



Ethics & Anti-Corruption Commission v Mabea & 4 others; I & M Bank Limited & another (Plaintiff); Ethics & Anti-Corruption Commission & 4 others (Defendant) (Environment & Land Case 56 of 2019) [2023] KEELC 21416 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21416 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 56 OF 2019
JO MBOYA, J
NOVEMBER 8, 2023

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ZABLON AGWATA MABEA 1ST DEFENDANT

WILSON GACANJA 2ND DEFENDANT

IKM PLACE LIMITED 3RD DEFENDANT

ARROW CENTRE LIMITED 4TH DEFENDANT

INVESTMENT & MORTGAGE BANK LIMITED 5TH DEFENDANT

AND

I & M BANK LIMITED PLAINTIFF

IKM PLACE LIMITED PLAINTIFF

AND

ETHICS & ANTI-CORRUPTION COMMISSION DEFENDANT

**MINISTRY OF LANDS, HOUSING AND URBAN
 DEVELOPMENT DEFENDANT**

THE CHIEF LAND REGISTRAR DEFENDANT

NATIONAL LAND COMMISSION DEFENDANT

THE HONOURABLE ATTORNEY GENERAL DEFENDANT



RULING

1. The Learned Counsel for the 3rd defendant herein, namely, George Oraro (Senior Counsel), has taken an objection to a question raised by counsel for Plaintiff as pertains to whether the Letters of allotments were duly paid for and/or the terms thereof relating to payments were duly complied with.
2. According to the learned counsel for the 3rd defendant, the issue being raised by way of cross-examination herein is irrelevant and in any event, does not form part of the plaintiff's case. Owing to the fact that the question relates to an irrelevant issue; learned counsel has therefore implored the court to decline to allow the question and disregard the answer thereto.
3. On the other hand, learned counsel for the plaintiff has submitted that the issue in question is relevant and in any event, same touches on whether or not the government protocols and procedures, which the witness alluded to, were duly complied with or otherwise.
4. Other than counsel for the plaintiff, the learned counsel for the 2nd, 3rd and 5th defendants to the counter-claim has also contended that the determination on whether or not the issue raised is relevant or otherwise, does not belong to counsel for the defendants or at all. To the contrary, learned counsel has submitted that the issue of relevance falls within the purview of the court and the same shall be determined at the appropriate time and not otherwise.
5. Furthermore, the learned counsel for the named defendants to the counter-claim has also contended that cross-examination is not bound by the issues contained in the witness statement of the witness or at all. In this regard, the counsel has reiterated that the objection under reference is devoid of merits and thus ought to be dismissed.
6. Having examined and reviewed the objections and upon taking into account the submissions of counsel for the Parties; two issues do arise and which merits determination.
7. Firstly, there is the question of relevance of the issue as to whether or not the payments were made at the foot of the Letters of allotment that were issued to and in favour of Honorable Sharif Nassir.
8. In respect of the question of relevance, I beg to state that the witness in the box has adopted his witness statement and in respect of which the same has alluded to inter-alia, the fact that the letters of allotments that were issued were indeed issued in accordance with the government protocols and procedures and hence the same are *ex-facie* lawful.
9. To the extent that the witness has himself alluded to compliance with government protocols and procedure; it is my finding that payments of the requisite statutory charges, if at all, is relevant and in any event, forms part of what would constitute compliance with the procedures attendant to allocation/ alienation of land and particularly, the suit properties.
10. Furthermore, I also beg to state that the issue of how relevant the issue of payments on account of the letters of allotment is; is one that falls for determination of the court and the determination of the relevance or otherwise, can only be gone at the appropriate time, namely, when the court will be assessing the totality of the evidence tendered and/or adduced by the Parties.
11. The second issue that does arise is whether the counsel for the Plaintiff is seeking to introduce a new issue which had not been pleaded and/or whether same is expanding the plaintiff's case *vide* the question on payments towards the Letters of allotment.



12. First and foremost, I wish to state and there is no gainsaying that the Parties are bound by their pleadings and hence no new issue can be raised and or canvased which has not been pleaded. See the provisions of order 2, rule 6 of the Civil Procedure Rules, 2010. [see also the *dictum* of the Court of Appeal in the case of Dakianga Distributors Limited versus Kenya Seed Company Ltd (2015) eKLR]
13. Nevertheless, it is not lost on the court that the question being objected to is not one that is calculated to introduce a new issue, but to test whether the contention by the witness that government procedures and protocols were complied with are correct or otherwise. Further and in any event, it suffices to point out that issues to a case are never introduced and/or added during cross-examination, either in the manner contended by learned counsel for the 3rd defendant or at all.
14. Be that as it may, I do not find any new issue or at all that is being introduced either as alleged by counsel for the 3rd defendant or otherwise.
15. Lastly, I also wish to observe that the cross-examination of a witnesses, including the current witness, is not bound by doctrine of departure and hence any question that relates to and is relevant to the issues in dispute can be raised, canvased and responded to. [See the provisions of section 146(2) of the Evidence Act, chapter 80, Laws of Kenya]
16. Before terminating the ruling, it is imperative to mention that by the time the objection was being taken, the question as to whether the letters of allotment had been paid for was already answered and the evidence thereof taken note of by the court. For coherence, the witness pointed out that the payments in respect of the two letters of allotment was made but same did not have the receipts before the court.
17. Consequently, and in this regard, I would still have come to the conclusion that the objection was taken after the horse had bolted; and hence is overtaken by events.
18. Consequently and in a nutshell, I come to the conclusion that the objection by counsel for the 3rd defendant and supported by learned counsel for the rest of the defendants is devoid of merits and the same be and is hereby declined.
19. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2023.

OGUTTU MBOYA

JUDGE

