



T.S.S. Investments Limited v Kenya Revenue Authority & another (Civil Suit 239 of 2015) [2024] KEELC 13715 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 239 OF 2015
LL NAIKUNI, J
DECEMBER 5, 2024
(FORMERLY HCCC NO.150 OF 2006)**

BETWEEN

T.S.S. INVESTMENTS LIMITED PLAINTIFF

AND

KENYA REVENUE AUTHORITY 1ST DEFENDANT

LAND REGISTRAR-MOMBASA 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 24th July, 2024 instituted by T.S.S Investments Limited, the Plaintiff/Applicant herein. It was brought under a certificate of urgency and the provisions of Article 35 of *the Constitution* and Sections 1A, 1B, 3, 3A & 22 of the *Civil Procedure Act* Cap 21.
2. Upon service of the application to the Defendants, the 1st Defendant vehemently opposed it through filing of a Replying Affidavit sworn on 29th July, 2024. The Honourable Court shall be dealing with it later on indepth.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.



- c. The 2nd Defendant, and/or the Ministry of Lands, be directed to supply to the Plaintiff and to the court, copies of the documents listed in the scheduled attached herewith.
 - d. Without prejudice to (3) above, the Plaintiff be granted leave to file further witness statement(s) and a further list of documents to introduce the documents sought under order (3) above.
 - e. The costs of this application be in the cause.
4. The application is premised on the grounds, testimonial facts and the averments made out under the 10 paragraphed annexed affidavit of NUREIN TAHIR SHEIKH SAID the one of the Plaintiff/Applicant's directors herein with one (1) annexure marked as "NTS - 1 a". The Applicant averred that:
- a. The Plaintiff/Applicant had been made aware that the suit has been listed for hearing on 30th July 2024. The date was fixed without the Plaintiff/Applicant's advocate's participation.
 - b. If the Plaintiff/Applicant had participated, it would have informed the court that it was seeking documents relating to the root of the title over Mombasa/Block XXI/585.
 - c. The Plaintiff/Applicant, who purchased the property from its original allottee who was now deceased, did not have the documents in its possession. This was despite appointing a surveyor to conduct a survey due diligence to establish the origin of the property.
 - d. The 2nd Defendant and the Ministry of Lands, who were the lawful custodians of those documents, had failed, refused or neglected to avail those: documents to the Plaintiff/Applicant or its surveyor.
 - e. In the absence of such documents, the Plaintiff/Applicant's right to a fair hearing will be greatly prejudiced and any resulting trial will be patently unfair.
 - f. It was therefore necessary that the hearing be adjourned, and the Plaintiff be given an opportunity to present all the evidence that can possibly be availed.
 - g. Unless this application was heard urgently and the orders sought granted, the hearing will proceed on 30th July 2024 thus render this application moot.
 - h. It was imperative that the reliefs sought be granted to guarantee the Plaintiff's right to a fair hearing and right of access to justice.

III. The Response by the 1st Defendant/Respondent

5. The 1st Defendant/Respondent vigorously opposed the Notice of Motion application through a 14 paragraphed Replying Affidavit sworn by PIUS NYAGA, an officer within the 1st Defendant's Legal Services and board Coordination Department appointed as such under Section 13 of the [Kenya Revenue Authority Act](#), Cap. 469 Laws of Kenya and with one (1) annexure marked as "PN – 1" who averred that: -
- a. The application was served upon counsel for the 1st Defendant/Respondent only on the afternoon of 26th July, 2024 this was only one (1) working day to the hearing of the main Suit scheduled for 30th July, 2024.
 - b. The suit was filed on or about 5th July, 2006 over 18 years ago. In all those years, the Plaintiff/Applicant had not been keen to prosecute its suit. Instead and as the Court record will confirm, it was the 1st Defendant/Respondent who had been ready to proceed whenever the matter had come up for hearing in the recent past.



- c. He had noted the nature of the application and he held the considered view that the application was just but part of the series of delaying tactics on the part of the Plaintiff/Applicant.
- d. He had reviewed the Schedule of Documents attached to the Application and he noted that the documents listed therein are documents which the Plaintiff/Applicant ought to have sought and obtained at the time of filing Suit in 2006. There was absolutely no justification to purport to sought them 18 years late and on the eve of the hearing.
- e. The Hearing Notice in respect of the hearing of 30th July, 2024 was served way back on 26th April, 2024. The Plaintiff/Applicant waited for three (3) months and up to the eve of the hearing to file the current Application aimed at derailing the hearing. Attached in the affidavit and marked "PN - 1" a true copy of the Affidavit of Service sworn by Wanjiru Carolyne on 29th April, 2024.
- f. The Plaintiff/Applicant had not offered any credible explanation for the inordinate delay in filing the application. Accordingly, the Plaintiff/Applicant was not deserving of the exercise of this Court's discretion in its favour.
- g. This matter came up for hearing on 17th February, 2022. The 1st Defendant/Respondent's Counsel was ready for hearing and had travelled from Nairobi to Mombasa together with the 1st Defendant/Respondent's witnesses. However, the Plaintiff/Applicant's Counsel was not ready leading to the adjournment of the matter.
- h. On the said date, the Court gave the following strict directions having regard of the-age of the matter: -
 - i. The Plaintiff/Applicant was given a very last adjournment.
 - ii. The Plaintiff/Applicant to pay the Defendant/Respondent's advocates' costs assessed at a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000.00/=) and the Authority's witnesses' expenses assessed at a sum of Kenya Shillings Twenty Three Thousand (Kshs. 23,000.00/=).
 - iii. The aforesaid sum of a sum of Kenya Shillings Fourty Three Thousand (Kshs. 43,000.00/=) to be paid on or before 28th February, 2022. In default, the Plaintiff's Suit shall-stand automatically dismissed and the Defendant would be at liberty to prosecute its Counter - Claim.
 - iv. The Plaintiff/Applicant was at liberty to file additional documents within 14 days
 - v. Hearing was adjourned to 18th May, 2022
- i. While the Plaintiff/Applicant complied with the direction on paying of costs (thereby keeping the Suit alive), the Plaintiff/Applicant continued to exhibit lethargy and applied for adjournment on 18th May, 2022. The Defendant was constrained nor to oppose the adjournment having cancelled travelling plans after being notified of the Plaintiff/Applicant's intention to apply for adjournment. This was to avoid unnecessary escalation of costs.
- j. The Plaintiff/Applicant filed an application dated 6th July, 2022 seeking leave to amend the Plaint. Leave was eventually granted but after a long time had been spent on the application. It was worth noting that the said application was also filed and served a few days to a scheduled hearing of the main Suit.



- k. The main Suit was thereafter fixed for hearing on 9th October, 2023. The 1st Defendant/Respondent's Counsel and his witness attended ready to proceed with the hearing but Counsel for the Plaintiff and the 2nd Defendant sought adjournment.
- l. The matter was then scheduled for hearing on 25th April, 2024 but the Court did not hold hearing on the said date. Nonetheless, the Court sat for the limited purpose of allocating further hearing dates.
- m. As the Plaintiff/Applicant's advocate was aware of the scheduled hearing date 25th April, 2024, he was under a duty to attend Court on the said date to take another mutually convenient hearing date. He elected not to attend Court. Nonetheless, the 1st Defendant/Respondent's Counsel promptly served a hearing notice on the following day, 26th April, 2024.
- n. The 1st Defendant/Respondent made all the preparation and travelling arrangements before being served with the application. Therefore, the 1st Defendant's Counsel had already written to the Plaintiff's Counsel reiterating that the 1st Defendant/Respondent would insist on proceeding with the main hearing scheduled for 30th July, 2024. Attached hereto and marked as "PN - 1" a true copy of the 1st Defendant/Respondent's Advocates' email dated 29th July, 2024.
- o. The Plaintiff/Applicant's counsel has previously stated in Court that the Plaintiff/Applicant's designated witness was in Turkey and unavailable to testify and that the Plaintiff/Applicant intended to substitute the said witness. However, the Plaintiff/Applicant did not substitute the witness and it was clear that the Plaintiff/Applicant was still not ready to prosecute the Suit.
- p. In view of the foregoing, it was clear that the Plaintiff/Applicant had engaged in a series of delaying tactics and was in the habit of filing applications on the eve of the hearing in order to scuttle such hearings.
- q. The Plaintiff/Applicant would not suffer any prejudice if the Suit was allowed to proceed to trial with the documents currently on record since the Plaintiff/Applicant had had 18 years to file any document they wished to file.
- r. The Affidavit was in response to the Plaintiff/Applicant's Notice of Motion application dated 24th July, 2024.

IV. Submissions

- 6. On 28th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24th July, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 29th October, 2024 a ruling date was reserved on 4th November, 2024 by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant.

- 7. The Plaintiff/Applicant herein through the Law firm of Messrs. Muriu Mungai & Company Advocates filed their written submissions dated 13th November, 2024. Mr. Kongere Advocate commenced his submissions by providing a brief background of its Notice of Motion application dated 24th July 2024, compelling the Honourable Court compelling the 2nd Defendant to produce certain specified documents. The 2nd Defendant, against whom the order was sought never opposed the application.



8. The Learned Counsel stated that the 1st Defendant/Respondent herein, against whom no relief was sought filed a Replying Affidavit sworn by Pius Nyaga on 29th July 2024. Because the facts could not be contentious, he asked whether on those facts, the order for production of documents should be made.
9. He submitted that there should be orders made by this Court for the production of the said documents. As noted, the party against whom the order was sought never objected to the order being made. The objection by the party against no order was sought, primarily was that the application was made after inordinate delay. According to them, it was coming as eighteen (18) years since the filing of the suit and after numerous adjournments attributed to the Plaintiff/Applicant. The Learned Counsel did not begrudge the 1st Defendant/Respondent for holding that view, he doubted that delay was a relevant consideration in an application of this nature. In saying so, he relied on the case of: “Oracle Productions Limited – Versus - Decapture Limited & 3 others [2014] eKLR”, which held thus:-

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial.
10. The same view also appears in the case of “Chase Bank (Kenya) Limited – Versus - Cannon Assurance (K) Limited [2019] eKLR” where the Court of Appeal, before upholding the order of the trial court, said:-

“In determining whether a document should be disclosed by a party two tests should be applied: (1) whether it is relevant: (2) whether it is or was in the possession, custody or power of the party or his agent:
11. He averred that while the order sought required the exercise of discretion, the 1st Defendant/Respondent was deliberately inviting the court to consider irrelevant factors and, ultimately, exercise that discretion injudiciously.
12. But even if delay was a relevant factor, there was a plausible explanation for it. Firstly, the Plaintiff/Applicant believed, based on the then prevailing jurisprudence, that it would not have been necessary to go to the root of the title. A fundamental shift in jurisprudence happened when the Supreme Court pronounced itself forcefully in the case of “Dina Management Limited (Supra) as recently as April 2023.
13. This pushed the Plaintiff/Applicant to appoint a Land Surveyor to conduct a survey due diligence. The surveyor, however, was unable to complete that process because the 2nd Defendant had either refused or neglected to supply the documents in its possession.
14. Secondly, with the amendment and addition of the 2nd Defendant into the proceedings, the Plaintiff/Applicant believed that the 2nd Defendant would assist the court by providing all information in its possession. That the suit was fixed for hearing without the 2nd Defendant filing even a solitary document, was the clearest indicator that the 2nd Defendant needed some compulsion of the law.
15. Having dealt with the somewhat irrelevant consideration out of abundance of caution, the Learned Counsel now turned to deal with the only two (2) relevant considerations.

Firstly, whether the 2nd Defendant was in possession of the documents. The 2nd Defendant had never denied it. Statutorily, the 2nd Defendant was the custodian of all land records. In fact, that was the entire basis upon which the Torrens system, which applies to the title in issue, was premised.



16. Secondly, on the issue of relevance. As Chase Bank (supra) notes:-“discovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party's case and/or to ascertain the existence of information that may be introduced as evidence at trial.
17. To determine whether a document was relevant, one was to look at the pleadings. Oracle Productions (supra) states:-

“...discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided.
18. From the Plaintiff and the counterclaim by the 1st Defendant, both parties claim to be the rightful and legal owners of the same parcel of land on the ground, even though they refer to it using different block numbers. “Dina Management (supra) says, and says loudly enough, that such a dispute cannot be resolved without the court tracing the root of the titles placed before it. The documents listed in the schedule are the documents that would enable the court to trace the history of the titles.
19. The Counsel never heard the 1st Defendant suggest that these documents are relevant. In fact, we see a tacit admission at par. 7 of the supporting affidavit that the documents should have been sought and obtained prior to filing suit. So really, it is not a suggestion that they are not relevant but that, though relevant, they were not sought early enough.
20. Apart from a few weeks' delay in concluding the trial, an inconvenience which can be ameliorated with an award of costs, the 1st Defendant do not say what prejudice it stands to suffer if the court is presented with the complete evidence available. The Counsel would have expected the 1st Defendant, if truly interested in the pursuit of justice, to have lauded the request for and the production of the documents.
21. The Learned Counsel invited the court to repeat what was said in the case of :Barclays Bank of Kenya Limited – Versus - Christopher Orina Kenyairi & Credit Reference Bureau Africa Limited [2017] KECA 479 (KLR) thus;

”...litigation is not a war or even a game. It is designed to do real justice between the opposing parties and, if the Court does not have all the relevant information, it cannot achieve this object”.
22. That statement of principle, made in the context of a defamation suit, is even more fundamental in land disputes which, as the courts have continuously noted, are highly emotive in this part of the world.
23. In conclusion, the Learned Counsel submitted that having shown that the Court had the discretion, free and unfettered powers towards ordering the production of the documents sought. It should allow the Notice of Motion application dated 24th July 2024 and grant the reliefs sought.

B. The Written Submission by the Defendants/Respondents

24. While opposing the Notice of Motion application dated 24th July, 2024 by the Plaintiffs/Applicants herein, the 1st Defendant/Respondent through the Law firm of Messrs. Regeru, Njoroge & Company Advocates filed their written submissions dated 25th November, 2024. Mr. Thuo Advocate commenced by stating that they were on the following:-
 - a. Replying Affidavit sworn by Mr. Pius Nyaga on 29th July 2024.
 - b. The 1st Defendant's List & Bundle of Authorities dated 25th November, 2024.



25. The Learned Counsel provided Court with a brief background of the matter. He stated that the Plaintiff/Applicant herein made an application dated 24th July, 2024 under the provision of Article 35 of *the Constitution* and Sections 1A, 1B, 3A and 22 of the *Civil Procedure Act*, Cap. 21 and seeking for the above cited prayers. The schedule of documents annexed to the Plaintiff/Applicant's application listed the following documents:
- a. Application for allotment of present-day Mombasa/Block XXI/585.
 - b. Approval granted for the allotment of present-day Mombasa/Block XXI/585.
 - c. Letter of allotment of present-day Mombasa/Block XXI/585.
 - d. Receipt for payments made in compliance with the conditions for letter of allotment.
 - e. Instructions for the preparation of lease over Mombasa/Block XXI/585.
 - f. Instruction forwarding the lease for registration.
 - g. If the land was unsurveyed at the point of allotment, the PDP and Deed Plan prepared for present-day Mombasa/Block XXI/585.
 - h. Any other document or correspondence relating to allocation and registration of the present-day Mombasa/Block XXI/585.
26. The Learned Counsel stated that the Application was supported by an Affidavit sworn by Mr. Nurein Tahir Sheik Said, one of the Plaintiff's Directors, who averred that the Plaintiff, despite appointing a surveyor to conduct survey due diligence to establish the origin of the property, purchased the said property from its original allottee, who is deceased, and did not have the documents in its possession. It was further averred that the 2nd Defendant and the Ministry of Lands, who are the lawful custodians of the listed documents, have failed, refused and/or neglected to avail the listed documents to the Plaintiff or its surveyor.
27. As such, in the absence of such documents, the Plaintiff/Applicant averred that the Plaintiff's right to fair hearing will be greatly prejudiced and any resulting trial will be patently unfair. The 1st Defendant filed a Replying Affidavit sworn on 29th July 2024 by Mr. Pius Nyaga, an officer within the 1st Defendant's Department of Legal Services and Board Co-ordination. From the onset, the 1st Defendant/Respondent averred that the Plaintiff served its Application to the 1st Defendant's Advocate in the afternoon of 26th July 2024, which was only one (1) working day before the Hearing date of the main suit originally scheduled for 30th July, 2024.
28. Further, it held that the suit was filed on or about 5th July 2006, over eighteen (18) years ago, and in all those years, the Plaintiff has not been keen to prosecute the suit. The 1st Defendant confirmed that it had been keen and ready to proceed whenever the matter came up before the court on various instances. This could be confirmed from the court record. It was the 1st Defendant's position that the instant Application was a delay tactic on the part of the Plaintiff and the documents sought ought to have been sought at the time of filing the suit in the year 2006. There was therefore absolutely no justification on the part of the Plaintiff to seek such document's eighteen (18) years late and on the eve of the hearing.
29. Originally, the Plaintiff's Advocates on record were served with a Hearing Notice on 26th April 2024 in respect of the Hearing scheduled for 30th July 2024 and were informed and aware of the intended hearing, but waited for up to three (3) month's later to file the instant application seeking production of the documents listed in paragraph 2.3 hereinabove. (See Annexure "PN – 1" being an Affidavit of Service confirming service of the Hearing Notice). The 1st Defendant further demonstrated that the



Plaintiff had engaged in a series of delay tactics. This could be confirmed from the court record, court attendances and directions arising therefrom since 17th February 2022. Therefore, the 1st Defendant asserted that the instant Application, filed on the eve of the hearing originally scheduled for 30th July 2024, was a clear demonstration of such delay tactic intended to derail the hearing. Thus, the 1st Defendant sought to have the suit be allowed to proceed for hearing with the documents on record as no prejudice would be occasioned on the Plaintiff.

30. Being guided by the above facts, the Learned Counsel relied on the following issues for determination by this Honourable Court:

Firstly whether the Plaintiff's Notice of Motion dated 24th July 2024 was merited. He referred the Court to the case of: "P.H. Ogola Onyango t/a Pitts Consult Consulting Engineers – Versus - Daniel Githegi g/a Quantalysis [2002] eKLR where Hon. H. P.G. Waweru while commenting on pre-trial procedures, discovery and introduction of new documents in trial aptly stated as follows:-

“.....indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action...The present suit was filed way back in 1999. The Defendant filed his defence in January, 2000. He had more than ample time to make discovery before the trial commenced...in civil litigation there must be a level playing field. That field cannot be level where one party to be permitted to introduce documents in the trial...and many years after pleadings closed...”

The Learned Counsel submitted that the substratum of the Plaintiff/Applicant's suit related to the parcel known as MOMBASA/BLOCK XXI/585 (hereinafter referred as "Suit Property"). The Plaintiff purportedly purchased the property from a Mr. Shariff Nassir on or about February 1996 and instituted this suit vide a Complaint dated 5th July 2006. The 1st Defendant filed its Defence and Counter - Claim sometimes in October 2006 and the same is dated 26th October 2006. Therefore, it was his humble submission that since the year 2006, the Plaintiff/Applicant had ample time to make discovery of the documents listed in Paragraph 2.3 hereinabove. It otherwise failed to do so, slept on its rights and at this point in time, such discovery ought not to be allowed. As it is, equity aids the vigilant and not the indolent. He reiterated that as aptly captured by Hon. H. P. G. Waweru, in the above-mentioned case, in civil litigation, there must be a level playing field. As could be confirmed from the court record, the said 30th July 2024 and currently 17th December 2024, was not the first time this first time this matter was scheduled to come up for hearing.

31. On 17th February 2022, when the matter came up for hearing, whereas the 1st Defendant's Advocates on record were ready to proceed, the Plaintiff's Advocates sought an adjournment which was granted. The Plaintiff was also granted leave to file additional documents. On 18th May 2022, the Plaintiff's Advocates equally sought an adjournment to which the Defendant's Advocates never objected to. However, in a surprising turn of events, the Plaintiff filed an Application dated 6th July 2022 seeking leave to amend its Complaint, which application was allowed and parties filed their amended pleadings. That is, Amended Complaint dated 24th May 2023 and Amended Defence and Counter - Claim dated 5th October 2023. On 9th October 2023 when the matter came up for hearing of the main suit, the Plaintiff's Advocate on record equally sought an adjournment and the matter rescheduled to 24th April 2024. Whereas the Court was not sitting on the said date, the Plaintiff's Advocate failed to attend court on



the said date necessitating the Defendant's Advocate to issue him with a hearing notice for the hearing scheduled for the said 30th July 2024.

32. From the above enumeration, it is evident that there had been a serious attempt by the Plaintiff to frustrate progress of this matter to its final logical conclusion. Clearly, the Plaintiff has established a pattern. The timing of the instant Application, made a day to the hearing and premised on the need to obtain and file more documents, once again was no different from a clear attempt by the Plaintiff to frustrate progress of this matter. To this end, he submitted that this Application was frivolous and vexatious and had been brought in bad faith.
33. The Learned Counsel further cited the cases of “Transport Company Limited & 3 Others – Versus - NIC Bank & Another [2014] eKLR”, where Court held that:-

“it is the primary duty of the Plaintiff to take steps to progress their case as they are the one who dragged the Defendant to Court. It is also the duty of a party to argue his case with the best evidence available which can throw light on the controversy at hand”.

And “Chase *Bank (Kenya) Limited – Versus - Cannon Assurance (K) Limited (Civil Appeal 11 of 2017)* [2019] KECA 313 (KLR) (Civ) (11 October 2019) (Judgment)”.

The Learned Counsel reiterated his position that the Plaintiff/Applicant since filing this matter had ample time to make discovery of the documents listed in Paragraph 2.3 hereinabove but, elected not to do so. Substantial steps and progress had been made in this matter and to otherwise allow such documents to be produced at this point in time would otherwise equate creating an uneven field of litigation and highly prejudice the 1st Defendant. On this point he referred Court to the case of “Moboko Shembekho Limited – Versus - Kiptalam & 2 others; Agricultural Development Corporation (Third party) (Environment & Land Case 43 of 2021) [2023] KEELC 19982 (KLR) (22 September 2023) (Ruling) where Hon.Mwangi Njoroge stated as follows:-

“...The hearing of the present suit has already commenced and it would prejudice the Plaintiff to have to go back to the drawing board perchance the applicants are permitted to file the said documents and that course of events may entail considerable delay in the disposal of the present suit. Besides the risk of delay aforementioned, it is noteworthy that the letters dated 9/11/2022 and 18/7/2022 were made after the suit had been filed. Though that may not be the intent of any of the parties in the present instance, this court must be worthy of and thwart any attempts by any party to influence the course of litigation by way of production of documents made after the hearing has commenced. In this case, it cannot be that the applicant's case was so hopeless before the new said letters were made that it could not succeed. It must be the evidence that the defendant had before the pleadings closed, which predated the date of filing of suit, that they relied on for the ultimate success of their defence. Indeed, this is a case whose ultimate determination is purely predicated on events happening prior to the filing of the suit. The likelihood of amendment triggered by those documents may have been a consideration by this court, but the documents sought to be filed and produced are not in any way likely to change the contents of the Plaint or defence, including the prayers therein, and no amendment has been sought to accommodate them in any way”.

34. He asserted that whereas hearing of this matter was yet to commence, this Honourable Court would note that the matter had, on various instances, been scheduled to come up for hearing. At this point in time, allowing this Application would cause considerable delay and would be highly prejudicial to the 1st Defendant. As it was in common parlance, justice delayed is justice denied. The Plaintiff in his



submissions has attempted to trivialize the issue of delay in not only making its request for the said documentation at the time of filing this suit nor in prosecution of this case to its logical conclusion. Equally, it had failed to offer any plausible and/or reasonable explanation and/or reason for its failure. The delay in prosecution of this matter goes against the strict provisions of Article 159(2)(b) and the right to fair trial under Article 50(1) of *the Constitution* of Kenya, 2010. It is highly prejudicial to the administration of justice and has substantially led to unnecessary inconvenience and costs on the part of the 1st Defendant, thereby eroding public confidence in the judicial system. He noted that this Honourable Court had previously noted that the delay in prosecuting this matter, which had remained pending for over eighteen (18) years, was giving the judiciary a bad name. Therefore, further delay ought not to be allowed. It was his submission that allowing the 2nd Defendant to delay the hearing in the guise that it intends to produce the documents would be extremely unfair. It would also amount to an ambush trial that would substantially change the course of events as the Defendants would need to go back to the drawing board eighteen (18) years after filing their defence and documents.

35. He submitted that it was trite law that he who alleges must prove. It was also noteworthy to mention that the Plaintiff had effectively failed to demonstrate that it served the 2nd Defendant with a Notice to Produce and that they deliberately failed, refused and/or neglected to avail the said documents. Further, there was no evidence that the Plaintiff had followed the procedure stipulated in Article 35 of *the Constitution* as read with the *Access to Information Act*. The Plaintiff had not shown a Request for Information made in accordance with the said Act. Therefore, he humbly prayed that the Application be dismissed and the suit be allowed to proceed for hearing with the documents on record. Additionally, the Plaintiff's Application was further pegged on Article 35 of *the Constitution* of Kenya, 2010 which provides for the right of Access to Information held by state and information held by another person and required for the exercise or protection of any fundamental right. From the onset, he submitted that the right to information under Article 35 could only be sought by a natural person. The Plaintiff, being a corporate person was not entitled to this right as enshrined under Article 35 of *the Constitution* of Kenya.
36. Be that as it may, it has effectively failed to demonstrate and or provide any credible evidence that any such request made for information was made and that such request was refused. The Application therefore fails this standard and ought to be dismissed with costs. To buttress on this point, the Learned Counsel relied on the case of "Kituo Cha Sheria & Another - Versus - *Central Bank of Kenya & Others* (*Petition 191 of 2011*) [2014] KEHC 8217 (KLR) where the court aptly stated as follows:

".....However, as this court held I in the Nairobi Law Monthly case relied on by the 1st Respondent, the right to information under Article 35(1) is limited to natural persons who are citizens of Kenya. The court agreed in that case with the decision of Majanja J in *Famy Care Limited -Versus Public Procurement Administrative Review Board & Another High Court Petition No.43 of 2012* in which the Learned Judge in declining to issue the orders sought by the C petitioner, a limited liability company incorporated in India, took the view that the right to information under Article 35 is limited in that it can only be enforced by natural persons. He observed at paragraph 18 of the judgment that:

"The right of access to information protected under Article 35 (1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to 'every person' or 'a person' or 'all persons' this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term 'person' and 'citizen' as applied in Article 35.



The Learned Judge therefore concluded that:

“A reading of *the Constitution* and an examination of words "person" and "citizen" within *the Constitution* can only lead to one conclusion: That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of *the Constitution*.”

The second limitation, which has been alluded to by the Respondents, is that there must be a request for information before a party entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief.

In the present case, there is no evidence that there was ever a request made from any of the respondents for information relating to the alleged currency printing contracts. Further, while the 2nd petitioner was entitled to information under Article 35(1), on the authority of the Nairobi Law Monthly and Famy Care decisions, the 2nd Petitioner, being a corporate person, was not so entitled...”

Equally, he relied on the decision by Hon. M. C. Oundo in the case of ”Peter Thuita Kariuki & 3 others – Versus - Kenya Rural Roads Authority [2020] eKLR while commenting on the right of access to information as enshrined under Article 35 stated as follows:

“...However, there must be a request for information before a party entitled to that information can allege violation. A citizen is therefore entitled to seek information under Article 35(1) and is under an obligation to request for it...”

37. He stated that even before getting to the relevance of the documents sought by the Plaintiff to the instant suit, which he humbly submitted that the Plaintiff had failed to effectively demonstrate, the Plaintiff had failed to effectively demonstrate there was a request for information made and that request was denied. Without prejudice to the foregoing, in giving effect to the provisions of Article 35 of *the Constitution* of Kenya, 2010, the *Access to Information Act*, Cap. 7M of the Laws of Kenya (herein after referred to as "the Act") was enacted to provide for the procedure and framework for accessing information. This the procedure as enumerated under Section 8 and 9 Act is crucial and any person who desires accesses of such information is entitled to strictly follow and comply with the procedure as set out in the Act. The Plaintiff herein had from the onset failed to demonstrate that in complying with the provisions of Sections 8 and 9 of the Act, it made a written request in the prescribed form to any officer in the office mandated office and that such request was declined. Therefore, he submitted that on this account, the Application should fail.
38. Ideally, a request for information and/or documentation cannot exist in hypothesis nor be made in a vacuum. It must be directed to a specific organ and/or entities of the state. More specifically, such information and/or documentation must be in the custody of or must be held by any such state organ, entity or individual. A question that therefore begs was whether such documents, if they exist, were in the custody and/or were being held by the 2nd Respondent or whether the same were with the National Land Commission, Commissioner of Lands or any other person. It was therefore his submission that specificity on whom the request was being made to was key in realization of the right under Article 35 of *the Constitution* of Kenya. As such, the Plaintiff had effectively failed to demonstrate that such request was made to a specific state organ, entity and/or individual with whom the requested documents



and/or information was in their possession. Therefore, he urged this court to dismiss the Plaintiff's Application with costs.

It was worth noting that there was no evidence whatsoever that the documents being sought actually exist. Additionally, the 1st Defendant argued that this was a classic case of land grabbing in which the Plaintiff attempted to acquire a parcel of land which belonged to the 1st Defendant-a public body. Chances were high that in cases of land-grabbing certain steps would not be taken and critical documents would not be available. The current Application presupposes that such documents exist which was not necessarily the case. Without cogent evidence that the documents sought actually exist and that they were in the custody of the 2nd Defendant, the Orders sought could not issue. The Plaintiff argued that the subject application had been necessitated by the jurisprudence in the Supreme Court case of "Dina Management Limited – Versus - County Government of Mombasa & 5 Others (2023) KESC on the necessity of the Court investigating the root of the Title. That argument is unconvincing As early as the year 2003 (3 years before this Suit was filed), the Courts asserted that they would not allow litigants whose titles were under challenge to avoid interrogation as to how the titles were acquired. In the case of: "Republic – Versus - Minister for Transport & Communication & 5Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No.617of 2003 [2006]1 KLR (E&L)" the Honourable Mr. Justice Maraga (as he then was) stated as follows:-

"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*."

39. Similarly, on 10th December, 2013, the Court of Appeal stated in the case of: "Munyu Maina - Versus - *Hiram Gathiba Maina (Civil Appeal 239 of 2009)* [2013]as follows:-

"...We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register..."

The jurisprudence on the necessity of the Courts to go to the root of title has been in this country for decades and there was no justification whatsoever for the Plaintiff to institute the current application on the eve of the hearing in an 18-year-old case claiming that its application has been necessitated by recent jurisprudence. In a nutshell, the Plaintiff was using the current application to cover for its failure to carry out due diligence at the time it purportedly acquired the Suit Property. The documents the Plaintiff is now seeking should have been sought before the Plaintiff made a decision to purchase the Suit Property. If they were not sought then, they should not be sought now in a fishing expedition for purposes of a litigation.

Therefore, the documents sought to be produced at this point in time are documents which ought to have been in possession of the Plaintiff at the point of purchase, and which documents should have



been as a result of the Plaintiff having been cautious in conducting due diligence. The due diligence process therefore ought not to have been after the purchase of the suit property but prior to the purchase of the suit property.

40. In conclusion, therefore, the Learned Counsel opined that the Civil Procedure Act and Rules 2010 provide for timelines in which the conduct of a suit should abide by. Indeed, the provision of Sections 1A, 1B and 3A under which the Plaintiff/Applicant's application was brought under were meant to facilitate timely conclusion of disputes. Therefore, the instant application sought an exercise of judicial discretion and production of documents listed hereinabove and leave to file the said documents, eighteen (18) years after institution of suit.
41. He reiterated that at some point, litigation has to come to an end. This should be as a result of a level litigation filed provided to both parties. The Plaintiff has been reluctant to prosecute this case over the years thereby causing agony and uncertainty to the 1st Defendant. Thus, it was in the interest of justice that the Court dismisses the Plaintiffs application and proceeds to hear and determine this suit substantively with the documents on record. Since institution of this suit, the Plaintiff had been indolent and slept on its rights. Allowing the said application would therefore be highly prejudicial to the 1st Defendant who has always been keen and ready to prosecute its case.

V. Analysis and Determination

42. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has two (2) framed the following issues for determination.
 - a. Whether the Notice of Motion dated 24th July, 2024 for production of documents and filing of a further witness and merited.
 - b. Who will bear the Costs of Notice of Motion application 24th July, 2024.

Issue No. a). Whether the Notice of Motion dated 24th July, 2024 for production of documents and filing of a further witness and merited.

43. Under this sub – title we shall determine whether the application for production and filing of further witness statement is merited. I must point out that parties to any litigation are the masters of their respective cases. It is their duty to draw and file proper pleadings and to prepare and to present in court such evidence as they believe would prove their respective claims and aid the court in arriving at a fair and just determination of the case. Filing of pleadings and presentation of evidence is, however, not an endless journey. The process is regulated by the Civil Procedure Act, Cap. 21 and Rules.
44. The provision of Section 22 of the Civil Procedure Act, Cap. 21 relates to 'inter alia' deliveries interrogatories, admission of documents and facts, discovering and production of documents and reads: -

(S.22) Power to order discovery and the like.

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 as aforesaid;
- c. order any fact to be proved by affidavit.

45. Similarly, the provision of Order 28 Rule 7 of the Civil Procedure Rules, 2010 provides as follows:-

“On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining:-

- (a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or
- (b) ...

46. Further I rely on the decision of “Nyanza Management Limited & another – Versus - National Bank of Kenya Limited & 3 others [2023] KEHC 19329 (KLR)”, where

“ 11. Without delving into the merits and demerits of that assertion, it is important to highlight that order 11 of the Civil Procedure Rules provides for discovery of documents prior to the hearing so as to aid the parties in appraising the strengths and weakness of the parties’ respective positions. Our system of litigation, though adversarial, but trial by ambush was abolished by the enactment of order 11 of the Civil Procedure Rules where parties to a civil dispute file and exchange the documents that they intend to rely on during the hearing such that where a party fails to file and serve relevant documents in advance during pre-trials, they cannot be allowed to spring up those document at the hearing in support of their respective cases or position.

12. In addition, where documents which a party intends to rely on are solely in possession of the adverse party and the adverse party appears not to be keen to file or produce those documents in evidence, to the detriment of the other party, the party who wishes to rely on those documents can apply for discovery under section 22 of the [Civil Procedure Act](#) which provides that:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application by either party-

- a. Make such orders as may be necessary or reasonable in all matters relating to the delivering and answering of interrogatories, the admission of documents and facts and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence.
- b. The court has the power to summon any person to produce such documents or adduce evidence as the case may be.



13. Discovery is a formal pre-trial process through which a party to litigation may seek to discover evidence and facts that are crucial to his case, and as can be seen from section 22 cited above, the scope of discovery is quite broad. A party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit. The emphasis should be that the documents sought are relevant to the issue before the court.
47. A court Nigeria presented with a similar application in the case of “Anakwe – Versus – Oladeji (2008) 2NWLR (Pt. 10, 72) at Pages 550 – 5221 Paragraphs G – A”, opined as follows:-
- “An Applicant therefore seeking to be allowed to do an act which he omitted to do when he ought to have done it during the trial, has a duty to give reasons that are adequate and reasonable to explain his omission and or failure to do the act at the appropriate time during the said trial.”
48. One object of Section 22 of the Act is to avoid trial by ambush and to ensure that all material relevant to the just and fair determination of a dispute can be availed to all parties and the Court in good time. As stated by Gikonyo J in “ABN Amro Bank N.V – Versus - Kenya Pipeline Company Limited [2014] eKLR” (a case cited by counsel for Concord), the provisions serve a useful purpose. The Judge held: -
- “Discovery as 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.”
49. Additionally, the Court of Appeal in the case of: “Chase Bank (Kenya) Limited – Versus - Cannon Assurance (K) Limited [2019] eKLR” aptly held as follows: -
- “As stated earlier, discovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party’s case and/or to ascertain the existence of information that may be introduced as evidence at trial. The respondent was well within its rights to request the return of documents given to the appellant, presumably with the intent to introduce the documents as evidence at the trial which was yet to begin. The test for discovery is proof of possession and materiality of the information sought by the parties. This being the settled legal requirement and having been proved by the respondent in the present case, we find no inclination to interfere with the trial court’s decision.”
50. From the above provisions of the law, it is undoubtedly clear that it is within the discretion of this Court to issue orders which facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and this is the overriding objective under Section 1A of the *Civil Procedure Act*, Cap. 21.
51. In the present, the Plaintiff/Applicant has been made aware that the suit has been listed for hearing on 30th July 2024. The date was fixed without the Plaintiff/Applicant's advocate's participation. If the Plaintiff/Applicant had participated, it would have informed the court that it is seeking documents relating to the root of the title over Mombasa/Block XXI/585. The Plaintiff/Applicant, who purchased the property from its original allottee who was now deceased, does not have the



documents in its possession. This is despite appointing a surveyor to conduct a survey due diligence to establish the origin of the property.

52. According to the Plaintiff/Applicant, the 2nd Defendant and the Ministry of Lands, who were the lawful custodians of those documents, have failed, refused or neglected to avail those documents to the Plaintiff/Applicant or its surveyor. In the absence of such documents, the Plaintiff/Applicant's right to a fair hearing will be greatly prejudiced and any resulting trial will be patently unfair. It was therefore necessary that the hearing be adjourned, and the Plaintiff/Applicant be given an opportunity to present all the evidence that can possibly be availed.
53. The 1st Defendant/Respondent on the other hand argued that the application was served upon counsel for the 1st Defendant/Respondent only on the afternoon of 26th July, 2024 this was only one (1) working day to the hearing of the main Suit scheduled for 30th July, 2024. The suit was filed on or about 5th July, 2006 over 18 years ago. In all those years, the Plaintiff/Applicant had not been keen to prosecute its suit. Instead and as the Court record will confirm, it was the 1st Defendant/Respondent who had been ready to proceed whenever the matter had come up for hearing in the recent past. The nature of the Application and he held the considered view that the Application was just but part of the series of delaying tactics on the part of the Plaintiff. He had reviewed the Schedule of Documents attached to the Application and he noted that the documents listed therein are documents which the Plaintiff/Applicant ought to have sought and obtained at the time of filing Suit in the year 2006. There was absolutely no justification to purport to sought them 18 years late and on the eve of the hearing.
54. There only question left for the court is whether this new information will help in the determination of this court. Moreover, the 1st Defendant/Applicant had not provided any plausible explanation as to what prejudice it would suffer with the production of this new evidence. In the event that the only hardship is costs, those can always be reimbursed accordingly. In the end, I find that application dated 24th July, 2024 is merited and the same hereby is allowed as prayed.

Issue No. b). Who will bear the Costs of Notice of motion application dated 24th July, 2024

55. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
56. In the present case, the Honourable Court elects not to award costs.

VI. Conclusion & Disposition

57. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. In a nutshell, I proceed to order the following: -
 - a. That the Notice of Motion application dated 24th July, 2024 is found to have merit and is hereby allowed with no orders as to costs.



- b. That the Honorable Court be and is hereby pleased to issue an order directing the 2nd Defendant and/or Ministry of Lands to supply the Plaintiff/Applicant and the court with copies of the documents listed in the scheduled attached herewith.
- c. That the Plaintiff/Applicant be and is hereby granted leave to file further witness statement(s) and a further list of documents to introduce the documents sought under order (b) above.
- d. That the 1st & 2nd Defendants/Respondents have the corresponding leave of 3 days to file and serve replies.
- e. That the scheduled hearing date for 16th December, 2024 to be maintained accordingly.
- f. That there are no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER, 2024.

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**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a). M/s. Firdaus Mbula, the Court Assistant.
- b). Mr. Bill Kongere Advocate for the Plaintiffs/Applicants.
- c). Mr. Oduor holding brief for Mr. Thuo Advocates for the Respondents.

