



**Rahemtulla & another v Irrico International Limited (Civil Suit  
E93 of 2021) [2025] KEHC 3759 (KLR) (Civ) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3759 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT E93 OF 2021**

**RC RUTTO, J  
MARCH 25, 2025**

**BETWEEN**

**MOHAMED HUSSEIN JAFFERALI RAHEMTULLA ..... 1<sup>ST</sup> PLAINTIFF**

**KAMAL MOHAMED RAHEMTULLA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**IRRICO INTERNATIONAL LIMITED ..... DEFENDANT**

**RULING**

1. This is a ruling on the defendant's Notice of Motion dated 15<sup>th</sup> July 2024. The Application is premised upon the provisions of Article 159 of *the Constitution*, section 146 (4) of the *Evidence Act*, sections 1A, 1B, 3A and 5 of the *Civil Procedure Act*, order 18; order 42, rules 6 and 11 and order 51, rule 1 of the Civil Procedure Rules. The applicant prays for the following orders:
  1. That the Honourable Court be pleased to set aside the proceedings of the 4<sup>th</sup> day of March 2024 in totality;
  2. That the Honourable Court be pleased to issue an order granting leave to reopen the plaintiff's case for the purpose of recalling Mr. Mohamed Hussein Jafferli Rahemtulla for further cross-examination and re-examination;
  3. That in the alternative to prayer two above, the Honourable Court be pleased to issue an order that the matter be heard de novo;
  4. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of it as well as the supporting affidavit and further affidavit of Bilu Vadera, the applicant's director, sworn on 15<sup>th</sup> July 2024 and 19<sup>th</sup> June 2024



respectively. The facts giving rise to the application are that vide a plaint dated 15<sup>th</sup> February 2021, the plaintiffs filed the present suit. The defendant, now the applicant subsequently entered appearance and filed its statement of defence and counterclaim dated 6<sup>th</sup> October 2021. Thereafter, the matter was certified ready for hearing on 22<sup>nd</sup> February 2022 after parties confirmed that they had complied with the provisions of order 11 of the Civil Procedure Rules. The applicant stated that it had filed documents running up to 684 pages.

3. The applicant further stated that on 4<sup>th</sup> March 2024, Mongare, J. informed the parties that the proceedings of the day would be recorded and transcribed. She therefore urged parties and their respective witnesses to speak directly into the microphones and remain audible. On that very day, the 1<sup>st</sup> plaintiff/respondent testified. During the proceedings, the deponent observed that the learned judge made short notes and was following the proceedings.
4. During his cross examination, learned counsel for the applicant, Mr. Okatch, referred the 1<sup>st</sup> respondent to the applicant's bundle of documents annexed to its counterclaim at pages 85 - 115. The applicant decried that due to a printing and compiling error by the court's registry, there were missing pages in the bundle. Withal, the learned judge stopped the applicant's counsel from making references to those documents as they were not in the court file. The applicant contended that those documents were indeed uploaded in the e-filing portal.
5. The applicant stated that since it could not comprehensively cross-examine the 1<sup>st</sup> respondent without those documents, its counsel sought and was granted a two-hour adjournment with leave granted to furnish those missing documents to the court. According to the applicant, that time was too short to countercheck if its bundle was complete.
6. The matter then proceeded in the afternoon on that day where the applicant was present with its bundle. However, the bundle was not properly compiled to confirm completeness on account of scarcity of time. Parties were reminded to remain audible for purposes of transcription. The 1<sup>st</sup> respondent was accordingly cross examined.
7. According to the applicant, the learned judge was interruptive and disregarded the provisions of the Evidence Act, the Civil Procedure Act and the Rules thereunder. In addition, she informed parties that she would only consider documents that had been placed in the physical court file.
8. Later on, the applicant's counsel wrote on 21<sup>st</sup> March 2024 to the court seeking for copies of the proceedings and transcripts of that day. The applicant, on 5<sup>th</sup> April 2024, received from the deputy registrar, a six-page copy of certified proceedings. Upon receipt, the applicant observed that the said proceedings did not accurately capture the transpirations of that day as they were too scanty for proceedings that lasted more than three hours. This prompted the applicant's counsel to write another letter seeking a complete record of the proceedings of that day. Upon inquiry, the applicant was informed that the recording and transcription machine had malfunctioned and did not record the proceedings. As a consequence, the applicant has never received the full record of proceedings.
9. The applicant urged that in view of the foregoing, the application was merited for the following reasons: proceedings of the court are sacrosanct and should be properly recorded and complete in the event of an appeal; the court will be disadvantaged for having an incomplete unreliable record; there was a real apprehension that the applicant's right to a fair hearing would be violated if they are not allowed to cross examine the 1<sup>st</sup> respondent again; it was a fair opportunity for the applicant to adduce its evidence; the applicant's documents properly justify its defence and counterclaim; the application was made in good faith and would be prejudicial to the applicant if the orders sought are not granted; and it was in the interest of justice that the application be allowed as prayed.



10. The application was opposed. Vide his replying affidavit sworn on 16<sup>th</sup> July 2024, the 1<sup>st</sup> respondent herein deponed the affidavit on his own behalf and on behalf of the 2<sup>nd</sup> respondent. He recalled that he was substantively cross examined by the applicant's counsel when the dispute was heard on 4<sup>th</sup> March 2024 after several adjournments on prior dates. He concurred with the facts on record in terms of what the parties had filed before the court save to state that the matter was certified ready for hearing on 9<sup>th</sup> February 2022.
11. The deponent stated that contrary to the applicant's dispositions, the matter first proceeded with hearing on 7<sup>th</sup> November 2023 when the 1<sup>st</sup> respondent testified in chief. During the cross examination of the 1<sup>st</sup> respondent on the same day, learned counsel for the applicant, one Miss. Mwangi, was advised to appraise herself with the file as she was referring to documents that she could not trace. She was granted leave to avail the court with the proper bundle filed by the applicant.
12. The matter was adjourned to 15<sup>th</sup> November 2023. However, the same did not proceed as the applicant had not availed its bundle. The same was served upon the 1<sup>st</sup> respondent's counsel on that day. He clarified that the hearing that took place on 4<sup>th</sup> March 2024 proceeded on account of a further hearing. He lamented that he was an old man and of poor physical status. That the applicant was craftily seeking to have a second bite at the cherry to fill gaps in its case. That the applicant was the author of its own misfortune for filing incomplete documents and could not condemn the respondents for their otiose preparedness.
13. It was deponed further that the court granted the applicant time to avail the trial bundle. At no point did the advocates object that the period given to furnish their documents as too short. That they did not tender any evidence to prove that they sought for more time. In any event, they had over five months to furnish that bundle but failed to do so on their own accord. That the allegations made in the application were not backed by any evidence and thus false.
14. In their view, the respondents contended that the applicant was imploring a delaying tactic. This is because when the matter was scheduled to come up for defence hearing, the applicant filed an application on 3<sup>rd</sup> July 2024, seeking to recuse the learned judge from hearing the matter; yet the grounds seeking recusal had been in the applicant's purview as at 5<sup>th</sup> April 2024.
15. In view of the foregoing, the respondents urged this court to dismiss the application with costs. They cited that not only was it filed inordinately, it also failed to meet the threshold set out for reopening of the respondents' case. They stated that no prejudice would be suffered by the applicant if the orders sought are not granted since it would have an opportunity to avail its eight witnesses. Instead, the application would be prejudicial to the respondents whose witness is a 78-year-old man and of ill health.
16. The application was disposed of by way of written submissions that were orally highlighted on 14<sup>th</sup> October 2024. The applicant filed its written submissions dated 19<sup>th</sup> July 2024 while the respondents filed their joint written submissions dated 9<sup>th</sup> August 2024.
17. This court has extensively considered those submissions that are persuasive on both ends of the spectrum. I have also taken due consideration of the application, the affidavits in support and the annexures thereto as well as the affidavit opposing the application.
18. The applicant seeks to reopen the respondents' case. Section 146 (4) of the Evidence Act permits courts to recall a witness for further examination in chief or cross examination. This provision is further echoed in order 18, rule 10 of the Civil Procedure Rules which provides that the court may at any stage of the proceedings recall any witness that has been examined and may put such questions as the court thinks fit subject to the law of evidence. The power to reopen a case is discretionary and the guiding



principles are well settled. In the case of *Susan Wavinya Mutavi vs. Isaac Njoroge & another* [2020] KEELC 8 (KLR) the court held as follows:

“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 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. (See (i) *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; (ii) *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; (iii) *Ladd v Mashall* (1954) 3 All ER 745; (iv) *Reid v Brett* [2005] VSC 18; (v) *Smith v New South Wales Bar Association* (1992) 176 CLR 256; and (vi) *EB v CT (No 2)* [2008] QSC 306.”

19. Guided by the above holding, which this court fully adopts, I proceed to examine whether the application has merit. The court confirms that, according to the record, parties confirmed compliance with pre-trial directions on 9<sup>th</sup> February 2022. The 1<sup>st</sup> respondent subsequently, testified on 7<sup>th</sup> November 2023. During cross examination of the 1<sup>st</sup> respondent, the hearing was adjourned to 10<sup>th</sup> November 2023. However, the same did not proceed until 4<sup>th</sup> March 2024.
20. During the hearing at 11:30 a.m., the matter was adjourned at the applicant’s request to allow it to file a copy of its bundle in the court file. The applicant’s advocate then extensively cross examined the 1<sup>st</sup> respondent. With no further questions raised, the witness was re-examined, marking the close of the respondents’ case. On 15<sup>th</sup> July 2024, the applicant made an oral request to reopen the respondents’ case. However, the learned judge directed the applicant to formally seek those orders.
21. That confirms that indeed, the 1<sup>st</sup> respondent was first cross examined on 7<sup>th</sup> November 2023. The matter was adjourned to 4<sup>th</sup> March 2024 during the 1<sup>st</sup> respondent’s cross examination. All this time, the applicant ought to have ensured that the documents it intended to rely on were properly on record. This is on the backdrop that the parties confirmed that they had complied with pretrial directions. Otherwise, there would have been no need to adjourn the matter. It is also instructive to point that the applicant did not object to the allegation by the respondents that the applicant was not constrained for time to file their bundle of documents. It only arose in the body of the application.
22. This court further notes that the applicant’s letter of 21<sup>st</sup> March 2024 to the court sought transcribed proceedings to enable the applicant file a complaint against Mongare, J. before the Judicial Service Commission. The letter of 8<sup>th</sup> April 2024 stated that the letter of 21<sup>st</sup> March 2024 erroneously sought for typed proceedings which were acknowledged as received on 8<sup>th</sup> April 2024. They were now seeking for certified copies of the transcribed proceedings to enable the counsel to advise his client. No complaint was advanced as to the competency or otherwise of the transcriptions adduced. It also appears as though the applicant was dissatisfied with the conduct of the judge but not the contents and correctness of the proceedings.



23. Taking all the above into account, I find that the application was an afterthought and was not made in good faith. It is alleged that the record is incomplete as it failed to capture the proceedings of the day. The matter is still at its infancy stage of hearing. Also considering the parties are of advanced age, I find that it is prudent for the applicant to allow the matter to proceed for full hearing to its logical conclusion and then elect to challenge the outcome if so dissatisfied.
24. I further concur with the respondents' disposition to the extent that affidavits are supposed to exemplify facts and not the law. Order 19, rule 1 of the Civil Procedure Rules states that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof. Any issues of law deposed are completely disregarded in the circumstances.
25. Moreover, the applicant's witnesses are yet to testify. It still has an opportunity to present its evidence and avail the witnesses it intends to call. That would not be achieved by reopening the plaintiffs' case to wit it is observed that the witness was comprehensively cross examined without any reservations. Noting the 1st plaintiff is of advanced age, this matter ought to be expedited to its logical conclusion. That would be achieved if the parties proceed to hear the defence case. To reopen the plaintiffs would be an infraction of the principle of expeditious disposal of disputes.
26. At any rate, testimony of the witness is just part of the evidence adduced before court by parties. The applicant was allowed time to furnish the court with the legible bundle of documents. The parties will have an opportunity to submit to their evidence, both oral and documentary and the court will consider the same as per the legal threshold. It appears to me that the applicant is motivated by the need to fill gaps that in his view are not contained in the transcribed proceedings without necessarily stating the nature and extent of the said evidentiary gaps. For the reopening of the plaintiffs/respondents case to be justified it must be shown that doing so would have a significant impact on the outcome of the case. However, that was not demonstrated thus there is no apparent credibility in the request to reopen the case.
27. I am persuaded that both parties have the record of what transpired at the hearing, particularly during the extensive cross examination of the 1<sup>st</sup> respondent. Each party remains at liberty to use the said evidence to further their case at submission or otherwise for the court's ultimate consideration. Whether the proceedings are transcribed or not does not in my view afford an avenue for the trial court to abdicate its duty to take into account all the relevant evidence adduced before court.
28. As earlier indicated, the applicant noted that the trial judge was taking short notes and following proceedings. Its main challenge is the judge was interruptive during cross examination which on the face of it does not of itself amount to lack of following the proceedings by the trial judge. Perhaps, without going into the merits of the applicant's actions may have been the spur of its consideration of filing the complaint against the trial judge. It is in my view premature at this juncture to anticipate that the trial judge in her eventual reasoning would fail to consider the evidence that was properly adduced before court. Should this happen, nothing prevents the applicant from preferring appropriate consequential proceedings including review and appeal.
29. It is also important to note that the applicant did not approach the court in a timely manner. There was unexplained and excessive delay in filing this application by the applicant as contended by the respondents. Ultimately, I come to the conclusion that the application was not only filed with an inordinate and unexplained delay but also failed to demonstrate the relevance of reopening the case.



- 30. Therefore, the upshot of the above findings is that the Notice of Motion application dated 15<sup>th</sup> July 2024 lacks merit. It is hereby dismissed with costs to the plaintiff's/respondents.
- 31. Mention before the Deputy Registrar on 9<sup>th</sup> April 2025 for onward transmission to the Presiding Judge of the Commercial and Tax Division for reallocation/or hearing of the appeal.
- 32. Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

**RHODA RUTTO**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of;

..... Plaintiff

..... Defendant

Wanyoike Court Assistant

