IN THE COURT OF APPEAL
AT ELDORET

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPEAL NO. 81 OF 2020

BETWEEN

RAIPLY WOODS (K) LTD.....APPELLANT

AND

SUB COUNTY CO-OPERATIVE

OFFICE,
TURBO & SOY ..... 1ST RESPONDENT
COMMISSIONER FOR
CO-OPERATIVE DEVELOPMENT 2ND
RESPONDENT THE ATTORNEY GENERAL .....
3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Eldoret (O. Sewe, J) delivered on 12th March, 2019

in

High Court Petition No. 25 of 2016)

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JUDGMENT OF THE COURT

1. This is an interlocutory appeal arising from the ruling of the High Court of Kenya at Eldoret (Olga Sewe, J.) delivered on 12th March 2019 in High Court Petition No. 25 of 2016. The ruling dismissed an application by the appellant, **Raiply Woods (K) Limited**, seeking to reopen its case after closure in order to introduce a company resolution that had been omitted from the record.

2. The facts giving rise to the appeal are largely uncontested. The petition arose from a commercial dispute between the appellant,

an industrial company employing about 2,000 people in Eldoret; and Plywood Savings and Credit Society (Plywood SACCO). The appellant alleged that it had been remitting employee deductions to the SACCO through payroll check-offs when it discovered what it alleged was a fraudulent scheme by SACCO officials resulting in overpayments of Kshs. 66,944,091/= between July 2007 and January 2011.

3. After recovering this amount from Plywood SACCO, the appellant was surprised to receive a fresh demand from the respondents in November 2016, based on an inquiry carried out by the Commissioner for Co-operative Development's Office, for Kshs. 33,472,045.50 plus interest totaling Kshs. 355,659,088.76.
4. Contending that it was never afforded a hearing during the alleged inquiry, the appellant filed a petition dated 14th December 2016 against the respondent seeking the following orders:

    a) Permanent injunction to restrain the Respondents from demanding and/or instituting any recovery process against, and/or attaching any bank account or any assets of the Petitioner to recover the said sum of Kshs. 355,659,088.76 or any lesser or higher sum allegedly owed to Plywood SACCO;

    b) Certiorari to quash the decision of the 1st and/or

2nd Respondent contained in the Report of Inquiry whose orders were communicated to the Petitioner by the 1st Respondent's letter dated 24th November, 2016 and made on 30th August,2011 or any other date to the

effect that the Petitioner be condemned to pay Plywood SACCO the sum of Kshs.33,472,045.50 and/or any alleged accrued interest;

c) Costs of this Petition.

5. The petition proceeded to hearing, and the appellant's case closed on 5th December 2018. On 21st December 2018, the appellant filed a notice of motion seeking the following orders:

a) Spent;
b) Spent;
c) That the petitioner's case closed on 5th December 2018 be re-opened;
d) That upon grant of prayer 3 above, the petitioner's witness Mr. Philip Varghese be recalled to testify to introduce a new document that will assist in the determination of this case.

6. The appellant sought to have the case reopened on the ground that it had inadvertently left out an important document, to wit, a resolution authorizing the filing of the petition. The missing document was described as "*a Resolution to Sue and Authority to Mr. Philip Varghese to testify for and on behalf of the Petitioner and Instructions to M/s Nyairo & Company Advocates to act for the Petitioner in this matter*." The application was vigorously opposed by the respondents. who contended that the application was an afterthought and that they would suffer prejudice if the case

was reopened.

7. Upon consideration, the learned Judge dismissed the application with costs and held as follows:

> *"[12]* ***Thus, a consideration of the record shows that this is a Petition that was filed on*** *15* ***December 2016 on behalf of a limited liability company. The Petitioner did not file a resolution of the Company for purposes of Order 4 Rule 1(4) of the Civil Procedure Rules; and whereas it is now settled that such a resolution need not be filed at the time of institution of the suit provided it is filed before the suit is fixed for hearing, no such resolution was filed by 5 December 2018 when the Petitioner closed its case. It is noteworthy that the Petitioner proceeded to close its case without having the said resolution, notwithstanding that the 2nd and 3rd Respondents had raised the issue at Paragraph 4 of their Response to the Petition filed on 24 May 2018; and notwithstanding that the issue had been raised in cross-examination of PW1.***
>
> ***[13] Whereas the Petitioner explained that failure to file the resolution was not deliberate, but due to inadvertence, no explanation was given as to why it took over two years to have the anomaly corrected; granted that the issue had been pleaded by the 2nd and 3rd Respondents…***
>
> ***[14] It is also noteworthy that, even after the proceedings of 5 December 2018, there was no eagerness on the part of the Petitioner to have the default rectified; for the instant application was not filed until 24 January 2019. Again, no explanation was proffered for the lapse***

of time between 5 December 2018 and 24 January 2019. It is also inexplicable, if indeed the application was

ready for filing on 21 December 2018 as purported, why it was not filed immediately.

[15] For the foregoing reasons, I am not persuaded that the Petitioner is deserving of the Court's discretion. To the contrary, it evident that the Petitioner's application is indeed an afterthought and is therefore devoid of merit. In the premises, I would dismiss the same with costs."

8. Aggrieved by the decision, the appellant filed a notice of appeal dated 12th March 2019. It also filed a memorandum of appeal dated 14th March 2019 with a whooping 15 grounds which is summarized as follows: That the learned judge erred in failing to exercise her discretion in reopening the appellant's case; that submissions were not considered; the application was dismissed on a technicality and substantial justice not done; and the learned judge was wrong in holding that there was unreasonable delay in filing the application.
9. The appeal came before us for hearing on 20th January 2026, whereby learned counsels Mr. Mungai appeared for the appellant, Ms. Nasongo held brief for Mr. Yego for the 1st respondent. There was no representation for the 2nd and 3rd respondents.
10. The appellant relied on their written submissions and case

digest both dated 8th November 2024 which they highlighted briefly. On

its part, the 1st respondent filed written submissions and a case digest both dated 4th December 2024 which they also briefly highlighted.

11. In its written submissions dated 8th November 2024, the appellant identified two broad issues for determination: first, whether the respondents stood to be prejudiced by the reopening; and second, whether the failure to avail the document at the proper time was excusable.

12. On the question of prejudice, the appellant contended that the trial court was empowered to entertain the application at any stage of the proceedings by virtue of Rule 21 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Relying further on Section 146(4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules, the appellant urged that, in the interest of justice, the learned judge ought to have allowed the case to be reopened for production of the company resolution. The appellant submitted that no prejudice would have accrued to the respondents had the case been reopened, given that the respondents had yet to present their own case and would have

retained the full opportunity to cross-examine PW1 on the resolution sought to be produced

13. Relying on the case of ***Spire Bank Limited vs. Land Registrar & 2 Others*** [2019] eKLR, the appellants submitted that Order 4 Rule 1(4) of the Civil Procedure Rules was not designed to be deployed as a procedural weapon to strike out suits but to safeguard the corporate entity by ensuring that only an authorised officer institutes proceeding on its behalf. In the circumstances, the appellant contended that the respondents had not produced any evidence to demonstrate that Mr. Philip Varghese was an unauthorized officer of the company, and that, in the absence of such evidence, the omission of the resolution was a mere administrative oversight that left the substantive merits of the petition entirely unaffected.

14. On the reasons for the omission, the appellant averred that the failure to file the resolution was neither deliberate nor tactical, but was the result of inadvertence at the time of compiling the voluminous petition documents and that the respondents would not have suffered any prejudice if the case was reopened to allow production of company resolution; taking into account that the said document is ordinarily not

one which must be filed at the

inception of proceedings, the court should have excused this oversight.

15. Finally, relying on the case of ***Wadhwa (As Legal representative of the estate of Deshpal Omprakash Wadhwa) vs. Mohammed & 4 Others, Civil Appeal No. 33 & 148 of 2019 (Consolidated)*** **[2022] KECA 25 KLR**, the appellant submitted that the decision by the trial court to dismiss the application without interrogating the explanation tendered by the appellant was unjust and ought to be set aside.

16. On its part, the 1st respondent submitted that under Rule 31 of the Court of Appeal Rules and Section 3(2) of the Appellate Jurisdiction Act, this Court can only reverse the orders of the lower court, remit the proceedings back to the lower court, or order a retrial, where sufficient grounds have been advanced, such as where the trial court misdirected itself on some matter and as a result arrived at a wrong decision, misdirected itself on the law, or failed to take into account some relevant matter. (See **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898**.)

17. Citing **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another [2015] eKLR** and Section 63(e) of the Civil Procedure

Act, the 1st respondent submitted that the reopening of a case is at the discretion of the court and that in exercising that discretion, the court should ensure that the reopening does not embarrass or prejudice the opposite party.

18. Citing **Mahamud v Mohamad & 3 Others[2018] KESC 62 (KLR)** it was submitted that for a case to be reopened to adduce further evidence, an applicant must show, among other things, that the evidence is directly relevant to the matter before the court, that it could not have been obtained with reasonable diligence for use at the trial, and that it was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce it.

19. Finally, the 1st respondent submitted that it would suffer prejudice as the documents were sought to be produced after the closure of the appellant's case. In any event, the omission had been expressly raised by the 2nd and 3rd respondents in their response to the petition, and the issue had surfaced again during cross-examination of the appellant's witness. Notwithstanding these clear notices, the appellant proceeded to close its case on 5th December 2018 without rectifying the default, and then delayed a further seven weeks before filing

the application on 24th

January 2019; a delay that remained entirely unexplained. The 1st respondent accordingly prayed that the appeal be dismissed with costs.

20. We have considered the record of appeal and the rival submissions by the parties. Though the appellant has raised 15 grounds of appeal, the only issue for determination, in our view, is whether the learned judge considered all the relevant facts and the applicable law in exercise of her discretion to disallow the reopening of the case and the production of the board resolution.

21. The law governing the reopening of cases is clear. A court retains the discretion to reopen proceedings after the close of evidence, but that discretion must be exercised judiciously and with due regard to the interests of both parties. The statutory framework within which that discretion operates is instructive. Section 146(4) of the Evidence Act provides that 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. Order 18 Rule 10 of the Civil Procedure Rules, 2010, similarly provides that the court may at any stage of a 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. Order 4 Rule 1(4) further provides that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

22. This question of reopening of cases is old hat and has been the subject of extensive judicial consideration across common law jurisdictions. The foundational principle was articulated by the High Court of Australia in ***Smith v New South Wales Bar Association*** **[1992] HCA 36; [1992] 176 CLR 256**, where it was held that:

> **"*The question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the Court retains its discretionary powers whether to admit any piece of evidence or not.*"**

23. That principle was endorsed by the Uganda High Court, Commercial Division, in **Simba Telecom v Karuhanga & Anor *[2014] UGHC 98***, where the court held:

> **"*The Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that***

> ***discretion, the Court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard reopening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.*"**

24. Kenyan courts have adopted and applied these principles in the persuasive case of ***Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another*** **[2015] eKLR**, where Kasango, J., drawing on both *Smith* and *Simba Telecom*, restated the governing principles and emphasized that the discretion to reopen must always be exercised with a keen eye on whether the opposite party would be embarrassed or prejudiced, and whether the application was in truth designed to fill gaps in the applicant's evidence rather than to place before the court material that was genuinely unavailable at the time of hearing.

25. These principles were further restated and elaborated upon in ***Wavinya Mutavi v Isaac Njoroge & Another*** **[2020] eKLR**, where the court comprehensively set out the considerations as follows:

> ***"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 party'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 the 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."

26. With those general principles in mind, it is necessary to examine the nature of the specific document that the appellant sought to produce upon reopening, for its character bears directly on the questions of prejudice and whether the reopening was designed to fill gaps in evidence. As regards the nature and purpose of a board resolution under Order 4 Rule 1(4), the position was settled by this Court in **Spire Bank Limited v Land Registrar & 2 Others [2019] eKLR**, where it was held:

> ***"It is essential to appreciate that the intention behind Order 4 Rule 1(4) was to***

safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief

***of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court...And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.*"**

27. This Court reinforced that position in ***Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another*** **[2015] eKLR**, holding that it is sufficient for a deponent to state that he is duly authorized, whereupon the burden shifts to the challenging party to demonstrate otherwise by evidence. In the same vein, this court in ***East African Safari Air Ltd v Anthony Ambaka Kegode*****, Nairobi Civil Appeal No. 42 of 2007 [2011] eKLR**, held that where authority to institute proceedings is in question, the proper course is not to strike out the proceedings but to stay them pending ratification; a proposition that underscores the law's reluctance to visit a party with the forfeiture of its suit on a purely procedural ground where the substantive claim remains intact.

28. With the foregoing legal framework in mind, we now turn to evaluate whether the learned judge properly exercised her discretion in dismissing the application. The learned judge's reasoning rested principally on two grounds: first, that the appellant had failed to explain why it took over two years to correct the anomaly despite the issue having been raised in the respondents' pleadings as far back as May 2018 and having surfaced again during cross-examination of its witness; and second, that even after the closure of the case on 5th December 2018, there was no urgency on the part of the appellant to rectify the default, the application not having been filed until 24th January 2019.
29. We have anxiously considered the learned judge's reasoning and, with respect, we are unable to agree that it represents a proper exercise of the discretion. Our reasons are as follows:
30. First, the learned Judge focused almost exclusively on the question of delay while failing to address herself to the more critical question of prejudice. The principles established in ***Samuel Kiti Lewa and Wavinya Mutavi*** (supra) make clear that delay and prejudice are separate considerations, each of which must be weighed independently. A finding of delay,

without more, does not automatically translate into a basis for refusing to reopen a matter. The court must go further and ask whether the opposing party would be embarrassed or prejudiced by the grant of the application. The learned judge did not undertake that inquiry. Had she done so, she would have found that at the time the application was made, the respondents had not yet presented their own case. They had therefore lost nothing. They retained the full opportunity to cross-examine Philip Varghese on the resolution once it was produced and to tailor their own case accordingly. The 1st respondent averred in opposition that it would suffer prejudice, but particularised none. A bare assertion of prejudice, unaccompanied by specifics, cannot constitute a sufficient basis on which to shut out a party from placing a document before the court.

31. Secondly, the learned Judge did not address the nature and purpose of the document sought to be produced. The board resolution was not sought to introduce new factual evidence going to the merits of the petition, nor to remedy deficiencies laid bare during cross-examination of the appellant's witness. Its sole and limited purpose was to demonstrate that Philip Varghese was a duly authorized officer of the appellant

company, a

procedural requirement under Order 4 Rule 1(4) of the Civil Procedure Rules.

32. In our view, the learned judge focused on the delay exhibited by the appellant in correcting the anomaly rather than on the demands of substantive justice and the prejudice, if any, to be suffered by the respondents. As this Court made clear in ***Spire Bank*** (supra), Order 4 Rule 1(4) was never designed to operate as a technicality to defeat a company's suit. The respondents had not produced any evidence to demonstrate that Philip Varghese was, in fact, an unauthorized officer. In the absence of such evidence, the burden of demonstrating lack of authorization had not been discharged, and the omission of the resolution was a procedural oversight that left the substantive merits of the petition entirely unaffected. As this court held in ***Makupa Transit Shade Limited*** (supra), it was sufficient for the deponent to state ***"duly authorized"***.

33. As regards the delay, the learned judge treated it as determinative without balancing it against the other relevant considerations, principally the absence of demonstrated prejudice and the limited procedural nature of the document sought to be produced. That, in our view, was a misdirection. The

only reason for reopening the case was for production of the board resolution, and given that the respondents had not yet presented their own case and retained a full opportunity to cross- examine Philip Varghese on the resolution once produced, that lapse, standing alone and in the absence of demonstrated prejudice, was insufficient to deprive the appellant of the court's discretion.

34. There is a further ground for interference that this Court considers it necessary to address. Both parties anchored their arguments on the Civil Procedure Act and the Civil Procedure Rules, and the learned judge similarly directed herself by reference to those provisions. However, the matter before the court was a constitutional petition, and the primary procedural framework governing the hearing of constitutional petitions is the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly referred to as the **Mutunga Rules**. While courts routinely invoke the Civil Procedure Act to ensure procedural fairness where the Mutunga Rules are silent, that recourse is secondary. The primary framework remained in the Mutunga Rules, and the learned judge was obliged to direct herself accordingly.

35. Rule 20 of the Mutunga Rules dictates the procedural manner for hearing constitutional petitions. It allows for petitions to be heard by way of affidavits, written submissions or oral evidence. Critically, it specifically empowers the court, on its own motion, ***to examine witnesses, call and examine, or recall any witness where the court is of the opinion that the evidence is likely to assist it in arriving at a decision***. The primary test under Rule 20 is therefore whether the recall of the witness is essential for a just decision, and its purpose is to ensure that constitutional petitions are determined on their substantive merits rather than defeated by procedural omissions. The court must be satisfied that recalling the witness will assist in clearing up ambiguities, contradictions, or doubts. The purpose is to clarify doubts regarding evidence on record, not to introduce new evidence or allow a party to ***'patch up'*** their case.

36. In our view, the learned judge did not address herself to the powers of the court under Rule 20 or to the pertinent tests it prescribes. Had she done so, she would have arrived at a different conclusion. That inquiry was never undertaken, and its absence was a further misdirection that justifies this Court's interference.

37. In view of the foregoing, the grounds of appeal have merit, and the appeal succeeds. Accordingly, we set aside the orders dated 12th March, 2019, and substitute them with an order allowing the notice of motion dated 21st December 2018 in terms of prayers No. (c) and (d). The appellant's case shall be reopened only for the purposes of production of the board resolution.

38. We further direct that the case shall be placed before a Judge other than Justice Olga Sewe for hearing and determination. Noting that this interlocutory appeal has taken many years to be determined, we direct that the case should be heard on a priority basis. On the issue of costs, we direct that each party should bear its own costs.

Dated and delivered at Nakuru this 27th day of February, 2026.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR