

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. E544 OF 2023

**EQUITY BANK KENYA LTD.....
APPLICANT**

VERSUS

**ROSEMELLE ONYANGO OKWANY.....1ST
RESPONDENT**

**TEMBO TAMU LTD.....2ND
RESPONDENT**

**RATILI CARGO AFRICA LTD.....3RD
RESPONDENT**

RULING

1. This ruling is in respect of the Notice of Motion dated 18th August 2025.
2. The Application is premised on the grounds on the face of it and is supported by the affidavit of *Kariuki King'ori* sworn on the even date.
3. The Respondent opposes the Application vide the grounds of opposition dated 6th October 2025.
4. The Application was canvassed by way of written submissions which parties duly filed.
5. Having considered the application, the opposition and the parties' respective submissions, the sole issue that falls for this Court's determination is whether the application is merited.

6. The court retains discretion to allow the reopening of a case. However, this discretion must be exercised judiciously. In **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR**, Kasango J. referred to the Ugandan High Court (Commercial Division) case of **Simba Telecom v Karuhanga & Anor (2014) UGHC 98**, which in turn cited the Australian case of **Smith v New South Wales [1992] HCA 36; (1992) 176 CLR 256**. The Australian court held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reason for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

7. The Ugandan Court in the case **Simba Telecom (supra)** held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (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...

8. In exercising its discretion to reopen, the court must ensure that reopening does not embarrass or prejudice the opposite party. Reopening should not be allowed where it is intended to fill gaps in evidence. Furthermore, such a prayer will be defeated by inordinate and unexplained delay.
9. The rationale behind the judicious exercise of discretionary powers was explained in ***Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR*** as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious, because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

10. In this case, the application comes after the case has been fully heard and after this court specifically directed the parties to file submissions, signaling the end of the

evidentiary phase. A party seeking to reopen proceedings at such a late juncture must demonstrate compelling and exceptional circumstances. The applicant has advanced none. The principle that finality in judicial proceedings is itself a value that courts must protect applies here: litigation must, at some point, come to an end.

11. First, the primary reason given for the application is a change of advocates. This court agrees with the 1st Respondent that a change in legal representation does not constitute exceptional circumstances sufficient to reopen proceedings. Advocates act as agents of their clients, and the consequences of choices made during litigation are binding on the party. To hold otherwise would reward poor litigation strategy and encourage parties to engage in serial advocate changes as a means of prolonging proceedings. This would be contrary to the overriding objective set out in Sections 1A and 1B of the Civil Procedure Act, which requires the court to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.
12. Second, the 1st Respondent has pointed out, without apparent contradiction, that no fresh evidence is being introduced by this application. The issues the Applicant now seeks to address through the proposed witnesses were, according to the 1st Respondent, already canvassed comprehensively in the Replying Affidavit of 3rd May 2024, accompanied by expert forensic handwriting evidence. The Applicant cannot now use the appointment of new advocates as a license to conduct a second trial on matters that should

have been addressed by its former advocates during examination-in-chief and cross-examination.

13. Third, the concern regarding prejudice to the 1st Respondent is real and cannot be dismissed. Litigation is costly, stressful, and disruptive. The 1st Respondent has already committed resources to fully contesting this matter and has, on her version, adduced all evidence, including forensic expert evidence, in support of her case. To permit the Applicant to re-enter the evidentiary arena at this point would deny her the legitimate expectation that the hearing of this matter has concluded. Courts must not lose sight of the interests of all parties, not merely the Applicant before them.
14. I am not persuaded that the Applicant has demonstrated any basis upon which the discretion to reopen the case ought to be exercised in its favour. The application discloses no exceptional circumstances, introduces no genuinely new evidence, and has been filed at a stage when granting it would irreparably prejudice the 1st Respondent and bring the administration of justice into disrepute.
15. It is my considered view that the Applicant cannot be allowed to patch up loopholes in its case after it has closed the same and the Respondent has also closed hers. This would offend the principle of finality as well as the overriding objective, which requires the court to facilitate the just, expeditious, efficient, and proportionate resolution of disputes.

16. The upshot of the above is that the Applicant's Notice of Motion dated 18th August 2025 lacks merit and is hereby dismissed with costs to the 1st Respondent.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Mbaji for Applicant

Mr. Okoth h/b for Mr. Simiyu for 1st Respondent

Court Assistant: *Lispa*