



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 15 OF 2017**

**1. ANDREW MUGANDI NURI**

**2. PATRICK MUNYAKA CHAMBEYU**

**3. NYOTA MUGANDI CHAMUSUHUNI.....PLAINTIFFS**

**VERSUS**

**CHINA DALIAN INTERNATIONAL GROUP.....DEFENDANT**

**RULING**

1. The application subject of this ruling is for the court to set aside the proceedings of 27<sup>th</sup> November, 2019, re-open the plaintiff's case and for the plaintiff's witness to be recalled for examination. The application which is dated 28<sup>th</sup> January, 2020 is brought under Sections 1A, 3 & 3A of the Civil Procedure Act, Order 51 Rule 10 and Order 18 Rule 10 of the Civil Procedure Rules.

2. The application is supported by the affidavit of Wafula Wanjala Advocate sworn on 28<sup>th</sup> January, 2020. He has deposed that this matter came up for hearing on 27<sup>th</sup> November, 2019 when the plaintiffs' witness testified and produced as exhibits the plaintiffs list of documents and the plaintiffs' case was closed. That while the plaintiff was on the stand testifying, the advocate realized that they had not filed a survey valuation report dated 10<sup>th</sup> March, 2017 and which document is crucial to the plaintiffs' case. A copy of the survey valuation report has been annexed. It is deposed that the valuation report was prepared and delivered to the advocates chambers in 2017 and the deponent proceeded with the hearing on the belief that all the relevant documents had been filed as required under the law before the matter was marked ready for hearing. It has been deposed that this application has been filed without any delay as the defence was coming up on 20<sup>th</sup> July, 2020 where the defence will have their day in court to testify. That the inadvertence on the part of the advocate in failing to file the valuation report was not deliberate and is an excusable mistake. That it will be an injustice and the plaintiffs stand to suffer extreme prejudice if the valuation report is not included as exhibit and that in the spirit of Article 159(1) (d) of the constitution of Kenya, 2010, this is a procedural technicality which would not be used against the plaintiffs. It is further deposed that the defendant will not suffer any prejudice if the plaintiffs' case is re-opened and the witness re-called for examination as the case is pending defence hearing.

3. David Mvoi Wachenje advocate for the defendant filed a replying affidavit sworn by himself on 26<sup>th</sup> February, 2020. He has deposed that the instant suit was filed vide a plaint on 26<sup>th</sup> January, 2017 with a comprehensive List of Documents and the plaint was amended on 3<sup>rd</sup> May, 2017. That upon the filing of the defendant's defence, the matter was set down for pre-trial directions with the parties appearing twice before the Deputy Registrar on 24<sup>th</sup> May 2019 and 11<sup>th</sup> July 2019. That the plaintiffs' advocate confirmed to court their having fully complied with the provisions of Order 11 rule 11 of the Civil Procedure Rules and indicated that the matter could be certified as ready for hearing, resulting in the court setting the suit down for hearing on 27<sup>th</sup> November, 2019 when the plaintiffs testified and their advocate on his own volition, closed the plaintiffs' case. That the court slated the defence hearing for 20<sup>th</sup> July 2020.

4. Mr. Wachenje has deposed that the plaintiffs seek to file a valuation report which was prepared and delivered in 2017, yet no reason has been given why the report remained in the plaintiffs' advocates office unfiled from 2017 to 2020. That the delay in bringing the report to court is inordinate, inexplicable and inexcusable. It was pointed out that from the supporting affidavit, at paragraph 3, the deponent confirms that he in fact realized as the witnesses were testifying that they had not filed the valuation report, yet went ahead to close the plaintiffs' case. That it would have been prudent to follow a different course of action, such as stepping down the witness to put their house in order. It is deposed that the plaintiffs' intention seem to be to fill a gap in their testimony left by lack of basis for the claim for damages which is in the amended plaint by belatedly seeking to provide evidence of the purported damages of Kshs.4,500,000/=. The defendant urged the court not to allow the application as to do so would be prejudicial to the defendants' case. It is the defendant's contention that the application by the plaintiffs is an affront to the principle of discovery and disclosure of documents, noting that the suit was filed in the year 2017 and since the valuation report was never brought to the attention of the defendant during discovery, the defendant doubts its authenticity and veracity. The defendant further contends that the plaintiffs have utterly failed to provide any compelling reasons to warrant the court exercise its

discretion in their favour and to have the case re-opened.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties. In their submissions dated 17<sup>th</sup> August, 2020 and filed on 26<sup>th</sup> August 2020, the firm of Sherman Nyongesa & Mutubia Advocates for the plaintiffs submitted that the application meets the threshold for the court to re-open the plaintiffs' case. Counsel submitted that there are several principles that govern the court's discretion and jurisdiction to re-open a case and allow further evidence, that is, that the said evidence has been brought without delay and there is reasonable explanation; that the said evidence shall not cause prejudice nor embarrass the other party; it should be clear that the evidence would have been obtained with reasonable diligence for use at the trial; that the said evidence when admitted, shall have an important influence on the outcome of the suit even if no decisive; and, that the said evidence should be that which is presumably credible, but it need not be incontrovertible. The plaintiffs' counsel submitted that the hearing was conducted on 27<sup>th</sup> January, 2020 (sic) where the plaintiffs closed their case pending defence hearing, and the application herein was filed on 28<sup>th</sup> January, 2020, thus the same was filed without any delay and before the defence case. That the evidence sought to be introduced is so critical to this suit as it relates to the value of the suit property and will actually give a bearing and assist the court on the final and expedient determination of the suit. It was further submitted that the failure to file the valuation report was inadvertent failure on the part of the advocate who was previously handling the matter, which mistake was not deliberate, is excusable and for the interest of justice the plaintiffs should not be punished for mistake of counsel. The plaintiffs' counsel relied on the case **Victoria Naiyanoi Kiminta –v- Gladys Kiminta Prinsloo (2019)eKLR**, Article 159 of the Constitution and the case of **Standard Chartered Financial Services Limited & 2 Others –v- Manchester Outfitter (suiting Division) Limited & 2 Others (2016)eKLR**. They denied that the applicant seeks to fill in gaps nor an afterthought. The plaintiffs' counsel further submitted that the new evidence can be adduced without causing any prejudice on the defendant. That the suit is pending defence hearing, and in the circumstances, the defence will have their day in court to review the said document and equally cross-examine the recalled witness. The plaintiffs' counsel also cited sections 146 (4) of the Evidence Act which allows the court to recall a witness and Order 18 rule 10 of the Civil Procedure Rules which grants the power to recall any witness. Counsel for the plaintiffs' also relied on the case of **Stephen Ngatia –v- Clement Kamau Gitau (2013)eKLR**.

6. In their submissions dated 28<sup>th</sup> July 2020 and filed on 29<sup>th</sup> July 2020, Messrs Wachenje Mariga & Company Advocates for the defendant submitted that the court should disallow the plaintiffs' prayer to re-open the case as it seems the plaintiffs' intention is to fill a gap in their testimony left by a lack of basis for their claim for damages by seeking to provide evidence of damages of Kshs.4,500,000/= sought in the amended plaint. Counsel for the defendant submitted that to re-open the case would be prejudicial to the defendant's case.

7. It was further submitted that the delay in bringing the valuation report to court is inordinate, inexplicable and inexcusable. Further, that the deponent of the supporting affidavit, who had conduct of the matter, confirms in paragraph 3 thereof that he in fact realized as the witnesses were testifying that he had not filed the valuation report. That it is inexplicable that he then elected to go ahead to close the plaintiffs' case when it may have been prudent to step down the witness to put the plaintiffs' house in order. Counsel further submitted that recalling the 1<sup>st</sup> plaintiff who was the sole witness, will serve no purpose as he is not an expert nor the maker of the valuation report. It was submitted that the plaintiffs are not deserving of the orders sought and that the plaintiffs have failed to satisfy the principles for re-opening or recalling of witnesses. The defendant urged the court to dismiss the application with costs.

8. I have considered the application, the parties rival affidavits and the submissions made. Two issues fall for determination in the application. The first issue is whether the plaintiffs have satisfied the criteria upon which the court exercises jurisdiction to re-open a case and receive additional evidence.

9. It is common ground that hearing of the plaintiffs' case commenced and ended on 27<sup>th</sup> November, 2019. What is pending is the hearing of the defendant's case. The present application was brought before hearing of the defendant's case commenced.

10. Section 146 (4) of the Evidence Act generally grants the court powers to recall a witness. It provides as follows:

**“(4) The court may in all cases permit a witness to be recalled either for further examination –in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”**

11. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined. It provides thus:

**“10. The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”**

12. The jurisdiction to re-open a case and receive additional evidence in a trial court 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. Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. The plea for re-opening of a case will also be rejected if there is inordinate and unexplained delay on the part of the applicant in bringing the application. The applicant is also required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing his case. Further, 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 need not be incontrovertible. (see **Victoria Naitano Kiminta – Gladys Kiminta Prinsloo (supra); Mohamed Abdi Mohamed – v – Ahmed Abdullahi Mohamed & Others (2018)eKLR; Samuel Kiti Lewa –v- Housing Finance Company Limited & Another (2015)eKLR; and, Ladd –v- Marshall (1954) 3 ALL ER 745**)

13. In the present suit, the plaintiffs closed their case but the defendant has not yet presented their evidence. Secondly, the evidence which the plaintiffs seek to introduce was already produced by the plaintiffs when the matter proceeded ex-parte on 19<sup>th</sup> October, 2017 as exhibit No.3. Indeed the court considered the said evidence when it delivered its judgment dated 5<sup>th</sup> February, 2018 which judgment was however,

set aside later to allow the defendant leave to defend the suit. Therefore the valuation report in question forms part of the court record. In my view, the plaintiffs or their advocate may have probably forgotten that the document in question had been produced earlier before the ex-parte proceedings were set aside. The evidence would certainly have an important influence on the result of the case, though it need not be decisive. Further, the defendant has not tendered evidence and will have the opportunity to present controverting evidence should need arise. I am therefore not persuaded that the defendant will suffer any prejudice if the plaintiffs' application is allowed. However, no basis for setting aside the proceedings on 27<sup>th</sup> November, 2019 has been made and that plea is rejected.

14. Taking the foregoing into account, it is my view that the Notice of Motion dated 28<sup>th</sup> January 2020 meets the criteria for re-opening of a closed case. The upshot is that the application is allowed in the following terms:

**a. The plaintiffs' case is re-opened and the plaintiffs are allowed to lead additional evidence by themselves and by any other witness.**

**b. The plaintiff's plea to set aside the proceedings of 27<sup>th</sup> November, 2019 is rejected.**

**c. Costs shall be in the cause.**

15. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 14<sup>th</sup> day of October 2020.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**