

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM NO. E424 OF 2019

POWER TECHNICS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

MULTIPLE ICD (KENYA) LIMITED.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 30th January 2025 under the provisions of Articles 50 & 159(2)(d) of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 12 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions. The defendant prays for orders of arrest or suspension of the delivery of judgment in this suit and upon arrest of the judgment, an order that the Court allows the defence case to be re-opened, grant the defendant leave to file witness statements and permit defence witnesses to take the stand and be examined.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Rajinder Singh Baryan, a Director of the defendant company. Mr. Baryan averred that the plaintiff instituted a suit for breach of contract against the defendant in November 2019, later amended in December 2020. That the defendant, represented by the law firm of Diro Advocates LLP, denied any liability and filed pleadings, after which the matter was certified ready for hearing. He deposed that the plaintiff closed its case in May 2024, but the defence hearing, scheduled for November

2024, could not proceed as the defendant's intended witness, Mr. Antony Raju, was outside the jurisdiction of the Court.

3. Mr. Baryan stated that Mr. Raju, who was the defendant's Project Manager at the material time, was expected to return to Kenya in March 2025. He described Mr. Raju's testimony as crucial for a fair and just determination of the dispute between the parties herein. He asserted that the defendant has a *prima facie* defence with a likelihood of success, thus proceeding to judgment without allowing its witness to testify would cause it to suffer irreparable prejudice. Mr. Baryan stated that the unavailability of the witness was unavoidable and no prejudice would be caused to the plaintiff in the event that the application herein is allowed. He averred that granting the orders being sought herein would uphold the defendant's right to a fair hearing under the Constitution and principles of natural justice.
4. In opposition thereto, the plaintiff filed a replying affidavit sworn on 25th February 2025 by Mr. Nareshkumar Sobhagyachand Mehta, the plaintiff's Director. Mr. Mehta deposed that the defendant's case was properly closed on 19th November 2024, after Counsel for the defendant informed the Court that their intended witness, Mr. Antony Raju, had been declared redundant and that there were no other witnesses. He contended that the defendant is now seeking to re-open its case under false pretences, alleging that the witness was abroad, contrary to the record in Court.
5. Mr. Mehta asserted that re-opening of the defendant's case would cause the plaintiff to suffer undue prejudice, as the plaintiff has already closed its case, filed submissions and has awaited judgment for many years since the dispute between the parties herein arose in the year 2014. He averred that the defendant's claims are unsubstantiated, the witness statement of Antony Raju

dated 22nd January 2023 already addresses the defendant's position and the annexed email relied upon by the defendant pertains to a separate legal entity. He maintained that the instant application is an abuse of the Court process, only intended to delay conclusion of this matter. He urged this Court to dismiss the instant application with costs and fix a judgment date for this matter.

6. In a rejoinder, the defendant filed a supplementary affidavit sworn on 13th March 2025 by Mr. Rajinder Singh Baryan, a Director of the defendant company. Mr. Baryan clarified that the defendant initially closed its case on 19th November 2024 because the scheduled witness, Mr. Julius Muchiri, had voluntarily left the defendant's employment and was therefore unavailable to testify, not because he had been declared redundant as alleged by the plaintiff. He averred that the plaintiff has mischaracterized the circumstances, noting that the intended substituted witness is in fact Mr. Anthony Raju, who will be available to testify upon his return to the country in March 2025, and whose witness statement is already on record.
7. Mr. Baryan maintained that leave for the defendant to substitute its witness had been granted by the Court on 23rd January 2025. He contended that the plaintiff was misleading the Court by failing to disclose accurate information. He stated that the availability of Mr. Raju was confirmed through email correspondence and that the relationship between Multiple Hauliers (E.A.) Limited and Multiple ICD explains the documentation relied upon. He asserted that re-opening the defendant's case and receiving the testimony of the substituted witness would aid the Court in achieving a fair and just determination of the dispute between the parties herein. Furthermore, the right to a fair hearing entitles it to present relevant evidence.

8. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Diro Advocates LLP on 21st March 2025, while the plaintiff's submissions were filed on 7th April 2025 by the law firm of Kabau & Associates Advocates.
9. Mr. Mulaku, learned Counsel for the defendant submitted that pursuant to the provisions of Article 50 of the Constitution, Sections 3A & 25 of the Civil Procedure Act, this Court has the requisite jurisdiction to arrest judgment and re-open the defendant's case. He cited the Court of Appeal cases of **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others** [2018] KECA 791 (KLR) & **Kiai Mbaki & 2 others v Gichuhi Macharia & another** [2005] KECA 143 (KLR) and the case of **Susan Wavinya Mutavi v Isaac Njoroge & another** [2020] KEELC 8 (KLR), and stated that the right to be heard, and to adduce evidence is central to the principles of natural justice.
10. Counsel cited the case of **Techbiz Limited v Royal Media Services Limited** [2021] KEHC 3272 (KLR), and contended that reopening of the defendant's case would not prejudice the respondent, who would have an opportunity to cross-examine the defendant's witness pursuant to the provisions of Section 146(4) of the Evidence Act. He referred to the case of **Mahui & another v Gatei & 3 others** [2024] KEHC 6635 (KLR) and argued that the application herein was made without inordinate delay, having been filed shortly after the defendant closed its case and upon confirmation of the availability of the substituted witness. Mr. Mulaku submitted that the witness evidence is relevant, credible, and central to the contractual issues in dispute, thus allowing the application herein would advance the ends of justice by ensuring that the Court has the benefit of all material evidence before judgment is delivered.

11. Ms Munyua, learned Counsel for the plaintiff relied on the case of **Bachu v Cheruiyot & 5 others; KCB Bank Limited (Defendant to the Counterclaim)** [2024] KEELC 4717 (KLR) and submitted that the defendant is not entitled to review of the Orders of 19 November 2024, having failed to satisfy the legal threshold under Order 45 Rule 1 of the Civil Procedure Rules, 2010, which permits review only upon discovery of new and important evidence, an error apparent on the face of the record, or other sufficient reason. Counsel argued that the defendant had not demonstrated any new evidence or error apparent on the face of the record and that the reason advanced, being the unavailability of the witness by the name of Antony Raju, was false and contradicted by the Court record. Citing the case of **Samoei v National Housing Corporation & another** [2023] KEHC 17919 (KLR), Counsel maintained that the instant application is an afterthought and an abuse of the Court process.
12. Ms Munyua further relied on the case of **Acceler Global Logistics & 4 others v Rahil International Limited & 13 others** [2024] KEHC 13196 (KLR) and asserted that reopening a case is a discretionary remedy available only where the delay is not deliberate, the evidence could not have been obtained with reasonable diligence, and where such evidence is credible and likely to influence the outcome, none of which have been demonstrated in this case. She argued that the alleged evidence was always within the defendant's knowledge, no attempt was made to request virtual attendance of the witness, and that the witness statement contained mere denials. She asserted that the said facts, coupled with the defendant's conduct of misleading the Court, disentitles it to the equitable relief sought.

ANALYSIS AND DETERMINATION.

13. I have considered the instant application, the grounds on the face of it, the affidavits filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the judgement should be arrested and the defendant's case be re-opened for hearing.
14. The power of a Court to arrest judgment and reopen proceedings is discretionary and must be exercised judiciously. This Court is alive to the provisions of Article 50 of the Constitution of Kenya which guarantees every party the right to a fair hearing, including the right to adduce and challenge evidence, as well as Article 159(2)(d) which obligates Courts to administer justice without undue regard to procedural technicalities, Section 3A of the Civil Procedure Act which preserves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court process, all of which have been heavily relied on by the defendant.
15. The principles governing the reopening of a party's case, were articulated by the Court in the case of **Susan Wavinya Mutavi v Isaac Njoroge & another** (supra), as hereunder –

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.

16. Applying the principles in the foregoing authority to the instant application, the defendant explained that it closed its case on 19th November 2024 since the witness it intended to call by the name of Antony Raju was outside the jurisdiction of the Court and could not attend Court. The plaintiff however contended that the defendant's Counsel informed the Court that the defendant's witness had been declared redundant and that no other witness was available, thereby closing its case voluntarily. In light of the contradicting positions by the plaintiff and the defendant as to the events of 19th November 2024 that led to the defendant's case being closed, this Court finds that the Court record of the proceedings of that day remain the most authoritative account of what transpired.
17. The Court record reveals that leave for the defendant to substitute its witness was sought and granted by the Court on 20th June 2023. Mr. Mulaku Advocate held brief for Mr. Diro Advocate for the defendant. Ms Munyua appeared for the plaintiff. The reason advanced by the defendant for substituting its witness was that the witness had left the employment of the defendant. Subsequently, the defendant filed the witness statement of Mr. Antony Raju.

18. It is further evident from the Court record that on 19th November 2024 when the defendant's Counsel voluntarily closed the defendant's case, Mr. Diro, learned Counsel for the defendant informed the Court that they had been unable to secure the attendance of the defendant's witness who was to testify for the defendant, as he had been declared redundant. He further informed the Court that the defendant had no other witness to call. It is important to note that this happened after the defendant had been granted leave to substitute its witness and had actually proceeded to substitute its witness.
19. Notably, on 17th February 2025 when Ms Munyua for the plaintiff and Mr. Mulaku for the defendant appeared before this Court for mention to confirm if they had filed their written submissions and to take a date for delivery of judgment, Mr. Mulaku, learned Counsel for the defendant indicated that the defendant had been able to find a witness who would be available in March (2015). He sought an order for re-opening of the defendant's case. From the foregoing, this Court opines that Counsel for the defendant intimated that the defendant had found a different witness, since the one who was to testify on 19th November 2024, had left the employment of the defendant.
20. Cognizance must be taken of the fact that we are living in the age where technology has been embraced by Kenyan Courts and nowadays, some Court cases and hearings are conducted virtually. Therefore, this Court agrees with Counsel for the plaintiff that although the defendant claims that its witness was unreachable as he was out of the country when the defence hearing was set to proceed, neither the defendant nor its Advocates on record offered any explanation as to why they never sought to proceed virtually with the defence hearing. The said fact, coupled with the contradictory positions taken by the defendants' Advocates that the first defendant's witness had left the

employment of the defendant company, and second, that the said witness was out of the country at the time of the hearing of the case, and could not avail himself to testify for the defendant, leaves a lot to be desired, and imputes bad faith on the part of the defendant.

21. In addition, on the date set for defence hearing, there was no indication given by the defendant's Advocate that the defendant's witness was out of the country and was as such unavailable to testify. The defendant's Advocates changing positions seem to be the case of the right hand not knowing what the left hand was doing, as demonstrated by the two Advocates for the defendant, who were reading from different scripts by giving the Court contradictory versions as to why the defendant's witness was not available.
22. This Court finds that the defendant's explanation in urging this Court to exercise its discretion in its favour and grant the orders being sought herein is not plausible and cannot be relied upon to grant the equitable relief being sought.
23. The delay between November 2024 and the filing of the instant application in January 2025 of approximately three (3) months is inordinate. To this end, I agree with the finding in the case of **Jaber Mohsen Ali & another v Priscillah Boit & another** [2014] KEELC 132 (KLR), where the Court explained unreasonable delay as hereunder -

The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been

given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.

24. On the issue of the prejudice that may be occasioned to the plaintiff, this Court is not persuaded by the defendant's contention that re-opening of the defendant's case would cause no harm to the plaintiff. This is especially so, since the plaintiff has already closed its case, filed written submissions and has the legitimate expectation that this matter that has been pending since 2014 and was at the judgment stage is finally coming to an end. It is my considered view that re-opening of the defendant's case at this stage in the absence of a satisfactory explanation to warrant the exercise of such discretion, would undoubtedly prolong this matter, disrupt the plaintiff's preparation for judgment, and subject it to additional expenses, inconvenience and uncertainty, especially noting that the defendant had every opportunity and was accommodated by this Court, by being given time to substitute its witness to testify, but it did not seek leave of the Court for its witness to proceed with the defence hearing virtually.
25. While Courts retain discretion to allow amendment of pleadings or re-opening of evidence before judgment, such discretion is not exercised where doing so would occasion irreparable or undue prejudice to the opposing party, such as is the case herein. Moreover, justice requires finality and the plaintiff should not be burdened with the consequences of the defendant's own procedural lapses.
26. Having weighed all the circumstances of this case, I am not persuaded that the defendant has demonstrated sufficient cause to warrant the exercise of my discretion in its favour.

27. It is my finding that the application herein is not merited. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 13th day of February 2026. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:-

Mr. Mulaku for the defendant/applicant

Ms Wambui for Mr. Kambau for the plaintiff/respondent

Mr. Kimutai – Court Assistant.