



**Abdalla v Shahena Enterprises Limited (Civil Case 45 of 2019)  
[2024] KEHC 10657 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 45 OF 2019  
DO CHEPKWONY, J  
AUGUST 16, 2024**

**BETWEEN**

**FANZY KASSIM ABDALLA ..... PLAINTIFF**

**AND**

**SHAHENA ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. Two issues arose from the submissions made by the respective counsels when they appeared before me on 14<sup>th</sup> August, 2024. Originally, this date had been reserved for the continuation of the Defense hearing, specifically for the purpose of calling the maker of the Bill of Quantities to produce the report as evidence before the court. However, Mr. Isika, counsel for the Defendant, informed the court that efforts to contact the maker of the Bill of Quantities had been unsuccessful. He argued that this failure should not result in the exclusion of the report from the record, as doing so would prejudice the Defendant's case. Mr. Isika further noted that the Defendant had filed an additional list of documents, including two letters, and requested that Mr. Viraj Shirol, one of the Defendant's witnesses, be recalled to present these letters. According to the learned counsel, these letters had been served to the Plaintiff's counsel, and their admission into evidence would not prejudice the Plaintiff.
2. Ms. Mulongo, learned counsel for the Plaintiff, expressed her dissatisfaction with the delays on the part of the Defendant, noting that the matter had been mentioned on various occasions for the defense hearing, yet had repeatedly been adjourned for unclear reasons. The learned counsel urged the court to uphold the legal principle that litigation must come to a conclusion and, on that basis, requested the court to close the defense case. Regarding the additional list of documents filed by the Defendant, the learned counsel argued that these documents were filed without the court's leave after the Plaintiff had already presented and closed its case. She contended that admitting these documents would amount to trying the Plaintiff by ambush.



## Determination

3. The court has considered the submissions made by the respective counsels regarding two primary issues: the admissibility of the Bill of Quantities Report, and the admissibility of additional documents filed by the Defendant after the

### Plaintiff had closed its case.

#### Admissibility of the Bill of Quantities Report

4. Section 67 of the *Evidence Act*, Cap 80 of the Laws of Kenya, stipulates that documents must be proved by primary evidence, which typically requires the testimony of the person who made or executed the document. In this case, the Bill of Quantities should have been produced by its maker to enable the court to assess its authenticity and reliability. However, the Defendant's Counsel has made it clear that the Defendant has lost contact of the person who made the Bill of Quantities and more likely than not the defence intends not to call any witness to produce the report.
5. Under Section 35 of the *Evidence Act*, a document not produced by its maker may only be admitted if certain conditions are met, including proving that the maker is deceased, cannot be found, or is incapable of giving evidence, and that the document was made in the ordinary course of business. However, these conditions must be supported by sufficient evidence.
6. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR emphasized the importance of presenting primary evidence, particularly when the authenticity of a document is in question. The court noted that documentary evidence should be subjected to scrutiny through cross-examination, and failure to present the maker of a document diminishes its probative value.
7. In this case, the court notes that the Defendant merely asserts that the maker of the Bill of Quantities was not reachable and could not be produced to testify. It has however not been shown that the document was made in the ordinary course of business hence the absence of its maker leaves the court without the means to verify the document's authenticity or to cross-examine the maker on its contents. As the Supreme Court held in the *Gatirau Peter Munya* case (supra), reliance on documents not properly introduced into evidence undermines the integrity of the judicial process.
8. Therefore, the court finds that the Bill of Quantities, having not been produced by its maker or any other competent witness, cannot be admitted into evidence. The court cannot rely on documents that have not been properly presented and tested through the judicial process.

#### Admissibility of Additional Documents filed by the Defendant

9. The second issue pertains to the Defendant's filing of an additional list of documents, which allegedly comprises of two letters. It is a common ground that the additional documents were filed after the Plaintiff had already closed its case. The Plaintiff's counsel, Ms. Mulongo, opposed the admission of these documents, arguing that they were filed without the leave of the court and that admitting them would amount to an ambush on the Plaintiff.
10. Order 7 Rule 5 of the *Civil Procedure Rules, 2010* requires a Defendant to file all documents they intend to rely on at trial together with their defense. Any additional documents must be filed with the leave of the court, especially if they are introduced after the parties had closed their cases. The court must consider whether admitting such documents would cause undue prejudice to the other parties and if the document could not have been obtained or presented previously on exercise of due diligence.



11. In *Railway Corporation v E.A. Road Services Limited* [2015] eKLR, the court held that the late filing of documents without leave, particularly after the close of the Plaintiff's case, should be discouraged unless exceptional circumstances are shown. The principle of fair trial under Article 50 of the *Constitution* of Kenya, 2010, on the other hand requires that each party be given a fair opportunity to present its case without being ambushed by late evidence.
12. The court finds that the Defendant's filing of the additional documents without prior leave, and after the Plaintiff had closed its case, constitutes an unfair tactic that would prejudice the Plaintiff. The Defendant had ample opportunity to present these documents earlier in the proceedings and it has not been shown that the two letters were not within the Defendant reach during pretrial or before the Plaintiff closed its case. Allowing their admission at this late stage would not only contravene the principles of procedural fairness but also risk undermining the integrity of the trial process since the Plaintiff might also be forced to reopen its case to rebut the contents of the said letters. Consequently, the court declines to admit the additional documents filed by the Defendant and directs that they be expunged from the record.
13. Since the Defendant intends not to call any other witness other than those contemplated in the summary above, I proceed to order that the Defence be and is hereby closed. Parties are further directed to file their written submissions within thirty days starting with the Plaintiff.
14. Mention on 2<sup>nd</sup> October, 2024 to confirm compliance and for purposes of fixing a Judgment date.

It is hereby ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF AUGUST , 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Ms Muhogo Counsel holding brief for Mr. Nanji

Mr. Isika holding brief for Ms Waruti counsel for defendants

Court Assistant - Martin

