



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 392 OF 2016

JOSEPH NDUNGU KAMAU.....PLAINTIFF

VERSUS

JOHN NJIHIA.....DEFENDANT

RULING

(Application to reopen plaintiff's case to adduce additional evidence; application made after both plaintiff's and defence cases were heard and closed; the plaintiff had prior to closing his case attempted to procure the evidence now sought to be produced but it was unavailable; the evidence has since become available; application allowed on conditions)

1. The hearing of this suit having proceeded and both the plaintiff's and the defence cases having been heard and closed, parties agreed to file and exchange written submissions. The court then set a date for oral highlighting of submissions.

2. On the eve of the highlighting of submissions, the plaintiff filed Notice of Motion dated 17th July 2017 in which he sought the following orders:

a) THAT this honourable court be pleased to suspend the highlighting of the written submissions and/or tendering of oral submissions.

b) THAT in place of prayer (a) above this honourable court be pleased to grant leave to the plaintiff to reopen the plaintiff's case limited to production of the original court file containing the proceedings and pleadings concerning the estate of Maria Nyambura Ndungu in Eldoret High Court Succession Cause Number 39 of 1988.

***c) THAT for purposes of prayer (b) above this honourable court be pleased to direct the in-charge of the Succession Registry Eldoret High Court to forward the original court file namely:
- Eldoret High Court Succession Cause Number 39 of 1988 concerning the estate of Maria Nyambura Ndungu.***

d) THAT costs of the application be in the cause.

3. The application is supported by the plaintiff's affidavit sworn on 17th July 2017 in which he deposes that he had sought the court file in Eldoret Succession Cause No. 39 of 1988 from the court at Eldoret almost 5 times but was told that it would be difficult to retrieve the file in view of its age. In the circumstances, he instructed his advocates to close his case even though he had intended to use the said file to fortify his case. That early in July he received a call from the Eldoret registry informing him that

the file had been located. He subsequently went to the registry and confirmed that the file had indeed been located. He thus prays that the application be allowed and adds that no prejudice will be occasioned to the defendant. The plaintiff also filed a further affidavit on 21st September 2017 although leave was neither sought nor granted for it.

4. The application is opposed by the defendant through a brief replying affidavit sworn on 25th July 2017. He deposes that the application does not disclose what is it that the plaintiff intends to prove which is not already on record. He adds that the fact that the applicant has letters of administration to the estate is evidence that suit land was in his mother's name when she died and that having closed his case it is the court and not the plaintiff which can call for further evidence.

5. The court ordered that the application be disposed of by way of written submissions. In that regard, the plaintiff/applicant filed submissions on 22nd September 2017. The defendant/respondent did not file any submissions. The applicant also filed list of authorities on 25th September 2017 in which he cited the case of **HCC No. 63 of 2007 (KITALE) Charles Antony Ondiek & 3 others –vs- Thomas Odhiambo Nyonje & 6 others**. I have considered the application, the affidavits, submissions and authorities.

6. It is important to note that the application herein not only seeks reopening of the plaintiff's case with a view to producing the court file and proceedings in Eldoret High Court Succession Cause no. 39 of 1988, it also seeks an order directing the officer in-charge of the "Succession" registry at Eldoret High Court to forward the said file to this court. The application was filed after close of both plaintiff's and defence cases, and after an order for written submissions had been made. No submissions had been filed at the time the application was filed.

7. The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in **Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR** Kasango J. stated:

17. Uganda High Court, Commercial Division in the case SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98 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.”

18. 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.”

20. 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 inordinate and unexplained delay.

8. The record shows that counsel for the plaintiff sought and was granted an adjournment on 20th March 2017 to produce the Eldoret Succession file. The plaintiff's case was ultimately closed on 26th April 2017 without the file being produced. Hearing of defence case subsequently commenced on the same date. Defence case was closed on 19th July 2017, after three defence witnesses were heard. On 19th July 2017 when the matter was coming up for oral highlighting of submissions, parties had not yet filed submissions. Instead, parties attempted to record a consent on the issue of the pending application but it turned out that there was not agreement.

9. The plaintiff has explained that he made efforts to locate the file so as to produce it prior to closing his case. The record confirms that he had intended to produce it prior to closing his case. I accept the plaintiff's explanation that he only closed his case when it appeared that the file couldn't be located. The file has now been located. The application is thus not an afterthought. The defendant has not suggested that any prejudice will be occasioned to him if the application is allowed.

10. I however do not think that it is in the interest of justice to give an open ended order. The reopening must be done within clearly defined parameters so as not to throw the proceedings generally open and cause delay. Bringing the entire court file in Eldoret High Court Succession Cause Number 39 of 1988 The estate of Maria Nyambura Ndungu to this court runs the risk of introducing issues that were in dispute in the said case into this case. It is enough to produce the final order or judgment rendered by the court in the said matter together with the final certificate of confirmation of grant. It is also crucial that there be a witness from the said registry who will produce the said documents. It is up to the plaintiff to procure the attendance of such a witness using the usual procedure for calling witnesses. I see no reason to grant an order in the nature sought at prayer (c) of the application.

In the end, I make the following orders:

- a) The plaintiff's case is hereby reopened but limited strictly to production of the final order or judgment of the court together with the final certificate of confirmation of grant (or certified copies thereof) in **Eldoret High Court Succession Cause Number 39 of 1988 The estate of Maria Nyambura Ndungu.**
- b) The documents in (a) above to be produced by an officer from Eldoret High Court Succession or Probate registry. The plaintiff to procure the attendance of the witness using the usual procedure for calling witnesses.
- c) The defence case is similarly reopened but limited strictly to responding to the evidence adduced under (a) above.

12. Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 16th day of November 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Maragia for the plaintiff

No appearance for the defendant

Court Assistants: Gichaba and Lotkomoi