



REPUBLIC OF KENYA



Hanson Developers Limited v Hanson Developers Limited & 3 others (Environment & Land Case E053 of 2021) [2025] KEELC 572 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E053 OF 2021
JA MOGENI, J
FEBRUARY 13, 2025**

BETWEEN

HANSON DEVELOPERS LIMITED PLAINTIFF

AND

SIGNATURE PROPERTIES LIMITED 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE 2ND DEFENDANT

RISHAD HAMID AHMED 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

RULING

1. The Applicant says that he has brought this Application to Court under Article 159 and 50 of *the Constitution* of Kenya, Section 1A, 1B(a), 3A and 63 (e) of the *Civil Procedure Act* and Order 51 Rule 1 and Rule 10 (2) and Order 8 of the Civil Procedure Rules and all other enabling laws.
2. The Application seeks the following Orders:-
 - a. That this Application be heard on priority basis
 - b. This Honourable Court be pleased to recall the Plaintiff's witnesses Mr. David Bett Langat, Mr Daniel Njoroge Kihiko and Mr Joseph Gwandaru for cross-examination by the 1st Defendant's Advocate
 - c. This Honourable Court be pleased to reopen the 1st Defendant's case and the Defendant be allowed to testify together with all its witnesses.
 - d. The costs of the Application be provided for.
3. The Application has the following grounds:



- a. The Application is brought on the grounds set out on the face thereof and on the Affidavit of KULDIP SINGH the Director of the 1st Defendant/Applicant sworn on 20/05/2024. The 1st Defendant has averred that their Advocate failed to attend Court on the date the matter was proceeding for hearing having appeared for the Company virtually during the call over when the matter was listed for hearing in open Court at 10:30 a.m. That the Plaintiff's three witnesses testified and the Plaintiff closed its case
 - b. That on Application by Counsel for the Plaintiff and the 3rd Defendant, the 1st and 2nd Defendant's case was closed.
 - c. That although the 1st Defendant attended Court they were directed to the Thika Chief Magistrate's Court by their Counsel and that when they finally were directed to the correct Court the hearing of this case had proceeded and the Plaintiff's case and that of the 1st and 2nd Defendants' closed.
 - d. That the mistakes of the Counsel should not be visited the client who is an innocent litigant. Further that the 1st Defendant has a legitimate counterclaim against the Plaintiff with reasonable chances of success.
 - e. That in the interest of justice and the constitutional right to fair hearing and access to justice it would only be right for the 1st Defendant to adduce their evidence and to be allowed to cross-examine the Plaintiff's witnesses who have to be recalled.
4. The Application is opposed by the Plaintiff through a Replying Affidavit sworn by Daniel Njoroge Kihiko a Director at the Plaintiff Company on 27/05/2024. The Plaintiff has contended that the Application is unmerited and tainted with perjury. That the 1st Defendant has not presented any correspondence to support his allegation that it was advised by the said Mr. Mugo that the matter has never proceeded as stated in the Supporting Affidavit at paragraph 4. At the same time this averment is in contradiction with the averment at paragraph 11 where the Applicant states that the hearing proceeded and the Plaintiff and 1st and 2nd Defendants' cases were closed on 7/11/2023.
 5. That the Directors of the 1st Defendant Company in company of their Advocate Mr. Mugo walked in Court late but did not address Court when its case was being closed. The matter post 7/11/2023 was scheduled for further hearing and on 6/03/2024 parties fixed for 15/05/2024 and on that date a Mr. Wafula informed the Court that he was acting alongside Mr. Mugo for 1st Defendant. That on 15/05/2024 Mr. Mugo informed the Court through email that he was unable to attend Court due to a personal engagement and this email is produced as annexure DK-1. Meanwhile Mr. Wafula was present in Court representing the 1st Defendant alongside Mr. Mugo.
 6. That the 1st Defendant has not explained to the Court why they waited from 7/11/2023 when their matter was closed to file the instant Application six (6) months and on the morning of 15/05/2024 when the matter was coming up for hearing to instruct a new lawyer despite Mr. Wafula being well apprised of the matter since he even appeared in Court alongside Mr. Mugo on 6/03/2024. Thus the delay is unexcusable.
 7. That a case belongs to a litigant and it is not enough that the Applicant heaps on the blame to its Advocate further that this is an old matter which the 1st Defendant through its lethargy wants to drag on and that the continued pendency of the suit has prevented the Plaintiff from recouping the investment it made upon acquiring the suit property in 2021.



8. That since the Plaintiff has at all times complied with the directions of the Court it prays for dismissal of the Application which it says is predicated on unfounded and/or irrelevant grounds and granting it would delay the progress of the matter. Thus it calls for the Court to dismiss the Application.
9. The 3rd Defendant also filed a Replying Affidavit sworn by Rishad Hamid Ahmed opposing the Application and termed it as having been made in bad faith and only meant to delay the matter and being full of lies and misdirections.
10. That the 1st Defendant is hell-bent on delaying this matter and this it has done from the very onset of the matter having taken two years to comply with pre-trial directions and filing its defence and documents long after the matter had been confirmed for hearing.
11. Further that despite the 1st Defendant's Directors being in Court during the hearing on 7/11/2023 it chose not to address Court and the Court processed to close its case after concluding the Plaintiff's case.
12. The Plaintiff has contended further that the 1st Defendant is not candid in that it is not true that the 1st Defendant did not know that the matter has proceeded for hearing and that it was not aware that the case closed on 7/11/2023 since its Directors were present in Court on that day. Further that at paragraph 11 the Applicant has contradicted its averment at paragraph 7 and 8 where it has stated it did not know that the matter proceeded yet at paragraph 11 it admits to attending Court albeit late and so it is only natural that its Directors would have sought to know what transpired during the hearing which they say they missed.
13. The 3rd Defendant avers that the fact that the 1st Defendant avers to have learnt of what happened in Court on 15/05/2024 is out rightly not truthful and also the delay is too inordinate and this cannot be excused having been a whole 6 months since the hearing.
14. That despite the matter coming up for hearing on 6/03/2024 and further hearing on 15/05/2024 the Applicant never moved the Court making the delay even longer. And that even the present Application was not certified urgent by the 1st Defendant to enable it to be placed before the Court for directions. That the orders being sought by the Applicant are equitable and that by its conduct the Applicant has shown that it is not deserving of the said orders. Thus the Application is unmerited.
15. The Applicant filed a Supplementary Affidavit dated 16/11/2024 and denied the act of perjury as alleged by both the Plaintiff and the 3rd Defendant. The Applicant has reiterated the issues raised in the Supporting Affidavit and I see no reason to reproduce the same herein.
16. The parties have filed written submissions to canvass the 1st Defendant's Application dated 20/05/2025. The 1st Defendant filed their submissions dated 16/11/2024 while the Plaintiff/ Respondent had filed their submissions dated 20/01/2025. My perusal of the Court record has not brought me to any submission filed by the 3rd Defendant.
17. I have reviewed the Application and the Affidavit filed in support and in opposition and the submissions by the parties and really the only issue for determination is whether the 1st Defendant is entitled to the prayers sought in its Application dated 20/05/2024. Put in another way, is the 1st Defendant entitled to have the Court exercise its discretion to recall the Plaintiff's witnesses, Mr. David Bett Langat, Mr. Daniel Njoroge Kihiko and Mr Joseph Gwandaru for cross-examination by the 1st Defendant's Advocate. Further, can the Court exercise its discretion to reopen the 1st Defendant's case and the Defendant be allowed to testify together with all its witnesses?
18. The facts giving rise to the instant Application are rather straight forward. The present suit was part-heard on 7/11/2023 when the Plaintiff's and 1st and 2nd Defendants' cases were closed. The hearing



of the case had been allocated hearing time on 7/11/2023 after the virtual call over when the 1st Defendant's Counsel failed to attend Court despite having been in the virtual call over. The Directors of the 1st Defendant attended the hearing albeit late and only arrived when the Plaintiff's and 1st and 2nd Defendant's case was closed.

19. Although the Plaintiff avers that there is no evidence to show that Mr. Mugo Advocate for the 1st Defendant has communicated with the 1st Defendant telling them that the case was not heard, it is not unusual for litigants to claim to have been misinformed by their Counsels. I take judicial notice that often the litigants always lay blame on their Counsels. It is however the responsibility of each litigant to manage its case and not lay blame on their Counsel.
20. Order 18 Rule 10 of the Civil Procedure Rules provides as follows: -

“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.”
21. Further, Section 146(4) of the Evidence Act provides: -

“(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.”
22. The Court held in the case of *Odoyo Osodo Vs. Rael Obara Ojuok & 4 Others* [2017] eKLR:-

“The Court's discretion in deciding whether or not to re-open a case which the Applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an Applicant who had established sufficient cause to warrant the orders sought.”
23. It is common ground that hearing of the Plaintiff's case closed and that of the 1st and 2nd Defendants, what is pending is the hearing of the 3rd Defendant's case then delivery of judgment. The Applicant herein seeks to testify on its defence and call witnesses as well as for leave to recall and to cross examine the Plaintiff's witness. It was the Applicant's case that it only learnt that its case had been closed when its Advocate communicated at the hearing on 15/05/2024. It stated that there has also been no inordinate delay by the Applicant in filing the present Application.
24. The decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion and ought to be exercised judiciously and in the interest of justice.
25. Taking into consideration the reasons advanced by the Applicant for failing to participate in the hearing of the suit; it is the Court's considered view that it is in the interest of justice that the 1st Defendant be allowed to testify and call its witnesses and equally be given leave to cross-examine the Plaintiff's witness. It is notable that the Applicant has not sought leave to introduce any new evidence and is thus expected to rely on the evidence already on the Court record and within the Respondent's knowledge.
26. Judgment is yet to be rendered in this suit and the Respondents have also not demonstrated any prejudice that they are likely to suffer and that cannot be ameliorated by an award of costs if the Application was allowed.



27. This Court is satisfied that it is therefore in the interest of justice that the Application be allowed granting leave to the 1st Defendant to testify and call its witnesses as well as recall and cross – examine the Plaintiff’s witnesses.

Determination

28. In the light of the forgoing this Court makes the following findings and determinations; because the Application is found to have merit and it is hereby allowed as follows;

- a. This Honourable directs and orders for the recall of the Plaintiff’s witnesses Mr. David Bett Langat, Mr Daniel Njoroge Kihiko and Mr Joseph Gwandaru for cross-examination by the 1st Defendant’s Advocate.
- b. This Honorable Court directs for the reopening of the 1st Defendant’s case and the Defendant be allowed to testify together with all its witnesses.
- c. The 1st Defendant is directed to pay the costs of this Application and throw-away costs of Kesh 40,000 to be paid before the next Court hearing which shall be on February 27, 2025.

29. Ordered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

- for 1st Defendant/Applicant
-1st Respondent/ Plaintiff
-2nd Respondent /Defendant
-3rd Respondent /Defendant
-4th Respondent/Defendant

Mr. Melita - Court Assistant

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MOGENI J

JUDGE

