



REPUBLIC OF KENYA



**Registered Trustees of the Sisters of Mercy (K) v Sanlam Life Assurance Limited & another
(Environment & Land Case 108 of 2017) [2023] KEELC 17567 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 108 OF 2017**

**LN MBUGUA, J
MAY 11, 2023**

BETWEEN

REGISTERED TRUSTEES OF THE SISTERS OF MERCY (K) PLAINTIFF

AND

SANLAM LIFE ASSURANCE LIMITED 1ST DEFENDANT

SEYANI BROTHERS & CO (K) LIMITED 2ND DEFENDANT

RULING

1. The 1st Defendant's application dated 21.10.2022 is for determination. It seeks orders that pending hearing and determination of the main suit, the Plaintiff and the 1st Defendant's qualified building professional (namely a quantity surveyor, civil engineer and building contractor) be granted access onto the Plaintiff's premises known as Land Reference Number 1870/V/73 in the presence of a judicial officer so as to have assessment of the suit premises and to give a professional report to this Honourable Court.
2. The application is based on grounds on its face and on the supporting affidavit of Emmah Wachira, the 1st Defendant's Group legal officer sworn on 21.10.2022. She deposes that in view of the prayers sought by the Plaintiff, it is critical that the professional opinion of building professionals be considered alongside the report of the site visit conducted on 11.7.2022.
3. The application is opposed by the Plaintiff by way of grounds of opposition dated 28.11.2022, where it contends that the joint professional report sought 8 years after adverse effects on the suit premises will not be accurate. It also avers that it has already filed a civil and structural engineer's report dated 19.10.2016 on the adverse impact to the suit premises and the author will testify and be cross-examined by the Defendants.
4. The 2nd Defendant did not file a response to the application.



5. The application was heard orally on 16.2.2023. It was argued for the 1st defendant that the orders sought will assist the Court to reach a decision and the Court has discretion whether to accept or reject the report and that no prejudice will be occasioned to any party.
6. In opposition thereof, it was argued for the plaintiffs that the prayer as framed is vague. That since the proceedings are adversarial, the proposed joint access / assessment and report is an issue between parties and a judicial officer cannot be involved and that the case is already partly heard.
7. I have considered the application and the response herein. I have also considered that there is a report filed by the Plaintiff dated 19.10.2016 on the impact of construction activities by the 1st Defendant on the Plaintiff's property. The 1st defendant also made an application on 17.6.2021 for the court to visit the site of which the application was allowed. I visited the said site on 25.7.2022. Another point for consideration is that the hearing is underway where 3 witnesses of the plaintiffs have already testified.
8. I find that the 1st defendant is making the application for the expert assessment report rather late in the day, yet they had ample time to do so before the testimony of the plaintiff's witnesses was taken. Further, I find that the nature of adducing evidence in our litigation is based on adversarial system- See; *Direct line Assurance Company Ltd v AKM Investments Ltd & 6 others* [2021] eKLR. Thus compelling the Plaintiff to nominate qualified building professionals at this point of the trial will certainly be prejudicial to them, taking into account the passage of time as well as the fact that some of their witnesses have testified.
9. In the end, I find that the application is not merited, the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Chiuri Ngugi for Plaintiff/Respondent

Henry Oduor holding brief for Waruhia for 1st Defendant/Applicant

Court assistant: Eddel

