REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 350 OF 2012

[Formerly Eldoret Hccc No. 94 of 2007]

CHRISTOPHER CHEROP CHETALAM….....PLAINTIFF/RESPONDENT

VERSUS

KENYA POWER & LIGHTING COMPANY LTD..…1ST DEFENDANT/APPLICANT

DISTRICT LAND REGISTRAR, UASIN GISHU....2ND DEFENDANT/RESPONDENT

DISTRICT LAND SURVEYOR, UASIN GISHU.....3RD DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....4TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

The application before me is dated 20.3.2018 wherein the applicant/1st defendant seeks orders that the Honourable court be pleased to re-open the case for purposes of entertaining proceedings with respect to new/additional evidence and incorporation of counterclaim by the 1st defendant. That upon grant of the said orders, the 1st defendant be granted leave to ament the statement of defence.

That in the meantime, the court be pleased to order that there be stay of further proceedings in relation to filing submissions/highlighting of submissions and delivery of judgment/conclusion of the case.

The application is based on grounds that the 1st defendant has discovered new and important evidence necessitating re-opening of the matter for facilitation of production of the further evidence and proceedings. The valuation report attached by the plaintiff to his submissions had only been marked as PMFI14 but was never produced as evidence hence it would serve both parties interest if the issue of valuation is revisited and the 1st defendant be given a chance to provide their own valuation report. No prejudice will be cause to the plaintiff if the case is re-opened.

The 1st defendant does not have any deliberate intention of delaying the prosecution of the suit. For the ends of justice to be met, the court should grant orders re-opening the case for hearing to conclusion on merit.

The matter would be addressed more comprehensively with respect to the subject property and the issue in controversy and applicable law if the matter is re-opened taking into account duty of the court to dispense justice.

That every party should be allowed to exhaust available legal mechanism including option by the 1st defendant to provide additional new evidence or lodge counterclaim where mandated. The 1st defendant's application is made in good faith.

In the supporting affidavit, the applicant states that the matter has proceeded to full hearing and is pending highlighting of submissions.

That the 1st defendant/applicant wishes to apply for re-opening of the case in order to accommodate canvassing of new evidence and proceedings of a counterclaim based on new law and considering all circumstances of the case including report that was marked as PMFI14 and necessity for independent valuation by the applicant in order to counter valuation provided by plaintiff as has been attached by the plaintiff to his submissions and so that the court has full opportunity to comprehensively address all the issues in controversy.

The applicant has conducted a valuation on the suit property in order to counter the valuation report which was filed in court by the plaintiff; see annexture JO-1 being Valuation Report.

That valuation on behalf of the applicant has been done by M/s Real Appraisal Limited who will submit a valuation report in evidence subject to leave of the court.

That it would be necessary to cancel the plaintiff's title in the event of the plaintiff not succeeding in the case as per the reliefs sought by him and therefore it is imperative that orders be sought in relation to the plaintiff's title existing simultaneously with the valid titles of the 1st defendant over the same subject property.

There is need to amend the defence to incorporate a counterclaim in this respect and as per the attached draft amended defence marked JO-2.

That the applicant shall suffer substantial harm unless the case is re-opened and heard afresh.

The plaintiff filed a replying affidavit stating:

That in response to paragraph 4 and 5 of the affidavit, it is instructive to note that the intention of the applicant to reopen the case, introduce new evidence and incorporate a counterclaim is a mere afterthought as the applicant has is no doubt come to the realization that its case stands on shaky ground after hearing and final submissions by the parties to the suit.

That he is further advised by their advocates on record, which advise he verily believes to be true that 1st Defendant testified in chief, called witnesses, among them, Denis Nyatuka who was a registered valuer and surveyor and as such the applicant had all the opportunity to submit all the necessary evidence in support of its pleadings.

That the alleged valuation report that the applicant wishes to introduce is dated 29th December, 2017 which report was authored at the time when parties had been attending court with a view of highlighting submissions in this matter. It is only after 3 months from the time the report was made ready that they now bring this application.

That the said valuation report did not form part of the 1st Defendant's list of documents and its production or lack of it will not prejudice the 1st Defendant's case as the document that they wish to counter was not produced by the plaintiff but was merely marked for identification. A failure to produce the said valuation report will not in any way render the 1st Defendant's Defence fatal.

That in response to paragraph 7 of the affidavit, he wishes to state this suit was filed way back in May, 2007 before being transferred to the Environment and Land Court. All this time, the 1st Defendant had a chance to amend its defence to include a counterclaim and no exceptional circumstances have been demonstrated to justify the application now after all parties closed their cases and filed their submissions.

That the instant application only amounts to and/or constitutes a fishing expedition and/ or excursion, which is frowned upon by the due process of the law and consequently, the instant application amounts to playing a lottery with the court as the 1st Defendant has discovered loopholes in its case which they now wish to cover up by introducing new evidence and incorporating a counterclaim.

That the application is not made in good faith and is not in the interests of doing justice to all the parties as the Plaintiff will be greatly prejudiced in all aspects if the leave to re-open the case and file a counterclaim is granted.

That he is further advised by his Advocates on record that the law is clear that parties are bound by their pleadings. In this case, the applicant is bound by its pleading as earlier filed before court and in compliance with pre-trial directions as such the 1st Defendant's application should fail.

That he is advised by his advocates on record and which advice he believes to be true that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party after close of proceedings in an attempt to sneak in documents.

That he is advised by his advocates on record and which advice he verily believes to be true that the Civil Procedure Rules of 2010 require parties to furnish and exchange their evidence in advance before the commencement of the trial. These provisions are found in Order 3, Order 7 and Order 11 of the Civil Procedure Rules.

The applicant through M/s Sitienei submits that the new evidence is a valuation report dated 29.12.2017. The valuation report was only availed to them after hearing of the matter. They were informed by their client that the valuer took time to value the property. Failure to adduce the evidence was not deliberate on their part. This matter is simply one in which hearing was completed but judgment has not been delivered. It is just and fair that the court exercises its discretion. The court should be able to make an informed decision. There is no inordinate delay. The application has been filed before delivery of judgment. It is in the interest of justice that the application is allowed and that none of the parties will be prejudiced. The land in question is of public interest as it houses a substation and supplies electricity in the region.

Mr. Odongo, learned State Counsel submits that he supports the application and that the orders sought in the application are discretionary. This court should exercise its discretion judiciously. The valuation report is dated 29.12.2017. Parties closed their cases on 17.7.2017 when directions for submissions were made. When the case was closed, the report was in the possession of the defendants. The land houses a Kenya Power & Lighting Company substation serving entire North Rift region. The plaintiff is seeking eviction and therefore the issue of public interest arises. If the plaintiff succeeds, the defendants can compensate him. If the plaintiff fails, the suit would be dismissed. The

plaintiff has a lease which should be cancelled if the plaintiff's suit fails. No prejudice will be occasioned on any of the parties. Public interest outrights private interest.

Mr. Kamau submits that there is no right to amendment of pleadings after close of pleadings. The discretion is intended to be exercised to avoid injustice due to hardship arising from inadvertence.

The 1st defendant is bent on delaying or obstructing justice. The case was closed on 17.7.2017. The report was commenced by the 1st defendant himself. It was prepared in December. The delay is not explained at all.

The 1st defendant has not explained why he did not commission valuation timely. The application was on 20.3.2018. More than 3 months after the valuation report. There is inordinate and unexplained delay. No explanation is given why the evidence was brought in time. This was evidence within the reach of the 1st defendant.

The counterclaim at paragraph 17 shows that the applicants knew that they would counterclaim. That is obstructing the cause of justice.

This application seeks drastic orders of re-opening the case and amendment of defence and calling additional evidence. The 1st defendant closed his case on the 2.3.2017. The 2nd to 5th defendants have closed their case.

in **Uganda High Court, Commercial Division in the case SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98, the court had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was 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 reasons 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."**
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> **The Ugandan Court in the case held thus:**
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> **"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." …..**

The upshot of the above is that 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 re-opening 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 in ordinate and unexplained delay.

In this matter, I do find that there is inordinate delay from 2.3.2017 when the 1st defendant's case was closed to 30.3.2018 when the application was made. There is a delay of more than one year that is not explained. The application is made after the plaintiff has filed submissions and therefore, the same is likely to embarrass the fair hearing of the case. It appears that the 1st defendant has realized after reading the submissions by the plaintiff that there are gaps in his case. This court cannot assist a party who was given adequate time to prosecute his case to fill in gaps after the close of hearing of all parties and after the other party has filed submissions. The explanation for the failure to call the new evidence is not satisfactory. I do decline to grant the orders sought. The application is dismissed with costs.

Dated and delivered at Eldoret this 7th day of December, 2018.

A.OMBWAYO

JUDGE