



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 1174 OF 2015 (OS)

SUSAN WAVINYA MUTAVI.....PLAINTIFF

- VERSUS -

ISAAC NJOROGE.....1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT..2ND DEFENDANT

RULING

1. This case was fully heard between 14/12/2017 and 9/7/2019. On 9/7/2019, the court directed parties to file and exchange written submissions. The court fixed the case for mention on 8/10/2019 for the purpose of confirming filing of written submissions, with view to fixing a date for judgment. When the case came up for mention on 8/10/2019, counsel for the plaintiff informed the court that he had not filed the plaintiff's written submissions. The court gave the case a further mention date of 6/11/2019. On 6/11/2019, counsel for the plaintiff informed the court that the plaintiff had filed an application dated 11/10/2019 seeking the re-opening of her case. The said application is the subject of this ruling.

2. The said application seeks the following verbatim orders:

- 1. That the plaintiff be allowed to reopen her case and Susan Mutavi be recalled for purposes of producing documents.**
- 2. That the 2nd defendant be compelled to produce one ABIUD OCHOLA, Assistant Director of Survey & G I S (formerly office of housing development department) Nairobi County for purposes of production the Official register of Records relating to Plot No B 212 on LR No 18280/1/2/3.**
- 3. That the costs of this application be provided for**

3. The application was supported by the plaintiff's affidavit sworn on 18/10/2019 in which she deposed in paragraphs 12 and 14 that there was need to re-open her case to rebut the 1st defendant's evidence. She deposed that upon closing her case, the 1st defendant led evidence by three witnesses but the 2nd defendant did not lead any evidence. She added that prior to closing her case, she had caused witness summons to be served upon one Abiud Ochola - Assistant Director of Surveys & G I S (Formerly Office of Housing Development Department), Nairobi County, for the purpose of producing the official register of records relating to the suit property. She added that the said witness did not attend court and the 2nd defendant did not produce the official register as per the notice to produce which she had served on them. It was her case that the official register held by the 2nd defendant was an important piece of evidence in the adjudication and settlement of the dispute in this suit. She further deposed that subsequent to closing her case, she had traced receipts and records relating to payments made in relation to the suit property. She pleaded with the court to allow her to re-open her case and tender additional evidence to controvert the 1st defendant's evidence.

4. The 1st defendant opposed the application through a replying affidavit sworn on 7th January 2010. He deposed that he stood to be greatly prejudiced if the plaintiff was to be allowed to re-open her case, call new witnesses, and produce new documents. He added that the plaintiff had not given a proper basis for re-opening her case, and contended that the plaintiff's application was an afterthought. He termed the plaintiff's application as an abuse of the process of the court. He urged the court to dismiss the application.

5. In her written submissions, the plaintiff stated that it was necessary for the 2nd defendant to produce the official register which contained details of initial registration relating to ownership of the suit property. She cited the following decisions to support her application: (i) **Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo [2019] eKLR**; (ii) **Joseph Ndungu Kamau v John Njihia [2017] eKLR** and (iii) **Samuel Kiti Lewa -vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR**.

6. The 1st defendant filed written submissions dated 6/10/2010 in which he argued that the plaintiff had not satisfied the criteria for re-

opening of a case in a civil trial. The 1st defendant cited the decision in **John Karuga Wahinya v Attorney General & 4 others [2020] eKLR** in opposition to the application.

7. I have considered the application, the parties' respective affidavits and submissions, the relevant legal frameworks, and the prevailing jurisprudence on the key question falling for determination in this application. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which Kenya's civil courts exercise jurisdiction to re-open a case and receive additional evidence in a civil trial.

8. Both the **Evidence Act** and the **Civil Procedure Rules** do not have a clear and express framework on how the jurisdiction to re-open a case is to be exercised. **Section 146(4)** of the **Evidence Act** generally grants the court powers to recall a witness. It provides thus:

“(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

9. 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.

10. Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, 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. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, 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 it need not be incontrovertible. (See (i) **Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others (2018) eKLR**; (ii) **Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another (2015) eKLR**; (iii) **Ladd v Mashall (1954) 3 All ER 745**; (iv) **Reid v Brett [2005] VSC 18**; (v) **Smith v New South Wales Bar Association (1992) 176 CLR 256**; and (vi) **EB v CT (No 2) [2008] QSC 306**.)

11. The dispute in the present suit revolves around the question of ownership of the suit property. The plaintiff contends that she co-owns the suit property with the 1st defendant. The 1st defendant contests the plaintiff's claim and asserts that he solely owns the suit property. At trial, the plaintiff testified and closed her case. Thereafter, the 1st defendant testified as DW1 and called two other witnesses. Subsequently, parties filed their respective submissions on the substantive claim in the suit.

12. The reason why the plaintiff brought this application at this stage is contained in paragraphs 12 to 14 of her supporting affidavit in which she deposes thus:

12. That on the strength of the 1st defendant witnesses and their court evidence, I believe it is paramount that I be allowed to produce this documents and be cross examined if need be.

13. That the defence would suffer no prejudice if the witnesses are re-called for production of documents and for cross examination purposes.

14. That I on the other hand will be exposed to extreme prejudice, loss and damage if I do not get to produce the crucial documents and test the averments and allegations of the defence witnesses.

13. It is apparent from the above depositions that the plaintiff seeks to fill the gaps which have emerged after the defence witnesses testified. She wants to lead additional evidence, not because of discovery of new evidence that could not be availed upon exercise of reasonable diligence during trial, but in her own words, “**on the strength of the 1st defendant's witnesses and their court evidence**”. Secondly, she wants to be allowed to re-open her case because the 2nd defendant did not lead evidence. These are certainly not the circumstances under which a trial court exercises the discretionary jurisdiction to re-open a case in a civil trial.

14. My understanding of our civil trial law is that the plaintiff is supposed to tender all her evidence and close her case. She has no right to re-open her case for the purpose of rebutting the defendant's evidence or to fill the emerging gaps after the defendant has closed his case and after parties have exchanged their written submissions. Secondly, failure by a defendant to lead evidence is not a legitimate basis for re-opening a plaintiff's case.

15. The plaintiff contended that she applied for witness summons but her witness never turned up. If indeed the plaintiff was keen to compel the attendance of a particular witness to testify in support of her case, she should have pursued that witness prior to closing her case. Having failed to pursue the evidence during the hearing of her case, she has no legitimate right to pursue the witness at this point.

16. The result is that the court finds no merit in the plaintiff's application dated 11/10/2019. Put differently, it is the finding of this court that the plaintiff has failed to satisfy the criteria upon which our courts exercise jurisdiction to re-open a party's case in a civil trial. The plaintiff shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Wesonga for the Plaintiff

Ms Njeri Kiarie for the 1st Defendant

Mr Mokua fo the 2nd Defendant

Court Clerk: June Nafula