the Defendant since it will take away a legitimate defence. He insists that the Plaintiff did not substantiate or prove its claim for special damages as sought in the amended Plaint. Further, that the witnesses called and evidence produced in defence were a direct answer to the Plaintiff's case as presented. He reaffirms that if the Orders sought are granted, the defence will also have to reopen its case, with implications of delaying litigation
11. He also avers that the trial court has been transferred to Nairobi, and the Defendant continues to incur injury as well as further legal fees as long as the suit is not fully determined. He urges the Court to take note of the conduct of the Plaintiff in this matter, which demonstrates that it has no genuine intention of having the issues speedily resolved on merit, including disinterest in resolving the matter amicably. Further, that the Plaintiff has abandoned the sewer line subject matter of this suit.
12. He accuses the Plaintiff of withholding material facts from the Court and points out that it failed to disclose that the Plaintiff's Counsel voluntarily closed the Plaintiff's case on 15<sup>th</sup> October 2025, yet it now heavily suggests that the expert witness was precluded from testifying by virtue of "order of the Honourable Court" closing the Plaintiff's case, thus attempting to shift responsibility.
13. In reply to the Defendant's replying affidavit, the Plaintiff filed a further affidavit sworn by Beatrice Ngumbau. She reiterates her averments in her supporting affidavit to the Plaintiff's Notice of Motion and avers that the reasons for the absence of the Plaintiff's expert were argued before the Honourable Court, to wit, his bereavement and the obituary confirming the interment of his relative on the material date was shared with both Counsel for the Defendant and the Court. Further, that Article 50 of *the Constitution* includes the right to have this Court determine the real issues in dispute and that there is no evidence from the Defendant that the reopening of the Plaintiff's case would alter the character of its case or occasion a miscarriage of justice in the context it suggests.

### Submissions

14. The Plaintiff submits that the Court has discretion to reopen a party's case. It further submits that where good cause is shown and the evidence sought to be produced is significant, Courts have readily re-opened cases. It argues that a just determination of the case would only be achieved, in allowing a holistic determination of the real issues in dispute. Further, that under Article 159 (2) of *the Constitution*, procedural concerns should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. To buttress its averments, it relied on the following decisions: Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Anor [2015] KEHC 3930 KLR; Raindrops Limited v County Government of Kilifi [2020] eKLR; Cason v State 140 MD App 379 [2001] and James A. Mohol v Kenya Breweries Limited [2012] eKLR.
15. On its part, the Defendant submits that the Plaintiff has not met the legal threshold for grant of review. Further, that since the prayer sought is an equitable relief, it is incumbent upon the Plaintiff to disclose all material matters as a show of good faith in moving the Court in the manner that it did but it has failed to do so. It urges the court to consider the history of the matter in determining the instant application and reiterates that it will be extremely prejudicial if the Plaintiff's case is re-opened. To buttress its averments, it relied on the following decisions: Republic v Public Procurement Administrative Review Board and 2 others (2018) eKLR and Manju Naul v George Macheho Mungai, Stephen Mungai S. Kamau & Opinder Singh Naul [2017] KEHC 413 (KLR).



## Analysis and Determination

16. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether this Court should review/ set aside the orders issued on the 15<sup>th</sup> October, 2024 and reopen the Plaintiff's case.
17. The Plaintiff has sought for the review of this Court's Orders issued 15<sup>th</sup> October 2025 marking the Plaintiff's case as closed and contends that their case should be reopened to allow the testimony S.S. Jabbal, Chartered Quantity Surveyor. The Plaintiff in its supporting affidavit claims that the said witness was slated for a rescheduled hearing on 15<sup>th</sup> October 2024 but he was precluded from testifying on account of the order of this Court that closed its case despite its Counsel having intimated the unavailability of the expert on 15<sup>th</sup> October 2024 and requesting that his testimony be taken on the subsequent hearing date, being 16<sup>th</sup> of October, 2024.
18. The Defendant has opposed the instant application and highlighted the proceedings herein. Further, it contended that the Plaintiff had not met the threshold for review. The Defendant insists that the Plaintiff closed its case on its own volition and that the witness sought to be introduced has always been available. Further, that the Plaintiff filed the instant application seeking to reopen its case to fill in the gaps in its evidence, which action would greatly prejudice the Defendant in the manner outlined in its replying affidavit.
19. From a perusal of the Court records, I note the Plaintiff had been granted several opportunities to present their case but they failed to present the witness. From the Plaintiff's supporting affidavits, it seems at one moment it sought to blame the Court for closing its case. I however opine that it is the Plaintiff's Counsel who voluntarily closed the Plaintiff's case on 15<sup>th</sup> October 2025. It is worth noting that this matter was scheduled for judgment on 24<sup>th</sup> June 2025, parties having closed their cases in October, 2024 and the Plaintiff's Counsel only sought to reopen its case after the Defendant had filed its submissions and after around five (5) months.
20. Courts are clear that an application for review must be brought within the parameters set out at Order 45 Rule 1(b) of the Civil Procedure Rules. The Court of Appeal stated as follows in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2019]eKLR;  

“An order for review is restricted to parameters set out by the law. The Appellant may have had a genuine grievance but this did not fall within the ambit of a review application.”
21. While this Court has discretion to allow an application to re-open a case, it ought not to allow it, if it is sought to fill in gaps in evidence. In *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, it was held that:  

“20. 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.”



22. Further, in *Hannah Wairimu Ngethe v Francis Mungai Ng'ang'a & another* [2016] eKLR, it was stated:
- “.....In my view this is an attempt by the Petitioner to have a second bite at the cherry. If he is allowed to re-open his case so as to prove it this would amount to allowing him to fill the gaps in his evidence after having heard the Objector’s case....”
23. The Supreme Court of Kenya has also laid guidelines for the admission of additional evidence in the case of *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, one of the prerequisites is that:
- “....It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.”
24. In this instance, I note the Plaintiff was granted several opportunities present its case. Further, the witness it seeks to call was within its knowledge and could have testified at any time. In my view, it is not the duty of the Court to aid a party on how to present their case.
25. Based on the facts before Court while associating myself with the decisions cited, noting that the Defence called witnesses and closed its case after the Plaintiff has closed its case, I find that it would be prejudicial to the Defendant to reopen the Plaintiff’s case.
26. It is against the foregoing that I will find the Plaintiff’s Notice of Motion dated the 19<sup>th</sup> March, 2025 unmerited and will dismiss it with costs.

**DATED SIGNED AND DELIVERED IN VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Githui holding brief for Lusi for Plaintiff/Applicant

Nyaribo for Defendant

Court Assistant: Joan

