Trust Bank Limited v Shah & 8 others (Civil Suit 73 of 2001) [2023] KEHC 21017 (KLR) (Commercial & Admiralty) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL SUIT 73 OF 2001

A MABEYA, J

JULY 31, 2023

BETWEEN

TRUST BANK LIMITED .... PLAINTIFF

AND

AJAY SHAH .... 1ST DEFENDANT

VINOD CHAUDRY .... 2ND DEFENDANT

ARUN JAIN .... 3RD DEFENDANT

PRAVIN MALKAN .... 4TH DEFENDANT

JIGNESH DESAI .... 5TH DEFENDANT

NAYAN MURTHI SABESAN .... 6TH DEFENDANT

REMUKA SHAH .... 7TH DEFENDANT

PRAFUL SHAH .... 8TH DEFENDANT

NITIN CHANDARIA .... 9TH DEFENDANT

RULING

1. On May 24, 2023, Micah Lekeiwan Nabori (PW1), the plaintiff's sole witness concluded his testimony. He had attempted to produce certain documents that had been filed in court but they were objected to by the defendants, which objection was upheld by the court for reasons contained in the ruling on record dated May 23, 2023.

2. Upon concluding his testimony, Mr Oyatsi learned counsel for the plaintiff applied for leave to call a new witness for purposes of coming to produce the plaintiffs' documents. By a ruling made on June

26, 2023, the court declined that application for reasons contained therein. The suit was then listed for further hearing on July 27, 2023.

3. By a motion on notice dated July 21, 2023, brought under article 159 of the *Constitution* of Kenya, section 146 (4) and 65(5) of the *Evidence Act*, and sections 3,3 (A) and 63(e) of the *Civil Procedure Act*, the plaintiff sought for the recall of PW1

> " for further examination in chief and re-examination and for purposes of adducing some primary evidence of the plaintiff's documents produced at the trial that had been rejected."

4. The grounds for the application were set out in the body of the motion and in the supporting affidavit of Mikah Lekeiwan Nabori sworn on July 21, 2021. These were that; under article 159 of the *Constitution*, justice is to be administered without undue regard to procedural technicalities, that the plaintiff was entitled under section 146(4) of the *Evidence Act* to recall a witness. That in exercise of that statutory right, the plaintiff wished to recall PW1 to produce some of the primary evidence of the documents that had been marked at the trial but rejected.

5. That the documents were part of the thousands of the plaintiffs' documents in a warehouse following the liquidation. That the original file of the plaintiff containing the original documents has been traced by the liquidation agent. That the production of those documents will not cause any prejudice to the defendants and will not cause any delay in the trial. That the depositors represented by the liquidator would be denied justice if the application is declined.

6. That the depositors lost about Kshs 8.3b as at the time the plaintiff bank collapsed. That the plaintiff was placed under liquidation in 2001 when the liquidator took control thereof. That the documents that were initially filed were photocopies made from the copies in the liquidator's file. That these documents were not new to the defendants. That there have been several changes in the liquidation agents from 2001. In the premises, the prayers sought should be granted.

7. The application was opposed by all defendants. The 1st and 5th defendant relied on the replying affidavit of Jigneish Desai sworn on July 27, 2023. He averred that of the said documents had been rejected on the reasons contained in the previous two rulings of the court. That the application was an attempt to revisit the aforesaid rulings yet the court was *functus officio*. That the assertions by the plaintiff were not supported by any evidence. That the application will delay the trial.

8. The second defendant opposed the application *vide* his grounds of opposition dated July 28, 2023. He contended that the court had already determined the matter. that there had been inordinate delay as the suit was now 22 years old. That the application offended article 159 2 (b) of the *Constitution*.

9. On his part, the 8th defendant opposed the application on the basis of his replying affidavit sworn on July 27, 2023. He averred that this was an attempt to review the court's rulings on the issue. That he had never been to the bank premises since 1998 and it will be very difficult for him to authenticate any of the documents at this stage. That the documents would be of zero value to the court. That it was curious that the witness purported that he had just found the documents now. That the application was an afterthought. The defendants urged the court to decline the application.

10. The application was orally argued and the court has considered the submissions. This is an application to recall PW1 to return and produce some primary documents of the documents that had been

identified but rejected for reasons on record. The same is predicated under section 146 (4) of the *Evidence Act* which 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."

11. From the foregoing, the power to recall a witness is in the discretion of the court. Such discretion is to be exercised judiciously and not capriciously.

12. I have considered the rival averments. It is not in dispute that the plaintiff is yet to close its case. That there is power to recall a witness who has testified for a party for either further examination in chief or cross examination.

13. PW1 made his witness statement on May 27, 2019. That was 19 years since the plaintiff filed the suit. It was also 12 and 13 years, respectively ever since being served with the notice of none admission of documents by the 1st defendant. Those notices were served in 2006 and 2007, respectively.

14. The exercise of the discretion under section 146 of the *Evidence Act*, in my view, is not meant to either aid an indolent and procrastinating litigant. Neither is it meant to aid a party who for one reason or another wants to delay the prosecution of a suit. It is meant to assist the court find the truth and do justice to the parties before it. It will for example be exercised where a witness, through a genuine oversight, failed to refer to evidence already on record, or clarify issues that were left unexplained.

15. That power, in my view, will not be exercised in circumstances that will prejudice the opposite party. It will also bot be exercised where it would breach clear provisions of the *Constitution* or the Law.

16. In the present case, six years after the suit had been filed, the plaintiff was put in express notice, that certain if not all the documents it sought to rely on at the trial would not be admitted. That meant that each of the referred to documents had to be strictly proved in accordance with the *Evidence Act*. That the originals had to be availed at the trial. That for those documents that were alleged to have been made by the defendants would be backed by forensic examination.

17. That at the time of delivering its evidence in chief through the witness statement(s) of its witnesses, the plaintiff would lay the basis for the production of those documents alleged to be bankers' books as required by section 177 of the *Evidence Act*. All this had to be done at the pre-trial stage. That is the purpose for which the elaborate procedures under order 11 of the *Civil Procedure Rules* are for. That order was not enacted for a show. It was meant to avoid the likely surprises or delays at the trial once the hearing of suit commences.

18. Article 159 (2) (b) of the *Constitution* provides:

"In exercising judicial authority the courts and tribunals shall be guided by the following principles –

a. ...

b. Justice shall not be delayed."

19. What will be the effect of allowing the current application? Firstly, the plaintiff had about 20 years to prepare for trial. On October 17, 2019, this court (Kasango J), allowed the plaintiff to prosecute its case after a second attempt by the defendants to have the same dismissed for want of prosecution. After several false starts, the suit finally commenced before me on May 22, 2023. PW1 testified on 22nd and

May 23, 2023. He was cross examined on May 24, 2023 and crossed his testimony. The suit was then fixed for further hearing on July 27, 2023. On that day the present application was argued.

20. When he testified, PW1 was not cross examined on the subject documents. He is now meant to come and re-introduce those documents.

21. I have carefully considered the supporting affidavit to the application. PW1 has sought to explain the gaps in his previous testimony. He is trying to lay a foundation for the admission of the documents. He has sought to give explanations he should have given in his witness statement made in 2019. Is that permissible? I don't think so. All that the plaintiff is seeking is to side step the reasons set out in the two rulings delivered by the court on May 23, 2023 and June 26, 2023. It is an afterthought.

22. The view I take is that, recalling PW1 to produce the subject documents will lead to a retrial. His failure to properly produce those documents at the time he testified has not properly been explained. As liquidation agent, PW1 received the notices of non-admission of his documents in 2006 and 2007, respectively. He did nothing to prepare the originals of the documents. He prepared his witness statement in 2019 without caring to get the originals of the documents he was to produce only to wait for the court to call him to order on those documents then rush to try and rectify his mistakes.

23. I think a party cannot be allowed to litigate in instalments. I do not think that section 146 (4) of the evidence was meant to assist a party to correct mistakes that he has committed in the course of the trial. A party is not to be allowed to keep correcting his case as the trial progresses in order to strengthen his case. After failing to respond to the notices of non-admission and adhere to the strict dictates of section 177 of the *Evidence Act*, the plaintiff now wants to use the route of recalling a witness to buttress its case.

24. While I appreciate that what is at stake is public monies that sank with the plaintiff over 22 years ago, but fair trial requires that all parties to a litigation are given an even and level playing ground. The plaintiff has had over 15 years to prepare its case. It will be prejudicial to the defendants to now allow the plaintiff rush back to its "go downs" and "unearth" a dearth of primary documents that have always been in its possession and spring them upon them. The cross examination would restart afresh on all those documents. The time already spent would have been lost. Surely, article 159 (2) (b) will frown upon such.

25. In the end, I find the application to be but an afterthought. It will lead to a further delay in the trial of the suit. The application is therefore dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE