



**Murungi v Cretum Properties Limited (Environment & Land Case
1395 of 2016) [2023] KEELC 15766 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1395 OF 2016**

J OMANGE, J

FEBRUARY 22, 2023

BETWEEN

JESSICA MURUGI MURUNGI PLAINTIFF

AND

CRETUM PROPERTIES LIMITED DEFENDANT

RULING

1. The subject matter of this suit is LR 280/9.
2. The Plaintiff filed this suit in November 11, 2016. The case was subsequently heard and the Plaintiff closed its case. However, the Plaintiff has sought to reopen her case so as to present the evidence of an expert witness.
3. By a Notice of Motion Application dated July 25, 2022, the Plaintiff seeks the following reliefs:
 - a. That this Honourable Court be pleased to re-open the Plaintiff/ Applicant's case.
 - b. That the Plaintiff/ Applicant be granted leave to present the evidence of an expert witness.
 - c. That costs of this Application be provided for.
4. The Application was based on the grounds set out in the face of the Application and the Applicant's Supporting Affidavit that the hearing of the suit had commenced, the Plaintiff's case had been heard and closed, during which time she was unable to bring the evidence as she was trying to trace a copy of the Sale Agreement dated December 14, 2012 in vain thus necessitating the involvement of an expert witness.
5. That the Plaintiff has seen it fit to involve an expert opinion in authenticating the signatures of the Defendant's directors in the Sale Agreements dated June 11, 2012 and December 14, 2012, and the



- evidence by such expert is so vital in confirming the validity of the Agreement dated December 14, 2012 as she relies on the same while the Defendant challenges it.
6. The Plaintiff asserts that the evidence of an expert will assist the Court in determining the issues in controversy surrounding the documentary evidence already presented by the Plaintiff and dispensing justice to the parties, that the reopening of the case would not prejudice the Defendant who will subject the expert to cross examination.
 7. The Applicant contends that the additional expert witness would not alter the character of the case and will not occasion miscarriage of justice.
 8. The Application was opposed by the Defendant. Vide the Replying Affidavit of the Mburu Mungai sworn on November 2, 2022.
 9. The Defendant contends that there is no valid reason to reopen the case as the Plaintiff has been aware of the Defendant's position to the Agreement since the Defence was filed.
 10. It is the Defendant's position that the Plaintiff has been unable to trace the Agreement as there was no such an agreement and it is clear that the application seeks to panel beat the Plaintiff's case after strong cross examination by their Counsel.
 11. The Defendant insists that there was never a second agreement, neither had there been proof of payment of balance of the purchase price thus opposed the Application.
 12. Parties filed submissions; the Plaintiff's dated November 7, 2022 while the Defendant's December 14, 2022. The Plaintiff largely relied on the provisions of Order 18 Rule 10 and the cases of *Raindrops Limited vs County of Kilifi*, *Victoria Kiminta vs Gladys Kiminta* and *Andrew Muganda and Others vs China Dalian International Group* while the Defendant relied largely on *Gulf Energy Limited vs Est Africa Safari Air Express Limited* and *David Muthami Muthbee vs Estate of James Titus Wambua and 4 Others*. I have considered all the above authorities cited.
 13. The power to recall and examine a witness is vested in the Court under Order 18, Rule 10 of the *Civil Procedure Rules* 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.
 14. The foregoing provisions however relate to a witness who had already testified and the recall serves the purpose of offering clarification on what the witness may have testified on or adduced. In this case, it is clear that the witness who is sought to be introduced is a new one.
 15. The case of *Gulf Energy Limited v East African Safari Air Express Limited* [2020] eKLR relied upon by the Defendant related to recall of witnesses who had previously testified while *Joseph Ndungu Kamau v John Njibia* [2017] eKLR relates to the adducing of additional evidence whether both the Plaintiff and Defence cases had closed. A similar fate meets some of the authorities relied on by the Plaintiff, particularly the *Raindrops Limited* and that of *Andrew Muganda* (supra). I have nevertheless taken the necessary persuasion therefrom.
 16. There is no doubt that this Court has the discretion to allow the re-opening of a case in appropriate circumstances. This discretion is exercised judiciously and sparingly with a view to doing justice between the parties. I am careful not to allow this be a mechanism of delay or abuse of this Court's processes. Re-opening of a case is an equitable remedy. Therefore, he who seeks this remedy must act equitably and must approach the court with clean hands.



17. In this case, the Plaintiff has disclosed that she did not manage to trace the Agreement of December 14, 2012, and has therefore decided to call an expert to buttress her case. She has also disclosed the nature of the evidence.
18. This court is of the view that in order to meet the ends of justice it is essential that the court allows the parties an opportunity to fully prosecute their case. I am not persuaded that the reopening of the case will visit any prejudices to the Defendant. In any event, the Defendant will have an opportunity to cross examine the expert witness. The value of the evidence to be tendered as proposed will be tested during the hearing of the case.
19. Consequently, the Plaintiff's Application is allowed to the extent that the Plaintiff shall within 30 days' file and serve a copy of the Expert witness report or statement. The Defendant shall be at liberty to file and serve within 30 days of service any documents to be relied upon to counter this evidence. Thereafter the witness shall be presented for a hearing limited only to the validity of the agreement.
20. The costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Kamwami for the Plaintiff

Steve - Court Assistant

