REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE 410 OF 2011

AGWU UKIWE OKALI……PLAINTIFF

VERSUS

SURESH SOFAT & 3 OTHERS…….DEFENDANTS

RULING

1. This is a ruling in respect of a Notice of Motion dated 23rd August 2019, which is brought by the Plaintiff/Applicant. The Applicant seeks to reopen his case so that he can produce important evidence in his possession. The Applicant also seeks to have the 1st Defendant/Respondent's case reopened for purposes of further cross-examination.

2. The Applicant contends that he has since discovered new and important evidence which he was unable to produce at the time he testified. He further contends that this evidence which is in the form of Environmental Impact Assessment Project Report ought to have been produced by the 1st Respondent but he did not. He therefore seeks for an opportunity to reopen his case so that he can produce the evidence.

3. The Applicant also states that he has since learned that his previous advocate did not properly cross-examine the 1st Respondent and that he wishes to have the said witness recalled for further cross-examination. He contends that the reopening of his case and that of the 1st Respondent will not prejudice the 1st Respondent in any way.

4. The 1st Respondent has opposed the Applicant's application based on a replying affidavit sworn on 16th September 2019. The 1st Respondent contends that the Applicant is seeking to reopen his case so that he can attack the defence case because he had seen that his case has collapsed. The 1st Respondent argues that the Applicant ought to have known his case from the beginning and that he cannot seek to reopen the case after closure of his case and closure of the 1st Respondent's case.

5. The 1st Respondent further contends that the evidence which the Applicant seeks to introduce was always available and that if the Applicant was diligent, he should have availed it as he has amended his plaint more than once. The 1st Respondent contends that the Applicant is merely intent on building his case as the hearing progresses and that reopening of the case will cause him prejudice as he is advanced in age (about 82 years) and this case has been hanging over his head for over 8 years now.

6. The 1st Respondent further argues that the Applicant is a lawyer and was represented by a lawyer and if he thought that his lawyer was not doing a good job, he should have raised this issue in time and that in any case, if he feels that his former lawyer was incompetent, then he can deal with that issue in a different forum. The 1st Respondent further contends that this application is an abuse of the process of court which is out to delay the case and should be dismissed.

7. The parties were directed to dispose of the application by way of written submissions. The Applicant filed his submissions on 31st January 2020. The 1st Respondent filed his submissions on 5th March 2020. I have gone through the submissions filed herein. There is only one issue to be determined. This is whether the Applicant has disclosed reasons to warrant re-opening of his case was well as that of the 1st Respondent.

8. Whether to allow re-opening of a case or not is an exercise of the court's discretion which should be exercised judiciously and considering the circumstances of the case. In the instant case, the suit herein was filed on 12th August 2011. An amended Plaint was filed on 23rd November 2011 bringing in the 4th Defendant/Respondent who is the wife of the 1st Respondent. A further amended Plaint was filed on 5th December 2013. Hearing of this suit commenced on 31st January 2017. The Plaintiff closed his case on 24th January 2018. The 1st Defendant's case started on 8th April 2019 and closed on the same day. This was the case with the 3rd Defendant's case. The case was adjourned to 19th September 2019 for the defence hearing but it could not proceed due to the filing of the present application.

9. The evidence which the Applicant seeks to adduce was all along with NEMA who had been sued by the Applicant on 12th August 2011. All the parties had filed the documents which they intended to rely on. If the Applicant was keen, he would have realized that the Environmental Impact Assessment Study Report had not been filed by either the 1st and 4th Respondents or the 3rd Respondent. It cannot be said that this evidence was not within the knowledge of the Applicant as at the time he testified and as at the time the 1st and 3rd Defendants testified.

10. The Applicant is said to be a lawyer. He was represented by a lawyer. He was present in court when his former lawyer was cross-examining the 1st Respondent. As a diligent lawyer, he would have even passed notes to his lawyer on areas he felt the lawyer needed to cross-examine further.

11. The Applicant relied on the case of **Fidelity Commercial Bank Ltd Vs Food maid Limited and 2 Others (2017)eKLR**. In this case, the Defendant's advocate failed to attend court as a result of which two witnesses of the third party testified in his absence. He made an application for re-calling of the two witnesses for cross-examination. The application was allowed because the court was satisfied that non-attendance was a result of an excusable mistake.

12. In the instant case, the Applicant is seeking to re-open his case and that of the 1st Respondent on grounds of discovery of new evidence and need for further cross-examination. The decision in the Fidelity Commercial bank Limited (Supra) is therefore of no assistant to the Applicant's case. The Applicant is also relying on the case of **Pinnacle Projects Ltd Vs Presbyterian Church of East Africa, Ngong Parish & Another (2-19) eKLR.** In this case, the Plaintiff had closed its case. When it was the turn of the Defendants to start their defence , the defence sought to introduce a witness statement which had not been discovered early on due to inadvertence. An objection was raised against its admission. The Court overruled the objection holding that it was important for a fair hearing that the statement be admitted and be served upon the Plaintiff's for preparation of their case during the next hearing date.

13. It is clear that the circumstances surrounding the Pinnacle Projects Ltd Case (Supra) were different from the case in point herein. In the instant case, the Plaintiff, the 1st and 3rd Defendants have already testified. The 1st Defendant is now required to come back for further cross examination not on the basis of the alleged new evidence but because the former advocate of the Applicant did not do a good job.

14. The Courts have in many cases considered factors which should be considered when a court is determining whether to re-open a case or not. Re-opening cannot be ordered where it is clear that the party applying is seeking to seal certain loopholes he/she has seen in his/her case as the trial progresses. In High Court Succession cause No.26 of 2008. In the matter of the Estate of Ngethe Karuga (Deceased),Justice Achode referred to **Malindi HCCC No. 56 of 1999** where the court states as follows:-

> ***" .....re-opening a case is not an impossibility but there must be urgent reasons for re-opening and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case…".***

15. The Applicant has suddenly noticed that his former advocate did not cross-examine well. He now wants to have the 1st Respondent recalled so that he can seal the loopholes which he has now seen. This cannot be sanctioned by the court. This is a case which was filed in 2011. The Applicant being a lawyer knew the documents which are required before NEMA can grant a licence to undertake a project. The Applicant in his claim is contending that the 1st and 4th Respondents constructed a house on their property which has infringed on his right to security and that the said building did not accord with the requirements of the relevant authorities. The Applicant cannot claim that the evidence which he seeks to adduce is new and could not be availed as at the time he testified.

16. It is clear that the Applicant's application if allowed will greatly prejudice the 1st Defendant who states that he is advanced in age (82 years). Considering the fact that the World is facing a pandemic known as Covid-19, which is potentially fatal for aged people, it will not be in the interest of the health of the 1st Respondent to be recalled to come and testify. I have already stated that the evidence which the Applicant seeks to adduce is not evidence which would not have been adduced were he diligent in preparation of his case. I therefore find that the Applicant's application lacks merit. It is dismissed with costs to the 1st and 4th Respondents.

It is so ordered.

Dated, signed and delivered at Nairobi on this 21st day of May 2020

E.O.OBAGA

JUDGE

In the virtual presence of :-

M/s Minyiri for Plaintiff

Court Assistant: Hilda

E.O. OBAGA

JUDGE