

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC CASE NO. 11 OF 2020 (OS)

LAUREEN ISIAHO SAWE
P/A ISIAHO SAWE & COMPANY
PLAINTIFF

VERSUS

TERESA CHEBICHII RUTTO1ST
DEFENDANT
TECLA CHERONO 2ND
DEFENDANT
PHILLIP KIPTOO MAIYO 3RD
DEFENDANT

RULING:

1. This matter came up for hearing of the Defence case on 6th October, 2025. Mr. Chemwok Michael Kipkoror, an Advocate of the High Court of Kenya practicing in the name and style of Chemwok & Co. Advocates testified as DW1. He adopted his witness statement dated 24.05.2021 as his evidence in chief and was thereafter subjected to cross-examination by the plaintiff's counsel, Ms. Chesoo.

2. During cross-examination, an issue of signature arose; whereupon being referred to the Authority dated 20.07.2012 at page 169 of the Record, DW1 denied that the signature on the said document was his signature and maintained that the said signature was different from the signature contained at page 168 of the Record.

3. The witness was further referred to the letter dated 18.06.2020 at 318 of the Record and it was his testimony that he had never seen the document before. That the said letter was neither from his office nor did he sign it. Even though he confirmed that the letter was done on his firm's letter head, he maintained that the signature thereon was not his signature.
4. Consequently, the plaintiff's counsel made an application under the provisions of Article 50(1) of the Constitution on the right to a fair hearing, to have DW1 stood down and have the documents (Authority dated 20.07.2012 and letter dated 18.06.2020) referred to the DCI for forensic examination.
5. In addition, the plaintiff's counsel sought to have the plaintiff's case re-opened pursuant to Order 18 Rule 10 of the Civil Procedure Rules and the plaintiff to be recalled to give evidence on the same.
6. It was her contention that the witness only contested his signatures in the Authority dated 20.07.2012 and the letter dated 18.06.2020, during cross-examination. That the said denial did not form part of his statement dated 24.05.2021 and therefore the plaintiff did not have a chance to give evidence on the same during her case. As a result, therefore, she averred that the plaintiff stands to be highly prejudiced.

7. Mr. Momanyi, counsel for the defence in response to the plaintiff's application stated that the oral application made by the plaintiff's counsel pursuant to the provisions of Article 50(1) of the Constitution and Order 18 of the Civil Procedure Rules ought to be vide a formal application and not oral application.
8. On the issue of the documents referred to by the plaintiff, it was his claim that the same were introduced by the plaintiff and the defence did not refer to them. He further stated that the witness in his statement was very specific and stated that he was not aware of the said documents and the same were not brought to his attention.
9. It was his claim that allowing the application would amount to giving the plaintiff an opportunity to fill the gaps in her case and would be highly prejudicial to the defence case.
10. It was further his contention that the parameters for re-opening a case had not been sufficiently demonstrated in the instant application. He thus, strongly opposed the application and urged the court to dismiss the same and give DW1 the chance to conclude his cross-examination and re-examination.
11. This court is therefore called upon to determine the plaintiff's application for re-opening the plaintiff's case and recalling PW1 and further whether the documents in

contest can be referred to the DCI for forensic examination.

12. The first issue is whether this court can order the re-opening of the plaintiff's case and the recalling of PW1 to testify on the issue of DW1's signature as contained in the Authority and letter. There is no express and clear legal framework on the jurisdiction of a court to order the re-opening of a case and recall a witness.
13. However, section 146 (4) of the Evidence Act generally grants the Court powers to recall a witness as well as Order 18 Rule 10 of the Civil Procedure Rules, which grants the Court powers to recall any witness who has been examined.
14. Be that as it may, the most important consideration to be made in the exercise of this discretion by a court is whether the re-opening of the case would be prejudicial to the adverse party, in this case the defendants.
15. Justice R. Nyakundi in the case of ***Raindrops Limited v County Government of Kilifi [2020] KEHC 1478 (KLR)*** cited with authority and relied on the legal text by the **Learned Authors of Murphy on Evidence 12th Edition at paragraph 17.17 thus:**

“The general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely

during the presentation of his case, and before closing his case. (See Kane {1977} 65 CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses' statements, is designed to enable this to be done wherever possible."

16. Similarly, in ***Samuel Kiti Lewa v Housing Finance Company Limited & Another {2015} eKLR***, the court while addressing the issue of re-opening a case opined as follows: -

"..... in my view if the plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant was different to the one he had would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants."

17. Taking the same into consideration, it is the finding of this court that the plaintiff has not demonstrated a sufficient cause to warrant the re-opening of a case to the satisfaction of the court. Further, it is my considered opinion that re-opening the plaintiff's case at this point would be prejudicial to the defendants.

18. To this end therefore, this court is unable to find in favour of the plaintiff and disallows the prayer as sought.
19. On whether there is need to refer the documents to the DCI for forensic examination, I have carefully considered the DW1's witness statement dated 24.05.2021, the Authority dated 20.07.2012 titled "Authority to file personal briefs through Chemwok & Company Advocates" between DW1 and the plaintiff herein, duly signed by the both of them and the letter dated 18.06.2020; referenced Eldoret ELC No. 515 of 2013 Teresa Chebichii Rutto (Suing as the Administratrix of the Estate of Ernest Kimaiyo vs Talalei Kiptenai) and allegedly signed at the end by DW1.
20. This court is careful not to comment on the contents, validity and/or merits of the said documents at this interlocutory stage. Be that as it may, it is not in dispute that the said documents bear the names of DW1 and from a cursory look at the same, they appear to have been signed by DW1.
21. What however appears to be in dispute is the signature contained therein and its authenticity. DW1 contends that the signature on the said documents does not belong to him. The plaintiff on the other hand maintains that the said denial of the signature is a new issue arising during cross-examination and therefore there is need to determine the authenticity of the said signature.

22. Section 107 of the Evidence Act deals with the burden of proof in any case, and it is clear that the same lies with the party who desires any court to give judgment as to any legal right or liability, and it is for that party to show that the facts which he/she alleges his/her case depends upon exist. This is known as the legal burden.

23. In the Halsbury's Laws of England, 4th Edition, volume 7 at paragraph 13 and 14, it is stated:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiations of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

24. As the issues herein are highly contested, the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in

rebuttal. This constitutes evidential burden. It is therefore upto each party to this case to adduce evidence in support of their respective cases.

25. In our system of adversarial litigation, the court performs the role of an umpire. It does not have an inquisitorial function. It is therefore my view that the court should not descend into the arena of conflict by looking for evidence for parties in respect of a contested issue. That ought to be left for the parties themselves. While I appreciate that the jurisdiction of the court is unlimited as to what and when orders may be issued. The court should however exercise caution and guard against descending into the arena of the conflict between the parties by appearing to look for evidence for one party against the other in respect of a contested issue such as the one at hand.
26. Consequently, I am not satisfied that an appropriate basis has been laid to warrant the grant of the order sought by the plaintiff to have the documents referred to the DCI for forensic examination. That must be left to the parties to decide. I therefore find it unnecessary to issue an order referring the documents in question to the DCI for forensic examination sought by the plaintiff's counsel. Consequently, that prayer is disallowed.
27. The upshot is that the oral application made by the plaintiff's counsel on 6th October, 2025 is dismissed with costs to the defendants.
28. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET**
on **13TH day of NOVEMBER, 2025.**

**HON. C. K. YANO
ELC, JUDGE**

In virtual presence of; -

Ms. Chesoo for plaintiff.

Mr. Wainaina holding brief for Mr. Momanyi for
Defendants.

Court Assistant - Laban

ORIGINAL