Mutiso & another v Kazungu & another (Environment & Land Case 149 of 2021) [2024] KEELC 5614 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5614 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 149 OF 2021

NA MATHEKA, J

JULY 23, 2024

BETWEEN

AMOS KILUNGYA MUTISO ..... 1ST PLAINTIFF

BEATRICE SILU MUTISO ..... 2ND PLAINTIFF

AND

KEITH NGALA KAZUNGU ..... 1ST DEFENDANT

JOSEPHINE MWERO RUWA ..... 2ND DEFENDANT

RULING

1. The application is dated 15th May 2024 and is brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 12(7), Order 51of the *Civil Procedure Rules* seeking the following orders;
    1. This application be certified as urgent and service hereof be dispensed with in the first instance;
    2. This Honourable Court be and is hereby pleased to Order the case to be re-opened and Order the OCS Makupa Police Station to come and produce the details of the OB entrance relating to the title deed of plot number CR NO. 26826 Subdivision No.2830/1/MN
    3. This Honourable Court be and is hereby pleased to Order the OCS Makupa Police Station and the officer who entered the OB to be summoned specifically for cross examination of the OB entrance.
    4. Costs of this application be in the cause.
2. It is based on the grounds that the plaintiffs testified and closed their case on 31st October 2023. It has come to the defendants' attention that the OB entrance is not of a lost Title and the same ought to be examined by the Court to ascertain its validity and truthfulness. That if the defendants are to proceed under the circumstances it will greatly prejudice them as they will be condemned with unverified

documents. It is only fair and just and in the interest of justice that the plaintiff's case be re-opened and the witnesses summoned for cross examination. The defendant/Respondent shall suffer no prejudice in the matter and can be compensated in costs.

3. I have read and considered the application herein. In *Raindrops Limited v 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.

4. 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.

5. 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."

6. 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.

7. 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."

8. 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)"

9. 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."

10. 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."

11. 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.

12. 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."

13. The grounds of the application is that it has come to the defendants' attention that the OB entrance is not of a lost Title and the same ought to be examined by the Court to ascertain its validity and truthfulness. The application is not opposed. With the above sentiments in mind, I find that it is only one witness who is to be called to explain the contents of the OB entry. I find the application is merited and I grant prayer 2 of the application. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE