Pirani & 3 others v Al Busaidy (As trustee of Seif Bin Salini Trust) (Environment & Land Case E127 of 2022) [2024] KEELC 4680 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4680 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E127 OF 2022

NA MATHEKA, J

JUNE 11, 2024

BETWEEN

SHAMM SHAKIR PIRANI ..... 1ST PLAINTIFF

JAMIL SHAKIR PIRANI ..... 2ND PLAINTIFF

IMRAN SHAKIR PIRANI ..... 3RD PLAINTIFF

ABBSAKI INVESTMENTS LTD ..... 4TH PLAINTIFF

AND

SAIF SAID SAIF AL BUSAIDY (AS TRUSTEE OF SEIF BIN SALINI TRUST) ..... DEFENDANT

RULING

1. The application is dated 11th November 2023 and is brought under Order Section 3, 3A & 63e of The *Civil Procedure Act*. Cap 21, 40 Rules and 4, Order 18 Rules 10 of The *Civil Procedure Rules* 2010, Section 146 (4) of the *Evidence Act*. Cap 80, Laws of Kenya, Article 159 of *the Constitution* of Kenya seeking the following orders;

    1. Spent.

    2. That this Honourable Court be pleased to stay the further hearing of the main suit until this application is heard and determined.

    3. That this Honourable Court be pleased to grant an Order to set aside this Honourable Court's orders of 30th October, 2023 and re-open the Plaintiff's/Applicant's case and allow the 3rd Plaintiff/Applicant herein to give evidence as per the attached witness statement.

    4. That this Honourable Court be pleased to make such Orders it deems fit and convenient to meet the ends of justice.

5. The costs of this application be provided.

2. The reasons given in the supporting affidavit sworn by the 3rd plaintiff is that on 30/10/2023 a director of the 4th plaintiff one Kazim Mohamedraza Panju testified and counsel for the plaintiff closed the plaintiff's case. However, the 3rd plaintiff had prior to the suit relocated out of the country and did not get a chance to testify, hence the reason for the late filing of the statement and willingness to participate. The 3rd plaintiff believes that his testimony would greatly assist the court in understanding the facts and the circumstances of the case.

3. The Defendant opposed the application and stated that it was a delaying tactic as the counsel for the plaintiffs have always known that the 3rd plaintiff can testify virtually. Counsel narrated how the plaintiff's advocates have been purposeful in derailing court proceedings and gave an example of the plaintiff's counsel making an application dated 19th October 2023 where the same sought leave to file a defence and counterclaim which the defendant did not oppose. The defendant claims that allowing the instant application would offend the provisions of order 3 rule 2 (c) and order 11 of the Civil Procedure Rules. Furthermore, the defendant faulted the 3rd plaintiff for not earlier filing his witness statement as he was listed as a witness in the list of witnesses dated 8th November 2022 and is apprehensive that the 3rd plaintiff simply put is pretending that he was not aware of the suit. The defendant concluded by stating that the witness statement marked as ISP-1 only reiterates evidence already testified by PW 1.

4. In their submissions, counsel for the defendant reiterated the contents in the defendant's replying affidavit and said that the application offended the provisions of order 3 Rule 2 of the *Civil Procedure Rules* which makes it mandatory for a party to file witness statements when filing suits. Counsel also submitted that the above rule needs to be strictly complied with as provided in Order 11 Rule 7 (2) and (3) *Civil Procedure Rules*. Furthermore, counsel while relying on the above argued that the application for reopening a case is discretionary to the court and relied on several cases such as *Joseph Njuguna Kamau vs John Njihia* (2017) eKLR, *Simba Telecom vs Karuhanga & Another* (2014) UGHC.

5. I have read and considered the application, the reply and the submissions thereto Section 146 (4) of the *Evidence Act* generally grants the Court powers to recall a witness. It provides thus:

> (4) 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."

6. Similarly, Order 18 Rule 10 of the *Civil Procedure Rules* grants the Court powers to recall any witness who has been examined. It provides thus:

> The Court may at any stage of the 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."

7. In *Raindrops Limited vs County Government of Kilifi* (2020) eKLR Nyakundi J. stated as follows;

> The decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion to albeit to be exercised judiciously and in the interest of justice.

8. Out of the primary concern would at what stage can a trial Judge permit the re-opening of the case to admit further evidence. Here is where jurisprudence is divided founded in the facts and circumstances of particular cases. The crucial question to be resolved in either situational analysis upon an application to re-open a litigant civil case is whether the adverse party will suffer prejudice in the legal sense.

9. The ambit of that trial, judicial discretion move to re-open the case and introduce additional evidence has also to be recognized under the fair trial rights which are constitutionally protected pursuant to Article 50 of *the Constitution*. Depending at what phrase such an application is made to re-open the case certain interrogatories question do arise and they are all in the interest of justice to grant or deny re-opening of the case."

10. The learned judge also stated as follows:

> I have in mind the various principles developed overtime governing an application of this nature to re-open the on-going case to adduce and admit further evidence.

11. In *State v Hepple*, 279265, 271 {1977}:

> "the Judge must consider whether the party deliberately withheld the evidence proferred in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts."

12. While the dictum in *Cason v State* 140 MD App 379 {2001} espouses the principles such as:

> "Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony." (underlined emphasis mine)"

13. This procedure was also described in Learned Authors of Murphy on evidence 12th Edition at paragraph 17.17 as follows;

> the general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case. (See Kane {1977} 65 CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses' statements, is designed to enable this to be done wherever possible."

14. The above position was also held in *Oakley vs Royal Bank of Canada* (2013) ONSC 145 (2013) OJ NO. 109 SC where the court stated;

> the Court requires the parties to mitigation to bring forward their whole case, in both civil and criminal matters, the crown or plaintiff must produce and enter in its own case all clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice."

15. The defendant opposes this application the 3rd plaintiff's strategy is to delay the proceedings of this suit, the defendant has invited the court to look at the conduct of the plaintiff in delaying the court and abusing the court process. Learned Author in the Canadian Encyclopedic Digest Evidence IV. 12

(a) which summarizes the approach the Court should adopt in assessing a party's conduct as a relevant factor thus;

> where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.
>
> (1). Whether the evidence. If it had been properly tendered. Would probably have altered the Judgment and
>
> (2). Whether the evidence could have been discovered sooner had the party applied reasonable diligence.

16. Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger, the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."

17. With the above sentiments in mind, I have perused the said witness statement by the 3rd defendant. I have also taken counsel's for the defendant's arguments that it does not raise new evidence and I have found that the same is not true. I cannot get into the merits of the testimony of PW1 and the said witness statement as I will deal with them at the stage of rendering judgment. I have also neither found that there is inordinate delay in requesting filing of the written statement nor do I find that the defendant will be prejudiced. Timelines were well argued in the *Raila Odinga & 5 others v IEBC & 3 othe*r (2013) eKLR case and prejudice was discusses in the Samuel Lewa Kiti cited above by counsel for the defendant as follows;

> 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."

18. It is only one witness who is requesting to testify and it is based on the statement I find the application is merited and I grant prayer 3 of the application. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE