



**Peony Management Co. Ltd v Kenya Urban Roads Authority & 3 others;
Gao Yu International Ltd (Interested Party) (Environment & Land Petition
E018 of 2021) [2024] KEELC 577 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E018 OF 2021
AA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

PEONY MANAGEMENT CO. LTD PETITIONER

AND

KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

MICHAEL OCHIENG 3RD RESPONDENT

DESTERIO OYATSI 4TH RESPONDENT

AND

GAO YU INTERNATIONAL LTD INTERESTED PARTY

RULING

1. The application for determination is dated 16th February 2023 filed by the 4th Defendant under the provisions of Rule 21(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*. The Applicant seeks to be granted orders that:
 - a. Spent
 - b. The Petitioner do produce the development application made under Section 31 of the *Physical Planning Act* Chapter 286 Laws of Kenya for development permission to construct a swimming pool, boundary wall and a guard house or any other structure on property LR No 330/561 Nairobi.
 - c. The Petitioner do produce the development permission granted to the Petitioner or any other party or person under Section 33 of the *Physical Planning Act* permitting the Petitioner or any



other person or entity to construct a swimming pool, boundary wall and a guard house or any other structure on property LR No 330/561 Nairobi.

- d. The development application and development permission referred to in 2 and 3 above be produced and form part of the Fourth Respondent's documentary evidence in this case or Petition.
 - e. The costs of the application be provided for.
2. The application is premised on the grounds listed on its face which include the following;
- i. The information and documents are required by the applicant to protect his right to a fair hearing under article 50 and to protect their rights under article 40 and 64 of the Constitution
 - ii. This dispute concerns the Petitioner's claims to ownership of some structures constructed on property LR No 330/561 Nairobi including a swimming pool, boundary wall and a guard house.
 - iii. The 4th Respondent as the owner of the suit property has never applied for or been granted permission under the Physical Planning Act to construct the said structures on his land and it is the Petitioner who can provide documents to prove whether lawful development permission was granted.
 - iv. That the Applicant will suffer injustice unless the said documents or information are provided.
3. The Petitioner/Respondent opposed the application vide the replying affidavit of Stanley Gibson Kadiri. Mr Kadiri deposed that the application lacks in merit, is vexatious and an abuse of the court process. It is averred for the Petitioner that the Interested party developed Peony estate comprised of apartments, a guard house and a swimming pool on LR 330/561 and 1349 which they later sold to the Petitioner. The Petitioner avers that their claim is based on the administrative acts of demolition done by the Respondents which has nothing to do with the construction of the impugned developments.
4. It is contended for the Petitioner that the order for documents requested should be directed at the Interested Party since they are the ones who developed the suit property and, in the alternative, the request should have been made in ELC Case No 79 of 2020 which determined the rights of use over the land. They proceeded to annex a copy of the judgement in ELC Case No 79 of 2020 as annex SGK1. The Respondent imputes material non-disclosure on the Applicant, adding that the Applicant is engaging the Court in a circus of academic nature and waste of precious judicial time.
5. Both parties filed their respective written submissions in support of and in opposition to the application. The 4th Respondent/Applicant submitted that where a claim or violation complained of relates to ownership and enjoyment of development, the aggrieved party must as a foundation to the Petition have a development permit authorizing the development. The Applicant cited the provisions of Rules 6 and 8 on the duties of parties to assist the court to further the objectives of the Rules as well as the inherent powers of the Court.
6. The Applicant submits that if the Petitioner does not have valid land rights under the Land Act, Land Registration Act and Physical Land Use Planning Act, then the present proceedings amount to abuse of the Court process. That the Petitioner has to produce the documents requested in the application to be able to sustain the Petition. In default, the continued presence of the petition in court become nothing less than an abuse of the court process. The applicant buttressed their submissions by citing the case of Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited, COA Civ Appeal No 11 of 2017.



7. The Respondent/Petitioner submitted that they purchased the suit property after it was already developed by the Interested Party hence the application is directed at a wrong party. It is the Respondent's submission that under article 35 of the Constitution, the applicant must demonstrate that the information required is for the exercise or protection of another fundamental right or freedom. It cited the holding of Ngugi J (as he then was) in the case of Nairobi Law Monthly & another v KENGEN (2013)eKLR to support this argument.
8. The Respondent argues that by seeking the documents for the purpose of laying the foundation and or sustaining the petition, the Applicant wants to wear the shoes of the Petitioner and to prosecute the petition on their behalf. That the Applicant can deal with these issues in cross-examination during the trial. Its their further argument that the Applicant has put the cart before the horse and so they urged the Court to dismiss the application with costs to them.
9. I have analysed and considered the pleadings filed and the submissions rendered in support and opposition to this application. The Applicant wants to be served with certain documents which process under the old Civil Procedure Rules was known as "notice to produce". Under the current Rules, Order 11 requires parties to file alongside their claim the documents and witness evidence they intend to rely on. The purpose of the rules was to cure was to avoid trial by ambush which in most instances created unfair advantage to the party ambushed for want of preparation. Consequently, the Petitioner is limiting the provisions of article 35 of the Constitution with regard to this application.
10. As stated by Gikonyo J in ABN Amro Bank N.V v Kenya Pipeline Company Limited [2014] eKLR (a case cited by counsel for Concord), the provisions serve a useful purpose. The Judge held;

“Discovery is a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that “the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial.” It, therefore, serves a higher objective as the enabler of fair hearing.”
11. Despite my observation above, the Petitioner has explained itself that it bought the suit property from the Interested Party already in its developed state hence the documents sought may not necessarily be within their possession. In the National Social Security Fund Board of Trustees v Dr.sally Kosgei & another [2005] eKLR Azangalalla J quoted the case of V.R. Mandevia v The Standard Bank Of South Africa Ltd (1944)21 P.3 for the proposition that inspection was sought of a specific document which was admitted to be in the possession of the Defendant and in the case of L.n. Lakhani & Another – v- V.p. Bhojani (1950)17 P27, the order for inspection was in respect of specific documents namely books of accounts and balance sheet which were in the possession of the Defendant.
12. Further, the Petitioner pleaded and submitted that their claim is premised on the administrative actions undertaken by the Respondents and so they do not need to provide the development permits to prove their claim. The Applicant on his part has quoted the relevant sections of the law which bestows property ownership rights as well as the requirements to obtain a license before undertaking a development. Most of the Applicant's submission touched on the merit of the Petition and yet directions on how to prosecute the petition is yet to be given. For instance, the submissions on the requirement to obtain licenses on developments done on land in urban areas and the inference to be drawn where a party fails to produce certain documents.



13. Some of the issues the Applicant is raising such as whether the petition is an abuse of the court process was dealt with by S. Okongo J in his ruling delivered on 3rd March 2022 in this matter. At page 19, the judge said thus;

“On the 4th Respondent’s contention that the Petitioners are trespassers on his land number 330/561, I am in agreement with the Petitioner that the issue of whether the Petitioner has an easement over the 4th Respondent’s land and the formula for resolving the dispute between the 4th Respondent and the Petitioner over the continued use of the 4th Respondent’s land was settled by the court in ELC civil suit number 79 of 2020. This court cannot be called again to determine the issue. Due to the foregoing, the petition before the court is not an abuse of the court process...”

14. Consequently, to the extent that the Petitioner’s claim is premised on purchase of the property in its developed form and thus is not in possession of the requested documents, I find No basis to compel the Petitioner/Respondent to produce requested documents. They have said the application ought to have been directed at the Interested Party who was the developer and who is a party to these proceedings. The Interested Party has not responded to the petition so the Applicant can hold their horses and deal with the issue of merits or otherwise of the petition later. Secondly, I opine that even if the Petitioner/Respondent had the documents, failure to produce them would not be a basis to strike out the petition. In any event, the consequences of non-compliance of the order of production can be used by the Applicant as their defence to the claim.
15. In view of the foregoing analysis, I find No merit in the application dated 16th February 2023. It is therefore dismissed with costs to the Petitioner/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024

A. OMOLLO

JUDGE

