



**Kiboi v Kenya National Highway Authority & another (Environment & Land Case 59 of 2019) [2023] KEELC 19930 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19930 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 59 OF 2019  
JG KEMEI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**CHARLES WAHOME KIBOI ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CHINA WU YI LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide an application dated the 23/2/2023 the applicant sought the following orders;
  - a. Spent
  - b. That the court be pleased to order the defendants to produce the entire 303 page contract agreement between itself and the 1<sup>st</sup> Defendant pertaining to the construction of James Gichuru Road/ Waiyaki way -Rironi (containing 26 kilometres of the main road and 17.5 kilometres of the 17.5 collector roads inclusive of all the matters and schedules referred to in clause No 2 of the said contract agreement without any redactions ( contract) as particularised as; the letter of acceptance ; the letter of bid; the tender addenda Nos 1, 2, 2A, 3 and 4; the particular conditions and especially the general conditions ; the specifications; drawing s and completed schedules.
  - c. That the contract be produced by the defendants without redactions whatsoever
  - d. The said contract be produced as a matter of urgency before the next hearing of the suit
  - e. That in default the court be pleased to strike out the Defendant’s defence for non-conformity to the discovery order given on the 20/6/2022.
  - f. Costs of the application be provided for.



2. The application is premised on the grounds annexed thereto and the supporting affidavit of the applicant sworn on the 23/2/2023 where he deposed that this court issued orders on the 30/6/2022 ordering the parties to inter alia file and serve pretrial bundles within 14 days in default of which pleadings would be deemed closed. Consequently the 2<sup>nd</sup> Defendant filed and served the undated pleadings some of which contained the bundle of documents. In the list of documents is an extract of a 303 page contract containing pages 4 and 5 only. That upon the closure of the Plaintiffs case his advocate wrote to the 2<sup>nd</sup> defendants advocates seeking to be furnished with the entire 303 page documents but the request elicited no response hence the filing of the application. That the defendants have refused to obey the lawful discovery orders hence the necessity to file the application. That the said contract is necessary as it will show whether the marking of the suit property with an X for demolition was within the contractual obligations of the 2<sup>nd</sup> Defendant.
3. The application is opposed by the 2<sup>nd</sup> respondent vide the Replying Affidavit sworn by Calvin Ochieng on the 15/3/2023 where he deposed that the application is designed to mislead the court. That the contract sought is neither relevant to the suit herein and that the applicant is on a fishing mission unrelated to the discovery in the suit and merely keen to procure the irrelevant information for purposes of blackmailing the 2<sup>nd</sup> respondent. Further that it is not in possession of the contract hence unable to provide the same. Moreover, that the company is in the process of winding down with most of the staff having been declared redundant and would be impossible to procure the documents. That in any event the reason why the properties were marked with X cannot be found in the contract as the same contains the terms of engagement between it and the 1<sup>st</sup> respondent with respect to the project.
4. The applicant filed a further affidavit on the 3/4/2023 where he reiterated that the contract will show the road delineations which was subject of the project to enable the court to be in possession of all the facts to determine whether the 2<sup>nd</sup> respondent breached its contract and illegally acted beyond the scope of the contract by marking a building that was outside the road reserve with an X to denote demolition. That the contract is critical and necessary for the just determination whether the suit land was within the James Gichuru - Rironi Junction road reserve and whether the suit land was demised property to be acquired and or demolished during the construction of the road.
5. On the 15/3/2023 parties elected to file written submissions which I have read and considered. The 2<sup>nd</sup> respondent however has not complied with the directions of the court.
6. It is not in dispute that the court on the 30/6/2022 ordered the parties to file their pretrial bundles failure to which pleadings shall be deemed to be closed. Following the said orders the 2<sup>nd</sup> respondent filed a list of documents which included page 4 and 5 of the 303 page contract. It is this document that has triggered the application.
7. The applicant sought orders that the whole contract should be produced for full disclosure and for the court to determine whether or not the suit land was part of the parcels within the road reserve and earmarked for demolition to pave way for the construction of the road. The 2<sup>nd</sup> respondent has vehemently resisted the application arguing that the document is irrelevant, cannot be found and a ploy by the 2<sup>nd</sup> respondent to use the information therein to blackmail it.
8. Discovery is provided for in section 22 of the [Civil Procedure Act](#) as follows;
  - “ Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party –
    - (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and



facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects aforesaid;

(c) order any fact to be proved by affidavit.”

9. The provisions of the above section are augmented by the provisions of order 11 rule 3 (2) of the *Civil Procedure Rules* which detail the components of case management.
10. The true purpose of discovery is to level the litigation field, to expedite hearing and allow parties to know the case that is facing them so as to prepare to sufficiently rebut it. It is a big contributor to fair hearing hence a catalyst to the right to be heard under article 48 of *the Constitution* of Kenya. It is also a critical component to the access to information in the sense of article 35 of *the Constitution* of Kenya.
11. Having said that I find that the 2<sup>nd</sup> respondent has already produced pages 4 and 5 of the said contract and I see no prejudice that it will suffer if the whole document is produced in court. As captured in the legal framework set out above there is no limitation when discovery may be done. In this case though the applicant has closed his case, I see no prejudice that will be suffered by the 2<sup>nd</sup> respondent as it is yet to present its case.
12. In the interest of justice I allow the application and order that the 2<sup>nd</sup> respondent produce and serve upon the applicant the said document within a period of 30 days.
13. Costs shall be in favour of the applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of**

**Ms. Gachugu / Wahome for the Plaintiff**

**Ms. Bala HB Mbugua for 1<sup>st</sup> Defendant**

**Ms. Maina HB Ms Eve Akelo for 2<sup>nd</sup> Defendant**

**court Assistant – Phyllis & Lilian**

