Ethics and Anti-Corruption Commission v Irungu & 2 others (Environment & Land Case 43 of 2015) [2024] KEELC 5612 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5612 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 43 OF 2015

NA MATHEKA, J

JULY 24, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF

AND

EDWARD MWANGI IRUNGU ..... 1ST DEFENDANT

MINALOVE HOTEL & RESTAURANT ..... 2ND DEFENDANT

EQUITY BANK ..... 3RD DEFENDANT

RULING

1. The application is dated 28th March 2024 and is brought under Section 3, 3A and Section 63 of the *Civil Procedure Act* Chapter 210 of the Laws Kenya, Section 146(4) of. the *Evidence Act* Chapter 80 of the Laws of Kenya, Order 18 Rule 10 of the Civil Procedure Rules and Article 159 of *the Constitution* of Kenya seeking the following orders;

    1. This Honourable Court be pleased to order the Plaintiff's case to be re-opened and be heard for purposes of adducing evidence in the Plaintiff/Applicant's Supplementary List of Documents dated 27th December 2023 and the witness statement of Paul Ogweno Manyala dated 24th January 2024 filed before this Honourable Court.

    2. This Honourable Court be pleased to recall the Plaintiff Witness Dedan Okwama (PW6) for further Examination in chief, Cross Examination and Re-examination respectively on the evidence herein above.

    3. Costs of this Application be in the cause.

2. It is based upon the annexed affidavit of Fatuma Abdulrahim Advocate and upon the following grounds that on the 16th January 2023, the Plaintiff/Applicant herein proceeded with the hearing of its case where its witnesses including Dedan Okwama the Investigating Officer PW6, testified and

it closed its case. That on the 22nd March 2023, the matter came up for hearing of the Defence case and the Plaintiff/Applicant was served with the Defendant/ Respondent List of Documents and sought leave of this Honourable Court be allowed to peruse the 1st and 2nd Defendant's List of Documents and verify the same from the County Government of Mombasa where the documents were emanating which leave was granted. That the Plaintiff/Applicant vide its Letter Reference EACC/MSA/6/ 15/2 VOL II (113) dated 29th September 2023 wrote to the County Government of Mombasa to verify and authenticate the 1st and 2nd Defendant List of Documents and on the 8th December 2023 the County Government of Mombasa respondent through their letter Ref: CGM/ CS/EACC/D71/12-23 attached with confidential letter Ref: LPH/LND/I1/CONF/V01.I/ (33) dated 23rd November and from Department of Lands, Physical Planning and Internal Memo Ref: LPH/M/VOL VI/025 dated 23rd November 2023.

3. That on the 22nd November 2023, The Plaintiff/ Applicant also had an opportunity of interviewing the County Official in charge of Physical Planning Department Mr. Paul Ogweno Manyala and recorded his statement in respect of verification and authentication of the Documents herein above which evidence was found to crucial and of assistance this Honourable Court in determination of this case. That the County Government of Mombasa in verification and authentication some of the documents has raised some new evidence which the Plaintiff/Applicant found it necessary that it re-open its case for Examination in Chef, Cross-examination and Re-examination by both parties in this suit. That this Honourable Court has the discretion to re-open the Plaintiff/Applicant case and can only administer substantive justice by allowing this substantive evidence filed in the Plaintiff/ Applicant supplementary List of Documents to be adduced before this Court. That the 1st and 2nd Defendant will not suffer any prejudice if the Plaintiff/Applicant case is re-opened.

4. The 2nd respondent stated that whereas this Court retains jurisdiction to re-open the Plaintiff's case, the discretion to do so should be exercised judiciously and the court is duty-bound to ensure that the proposed re-opening of a case does not embarrass or prejudice the opposite party. Further, that where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the Court will not grant the plea. That they are not opposed to the Plaintiff being allowed to recall the Investigating Officer (PW6) and call a new witness Paul Ogweno Manyala as proposed, on the condition that the said witnesses be restricted to giving evidence in as far as two issues are concerned, that is, the building plan and building inspection forms and the statement of payment of rates in respect of the suit property.

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.
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> 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."

11. 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)"

12. 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."

13. The above position was also held in Oakley v 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."

14. The defendants did not oppose this application subject to the recalled witnesses commenting on specific documents and not giving their opinions. 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.

15. 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."

16. With the above sentiments in mind, I have perused the supplementary list of documents dated 27th December 2023 and the witness statement of Paul Ogweno Manyala dated 24th January 2024 and find that the defendants will not be prejudiced as they are yet to tender their defence. Recalling PW6 will also shed more clarity on this matter. 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 other (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."

17. Based on the discussion above, I find the application is merited and I grant prayer 2 and 3 of the application. Costs to be in the cause.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE