



**Japeth v Homeland Express Limited & 6 others (Civil Suit 51 of 2019)  
[2024] KEELC 6163 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6163 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 51 OF 2019  
LL NAIKUNI, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**LYDIA KAGUNA JAPETH ..... PLAINTIFF**

**AND**

**HOMELAND EXPRESS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA C/O AG ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPHINE KATANA ..... 3<sup>RD</sup> DEFENDANT**

**LEONARD SHIMAKA ..... 4<sup>TH</sup> DEFENDANT**

**HASHIM GOT SAT ..... 5<sup>TH</sup> DEFENDANT**

**KATANA VUTO NYAWA ..... 6<sup>TH</sup> DEFENDANT**

**MWERO MWAMBEYU VUTO ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked with the determination of the Notice of Motion application dated 12<sup>th</sup> February, 2024. The application was instituted by Lydia Kaguna Japheth the Plaintiff/Applicant. It was brought under the dint of the provision of Order 18 Rule 10, Order 51 Rule (1) Civil Procedure Rules 2010, Section 146 (4) of the Evidence Act, Cap. 80 Laws of Kenya; Sections 1A and 3A of the Civil Procedure Act, Cap. 21 and all enabling provisions of the Law.
2. Upon service of the Notice of Motion application none of the Defendants opposed the application. They intimated to Court that their decision was based on expediting this rather old case to be finally determined.



## II. The Plaintiff's case

3. The Plaintiff sought for the following orders: -
  - a. Spent.
  - b. That the Plaintiff be allowed to re - open her case, call (Emmanuel Kenga) a forensic document examiner and produce a forensic document examiner's report on the signatures of Mary Ndari Kai who testified as DW - 1.
  - c. That Mary Ndari Kai (DW1) be recalled for further cross-examination in light of the findings in the forensic document examiners' report.
4. The application was premised by the grounds, testimonial facts and the averments made out under the 9 Paragraphed supporting affidavit of Lydia Kaguna Japhet, the Plaintiff/ Applicant herein with one (1) annexure marked as "LKJ - 1" annexed thereto. She averred that: -
  - a. On 1<sup>st</sup> March, 2023 Mary Ndani Kai (DW - 1) tendered evidence and was shown a copy Mombasa/ Mwembelegeza/262 contained in the Plaintiffs documents tendered before court.
  - b. In the course of giving evidence she denied that the signature on the face of the copy of title and part A were her signature yet she was the one who issued it to her.
  - c. Following that evidence through her current advocates on record engaged the services of Mr. Emmanuel Kenga a Forensic document examiner to compare the DW - 1's signatures appearing on the title document she produced in court against her known signatures as contained in other title documents.
  - d. The said Forensic document examiner prepared a report a copy of which was attached in the affidavit and marked as "LKJ - 1".
  - e. The Forensic Document examiner concluded that the signatures were similar and indistinguishable from DW - 1's known signatures.
  - f. The said report and the evidence of the Forensic document examiner was relevant for the fair and just determination of the issues in dispute in this case.
  - g. She made and swore the affidavit in support of her application to re - open her case, call and tender the evidence of the forensic document examiner recall DW - 1 for cross examination.

## IV. Submissions

5. On 9<sup>th</sup> April, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 12<sup>th</sup> February, 2024 be disposed of by way of written submissions. Pursuant to that, it was only the Plaintiff/Applicant who complied. Thus, a ruling date on its merit was reserved on 23<sup>rd</sup> September, 2024 by Court accordingly.

### A. The Written Submissions by the Plaintiff/Applicant

6. The Plaintiff/Applicant through the Law firm of Messrs. Gitonga Kamiti Kairaria & Company Advocates filed her written submissions dated 3<sup>rd</sup> May, 2024. Mr. Kairaria Advocate commenced by submitting that the issues were based on the filed Notice of Motion application dated 12<sup>th</sup> February, 2024. Through it, the Plaintiff/Applicant first sought to re-open her case and call Mr. Emmanuel Kenga a forensic document examiner to attend court to produce a forensic document examiners report



the signatures of Mary Ndari Kai who testified as DW - 1 in these proceedings. Secondly and related to the first principal prayer the Plaintiff/Applicant prayed that Mary Ndari Kai (DW - 1) be recalled for further cross-examination in light of the findings relating to her signature contained in the forensic report of Emmanuel Kenga.

7. The Learned Counsel relied on the grounds set out on the body of the Notice of Motion application her affidavit in support of the motion sworn on 12<sup>th</sup> February, 2024 the forensic examination report of Emmanuel Kenga attached thereto and these submissions to urge this court to hold and find that the said application was merited and allow it in the wider interest of justice to aid this court to reach a just determination of the dispute between the parties. The application was served on all the parties advocates on 12<sup>th</sup> February, 2024 and an affidavit of service filed but none of the Defendants had filed any grounds or replying affidavit in opposition to the application. Consequently, he urged the court to find and hold that the application was unopposed.
8. According to the Learned Counsel the Plaintiff/Applicant explained that she engaged the document examiner on the advice of her Advocate and he urge Court to accept her explanation because she was a lay person not conversant with the Law especially the technical and complex area of the Law of evidence. This Court has the requisite power and jurisdiction to grant both orders to re-open the case and recall the witness for cross examination. Under the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 this court has inherent power to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the court.
9. In the case of “Techbiz Limited – Versus - Royal Media Services Limited [2021] eKLR” it was held that:-

“The power to make orders for re-opening of cases for purposes of calling additional witness is a matter exercised under the interest powers of the court as per the provisions of Section 3A of the *Civil Procedure Act*.”
10. The Learned Counsel averred that the power to order recall of a witness is granted by Section 146 (4) of the *Evidence Act*, Cap. 80 as well as Order 18 Rule 10 of the Civil Procedure Rules, 2010 which the Plaintiff had cited in the instant application. Pursuant to Section 146, the court is permitted to recall or allow the recall a witness for further examination in chief or cross examination. The only condition is that parties have a right of further examination or cross examination as the case may be.
11. The Learned Counsel contended that it was necessary to recall Mary Ndari Kai to be further cross-examined in light of the findings contained in the forensic document examination report. Further the Learned Counsel argued that the defendants will not be prejudiced if the order for re-opening of the case and the recall of DW - 1 is made since their advocates would have the right to cross-examine and re-examine the witnesses.
12. In conclusion, the Learned Counsel held that the upshot of it all was that they implore the court to grant the Plaintiff/Applicant’s application.

## V. Analysis and Determination

13. The Honourable Court has considered the application by the Plaintiff, his written submissions, the cited authorities, the provision of *the Constitution* of Kenya, 2010 and the statutes. To arrive at an informed, fair and reasonable decision, the Honourable Court has crafted three (3) salient which fall for determination in the Notice of Motion application dated 12<sup>th</sup> February, 2024. These are: -



- a. Whether the Notice of Motion application dated 12<sup>th</sup> February, 2024 by the Plaintiff/Applicant has any merit?
- b. Whether the parties herein are entitled to the reliefs sought?
- c. Who bears the Costs of the Notice of Motion application dated 12<sup>th</sup> February, 2024?

**Issue No. a). Whether the Notice of Motion application dated 12<sup>th</sup> February, 2024 by the Plaintiff/Applicant has any merit?**

14. Under this sub – heading the main substratum of the application is rather straight forward. Further, it is instructive to note that the said application is not opposed. For record purposes, the application before Court is for re-opening of a party’s case and adducing of additional or further evidence. Both sides agree and I accept, that whether or not to allow a party to re-open its case and to adduce additional evidence is a matter of discretion. It is trite law 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 inordinate and unexplained delay.
15. This being a Court of record, I will proceed to highlight certain legal provisions governing recalling of witnesses and reopening of cases. The provision of Order 18 Rule 10 of the Civil Procedure Rules, 2010 provides that:

‘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.’
16. While the provision of Section 146 (4) of the Law of *Evidence Act*, Cap. 80 provides that:

“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.”
17. In Halsbury’s Laws of England Volume 13 on discovery, it is stated that:

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”
18. Further, that the manner of exercising that discretion is set out by Odeny J in “David Kipkosgei Kimeli – Versus - Titus Barmasai [2017] eKLR”: -

“Kasango J. in the case of Samuel Kiti Lewa – Versus - Housing Finance Co. of Kenya Limited & another [2015] eKLR referred to a Ugandan High Court, Commercial Division case of Simba Telecom –versus- Karuhanga & Anor (2014) UGHC 98 which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred



to an Australian case *Smith –versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held that:

“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.”

It should be noted 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 as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative, then the discretion should not be exercised in the applicant’s favour.”

19. 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 – Versus - Housing Finance Co. of Kenya Limited & 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.
20. In this aspect, I am bolstered by the cases of “Wavinya Mutavi – Versus - Isaac Njoroge & another (2020) eKLR” the court in disallowing an application similar to this one held that:

“Over the years, Kenya’s superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”

21. Similarly, in the case of “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.”

22. Further, in the case of “Republic – Versus - District Land Registrar, Uasin Gishu & Anor (2014) eKLR” where Justice Ochieng held that:-

“..... to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.’



23. Additionally, the provision of Section 19(1) of the *Environment and Land Court Act*, No. 19 of 2011 stipulates that:

‘in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.

24. While the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 states that:

‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.’

25. From the foregoing, I am fully persuaded that the application by the Plaintiff/Applicant herein is within the ambit of the provision of law and supported by well-articulated precedents and hence has merit. It must succeed whatsoever.

**Issue No. b). Whether the parties herein are entitled to the reliefs sought?**

26. Under this heading, the issue is whether the Plaintiff/Applicant is entitled to the relief sought. To respond to that, the Honourable Court will proceed to directly apply the above legal principles to the facts of the case. As I understand it, the Plaintiff/Applicant’s request is premised on 1<sup>st</sup> March, 2023, M/ s. Mary Ndani Kai (DW - 1) tendered evidence and was shown a copy Mombasa/Mwembelegeza/262 contained in the Plaintiff/Applicant’s documents tendered before court. In the course of giving evidence she denied that the signature on the face of the copy of title and part A are her signature yet she is the one who issued it to her. Following that evidence through her current advocates on record engaged the services of Mr. Emmanuel Kenga a Forensic document examiner to compare the DW - 1’s signatures appearing on the title document she produced in court against her known signatures as contained in other title documents. The said Forensic document examiner prepared a report a copy of which is attached in the affidavit and marked as “LKJ – 1”. The Forensic Document examiner concluded that the signatures are similar and indistinguishable from DW - 1’s known signatures. The said report and the evidence of the Forensic document examiner is relevant for the fair and just determination of the issues in dispute in this case. She made and swore the affidavit in support of her application to reopen her case, call and tender the evidence of the forensic document examiner recall DW - 1 for cross examination. The application is thus not an afterthought. The Defendants have not suggested that any prejudice will be occasioned to them if the application is allowed therefore they did not oppose the same.

27. 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.

28. Having stated this, I am persuaded that the Plaintiff/Applicant herein is entitled to the reliefs sought from the application. In saying so, I note that even though the Plaintiff/Applicant had closed her case, the matter had not proceeded to Judgment and the provision of Article 25 ( c ), 47, 48, 50 and 159 (2) (d) of *Constitution of Kenya, 2010*; Civil Procedure Rules, 2010 as well as the Law of *Evidence Act*, Cap. 80 made provisions to cater for such situations. As ably put by my brother Justice Ochieng that ‘Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing.’ To my mind, the Defendants will not suffer any injustice as their case is yet to commence and after all they will equally have an opportunity to cross examine the said re – called witnesses or adduce evidence in rebuttal.



**Issue No. c). Who bears the Costs of the Notice of Motion application dated 12<sup>th</sup> May, 2024**

29. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
30. In the present case, the Honourable Court reserves the discretion not to award any costs.

**V. Conclusion and Disposition.**

31. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -
- a. That the Notice of Motion application dated 12<sup>th</sup> February, 2024 be and is hereby found to have merit and is hereby allowed with no orders as to costs.
  - b. That the Plaintiff’s case is hereby reopened but strictly limited to the Plaintiff calling (Emmanuel Kenga) a forensic document examiner and produce a forensic document examiner’s report on the signatures of Mary Ndari Kai who testified as DW - 1.
  - c. That an order do and is hereby issued recalling Mary Ndari Kai (DW - 1) for further cross – examination in light of the finding in the forensic documents examiner’s report.
  - d. That for expediency sake, the hearing date of the matter fixed by the consensus of all parties in Court being the 29<sup>th</sup> January, 2025 to be maintained whatsoever.
  - e. That there shall be no orders as to the costs of the Notice of Motion application dated 12<sup>th</sup> February, 2024.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2024.**

**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT**  
**MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant;
- b. Mr. Kairaria Advocate for the Plaintiff/Applicant.
- c. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> for the Defendants/Respondents.

