



REPUBLIC OF KENYA



KENYA LAW
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**Kaur v Suri (Environment and Land Case Civil Suit
738 of 2013) [2022] KEELC 58 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 58 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 738 OF 2013**

JO MBOYA, J

MAY 4, 2022

BETWEEN

PARMJIT KAUR ALIAS MANDEEP KAUR PLAINTIFF

AND

AVTAR SINGH SURI DEFENDANT

RULING

1. On the 10th December 2020, this Court (differently constituted) delivered a Ruling in respect of two Application, namely, the Application dated the 18th October 2019 filed by the Plaintiff and the second Application dated the 17th August 2020, the latter which was filed by the Defendant herein.
2. Following the delivery of the Ruling, details in terms of the preceding paragraph, the Honourable court (differently constituted) dismissed the Defendant's Application dated the 17th August 2020, but on the other hand proceeded to allow the Plaintiff's Application dated the 18th October 2019.
3. In the course of delivery of the Ruling under reference, the court held and/or stated at paragraph 25 as hereunder;

“Turning to the Plaintiff's Application, the court finds that the Application is merited for it seeks enforcement of the consent order of 4th March 2014, which this court already determined was valid. The court grants prayer 1 of the application dated 18th October 2019. Since the issue of accounts of the rents from the suit property is contested, the Defendant is to produce up to date accounts of all the rents received from the suit property from August 2015 to date, within thirty (30) days of today, to enable the court determine the share of rents payable to the Plaintiff”.

4. It is important to note that upon the delivery of the subject ruling, the Defendant herein filed and/or lodged another Application dated the 17th August 2021, and in respect of which same sought various



- Reliefs, inter-alia, Review of the consent order entered and recorded by the court on the 4th March 2014.
5. Following the filing of the foregoing Application, namely, the Application dated the 17th August 2021, the Court was obliged to and indeed gave directions pertaining to the hearing and disposal of same.
 6. Subsequently, the Parties herein filed and exchanged their respective submissions in respect of the Application dated the 17th August 2021 and same was thereafter disposed of vide Ruling rendered on the 24th day of February 2022, whereupon same was Dismissed.
 7. Suffice it to note, the after the delivery of the Ruling which was rendered on the 24th February 2022, the court issued further directions, whose purport and tenor was to actualize the directions contained at the foot of the Ruling delivered on the 10th December 2020.
 8. For coherence, the directions which were issued by the Court were in respect of the crafting and delivery of a Judgment, based on the Rent accounts which had been filed by the Defendant in line with the directions contained in the Ruling dated the 10th December 2020, coupled with the written submissions, which had been filed by the respective Parties.
 9. Nevertheless, while perusing the entire court file, with a view to crafting the Judgment, this Court landed on the terms of the consent which had been entered into and endorsed by the court on the 4th March 2014 and apparently which consent premises the directions of the Court at the foot of the ruling rendered on the 10th December 2020.
 10. To be able to appreciate the difficulty posed in the subject matter and particularly, in crafting the Judgment, it is imperative to reproduce the terms of the consent and the same are reproduced in the next segment of the subject Ruling.

Background:

11. On the 4th March 2014, the Parties herein entered into the first consent, whose import and tenor were as hereunder;
 - a. The consent touches on the following applications and compromises the said applications;
 - i. Plaintiffs Notice of Motion Application dated 24th June 2013.
 - ii. The Defendant’s Notice of Motion Application dated the 12th August 2013.
 - iii. The Plaintiff’s Notice of Motion Application dated the 18th February 2014.
 - b. The parties have agreed that the Plaintiff’s share of income from the suit property be paid directly to her and be backdated with effect from August 2013 less the taxes, if any, paid upon that income to the government.
 - c. Both the Plaintiff and the Defendant to commission separate audits of accounts so that their respective backdated shares are known for the period that the Plaintiff has not been paid. This period to be agreed upon by both the Plaintiff and the Defendant. The Defendant shall make an offer on how the amounts due to the plaintiff shall be paid less any taxes paid to the government.
 - d. The suit property to be separated into separate titles for each party, namely the Plaintiff and the Defendant respectively.
 - e. Upon default, any party to be at liberty to apply.



12. Other than the foregoing consent which was adopted, the Parties herein entered into yet another consent which was adopted and ratified by the court on the 3rd April 2014, whose terms were as hereunder;
 - a. An audit of accounts be independently undertaken by the Plaintiff and Defendant of the amounts of income from the suit premises with effect from January 2004 up to date.
 - b. The respective audit report be filed in court by way of supplementary further affidavits by the parties before the 5th May 2014.
 - c. Mention for further directions on the 7th May 2014.
13. The foregoing excerpts, constitutes the terms of the consent that were entered into by the Parties herein and thereafter endorsed by the court.
14. It is worthy to note that subsequent to the entry into and endorsements of the consent orders, the Defendant herein filed a total of three Applications whereby same sought to impeach, set aside and/or otherwise vary the terms of the consent which was entered into on the 3rd April 2014.
15. Be that as it may, the three (3) Applications which were filed by the Defendant and which were challenging the consent order which was entered into on the 3rd April 2014, were dismissed. For clarity, the last Application was dismissed vide Ruling rendered on the 24th February 2022.
16. The foregoing consents, constitutes and/or reflects the status of the proceedings in respect of the Subject matter.

Submissions by the Parties :

17. Premised on the directions contained at the foot of the Ruling rendered on the 10th December 2020, the Defendant herein proceeded to file what is called the Defendant's list of Documents, dated the 15th March 2021.
18. Having filed the aforesaid Documents, the Defendant thereafter proceeded to and filed Written submissions, which are stated to be in support of the Defendant's list of Documents dated the 15th March 2021.
19. In respect of the said submissions, the Defendants has itemized two (2) issues for determination, namely;
 - i. Whether the Defendant has filed the correct Rental income Report for the Suit property.
 - ii. Whether the Mediation Report can be used to assess the Plaintiff's share of Rental income.
20. Having itemized the foregoing two issues, the Defendant has then proceeded to make submissions and in this regard, same has contended that the rental income report, being Document number 1 at the foot of the list of Documents dated the 15th March 2021, is the complete record of the rental income and that same is further accompanied by an official rental income assessment report from Kenya Revenue Authority.
21. It is the Defendant's further submissions that based on the Rental Income Report, which has been attached to the list of Documents dated the 15th March 2021, the Court can thereafter be able to determine and/or ascertain the Plaintiff's share of Rents arising from the Suit property.



22. On the other hand, the Defendant has further submitted that the Plaintiff's predecessor in title had similarly entered into a Sale agreement in respect of the suit property, whereby same agreed to sell his half share portion thereof, to the Defendant and that based on the intention to sell, the Defendant herein paid to and in favor of the Plaintiff's predecessor some monies on account of stakeholders sum.
23. Secondly, the Defendant's counsel has also submitted that contrary to the directions of the court, the Plaintiff herein has sought to have the rents due and payable to the Plaintiff to be assessed and determined on the basis of a Mediation report which was filed by the East African Ramgarhia Board Welfare Committee.
24. However, it is the Defendant's submissions that the said Mediation Report, was not envisaged vide the court order in terms of the Ruling rendered on the 10th December 2020.
25. Based on the foregoing, the Defendant has implored the court to disregard, the terms of the Mediation Report and not to take same in account in ascertaining and/or determining the Plaintiff's share of Rents.
26. Finally, the Defendant herein has attached and/or annexed various documents to the written submissions and which documents the Defendant has implored the court to take note of and rely on in crafting the Judgment and ascertaining the Plaintiff's share of rents.
27. On her part, the Plaintiff's counsel have similarly filed written submissions dated the 21st April 2021 and in respect of which same has submitted as follows. First and foremost, the Plaintiff has submitted that what the Defendant has filed vide the Defendant's list of Documents dated the 15th March 2021 are not Audited Rents accounts, in the manner envisaged by the Court order.
28. Secondly, the Plaintiff's counsel has also submitted that the income figures which are contained and/or reflected on the piece of paper which have been filed by the Defendant are not backed by the List of tenants and the rents paid by each tenant. Consequently, it is the Plaintiff's submissions that the income figures are therefore devoid of any substantive foundation.
29. Thirdly, the Plaintiff's counsel has submitted that though the Defendants documents also contains and or reflects expenses incurred, it has been submitted that the said expenses and/or items have not been supported by any Documents, to show how same arose and/ or were incurred.
30. Fourthly, the Plaintiff's counsel has also submitted that the amounts shown as the additional assessment on account of tax liability in the sum of Kshs.1, 828, 269/= only, arose on the Defendant's own failure to provide documents to the Kenya Revenue Authority and hence the additional assessed liability ought to be borne by the Defendant and not otherwise.
31. Fifthly, the Plaintiff's counsel has also submitted that to the extent that the Defendant herein has not filed and/or presented to court the Audited rents accounts, as ordered and/or directed by the court, the court should therefore proceed to assess the Plaintiff's share of Rents on the basis of the Mediation Report, which was prepared by the East African Ramgarhia Board Welfare Committee.
32. Based on the foregoing submissions, the Plaintiff's counsel has therefore implored the Court to assess the Plaintiff's share of Rent on the average Monthly share calculated at Kshs.189, 980/= Only, and thereafter to multiply same by the number of months from August 2014 to date. For clarity, the Plaintiff's counsel submitted that what was due to the Plaintiff up to and including April 2021 amounted to Kshs.13, 108, 620/= only.
33. Other than the foregoing, the Plaintiff's counsel has thereafter proceeded to and attached various Documentary exhibits and/or annexures to the submissions and has invited the Court to utilize



the attached Documents, including, the Report of the Mediation of East African Ramgarhia Board Welfare Committee, as a basis for calculating the Plaintiff's share of Rents.

Issues for Determination:

34. Having reviewed the terms of the Consent(s) that were endorsed on the Court record on the 4th March 2013 and the 3rd April 2014, respectively and taken cognizance of the terms of the ruling rendered on the 10th December 2020 and similarly having reviewed the submissions filed by and/or on behalf of the Parties herein, the following issues do arise and are germane for determination;
- i. Whether the Parties herein have complied with the terms of the consent order endorsed on the court record on the 3rd April 2014 and if not, whether same are obliged to comply with the terms thereof.
 - ii. Whether the Parties herein can attach Documentary Evidence, annexures and/or exhibits to written submissions and whether such Documents have any probative value or at all.
 - iii. Whether this Court can render a Judgment on the basis of the two sets of submissions which have been filed.
 - iv. What Directions are appropriate in the matter.

Analysis and Determination:

Issue number 1:

Whether the Parties herein have complied with the terms of the consent order endorsed on the court record on the 3rd April 2014 and if not, whether same are obliged to comply with the terms thereof.

35. Pursuant to the consent entered into and endorsed by the court on the 3rd April 2014, the Parties herein agreed as hereunder;
- a. An audit of accounts be independently undertaken by the Plaintiff and Defendant of the amounts of income from the suit premises with effect from January 2004 up to date.
 - b. The respective audit report be filed in court by way of supplementary further affidavits by the parties before the 5th May 2014.
 - c. Mention for further directions on the 7th May 2014.
36. My reading and understanding of the terms of the consent that was entered into by the Parties and thereafter endorsed by the court, is that the Plaintiff and the Defendant were each to engage a qualified accountant or auditor to undertake the audit of the accounts of the Rental income arising from the suit property and that each Party was to do so independently. For clarity, the audit in respect of the rent accounts was to cover the period from January 2004 up to date.
37. It is my further understanding, that upon the engagement or retention of the qualified accountants/ auditors by either Party, the appointed auditors/accountants was to generate the Accounts Report in respect of the rental income independently and that upon such report being generated, the Parties herein were to file the resultant report by way of Supplementary Further affidavits.
38. From the foregoing, it is imperative to note that both the Plaintiff and the Defendant were enjoined to appoint, instruct and/or retain own accountant/auditor for purposes of the preparation of the audited Rents Accounts and thereafter to file the report to court.



39. For coherence, the task of filing the audited rent accounts was not placed upon the Defendant only. Consequently, it behooves both the Plaintiff and the Defendant to comply with the terms of the consent and to endeavor to file the respective Audit statement of account in respect of the rental income from the suit property.
40. Sadly, neither of the Parties herein have endeavored to nor complied with the terms of the consent and as a result of the failure, no audit of Rents accounts has been filed and/ or lodged with the Court to date.
41. It is also important to observe that vide the ruling dated the 10th December 2020, this court (diferently constituted) appeared to have directed the Defendant to produce the up to date Accounts of all the rents received from august 2015 to date, however that direction appears to be contrary to the terms of the consent entered into on the 3rd April 2014, which the court had found to be valid.
42. Based on the foregoing, it is my finding and holding that both the Plaintiff and the Defendant were enjoined and/or obliged to engage and/or retain an independent and qualified accountant/auditors to undertake the audit of the rental accounts and thereafter the resultant Reports were to be filed in court.
43. Similarly, it is also my finding and holding that the terms of the consent which were entered into by the Parties also prescribed and/or circumscribed the timeline which was to be covered by the audit of the rent accounts. For clarity, the audit was with effect from January 2004 to date.
44. Based on the foregoing findings and holdings, it is therefore evident and/or apparent that both the Plaintiff and the Defendant have not endeavored to abide by the terms of the consent and it is therefore imperative that the advocates for the respective Parties do advise their Principals to proceed and appoint qualified accountants/auditors to undertake audit of the rents accounts in respect of the suit property.
45. On the other hand, it is also imperative to point out that the piece of paper contained and indicated as item number 1 in the Defendants list of documents dated the 15th March 2021, which was purported to have been filed in compliance with the court order, is neither an audited rents accounts or statements of rents, in the manner envisaged by the terms of the consent.
46. Further, it is also imperative to observe that the said piece of paper, details in terms of the preceding paragraph, which is neither dated, signed or drawn by any designated person, is devoid of any probative value and hence cannot be relied upon by the Court, either for purposes of crafting the Judgment or otherwise.
47. In a nutshell, I hold that neither of the Parties herein have complied with the terms, tenor and import of the consent order entered into on the 3rd April 2014 and which consent order remains valid and binding to date.

Issue Number 2

Whether the Parties herein can attach Documentary evidence, annexures and/or exhibits to written submissions and whether such Documents have any probative value or at all.

48. While highlighting the salient features of the submissions that were filed by the Parties herein, I pointed out that both the Plaintiff and the Defendant, have attached various documentary exhibits and/or annexures to their submissions and having attached same, the advocates for the Parties have proceeded to make submissions on the basis of the said Documents, as if same formed part of the Evidence produced before the court.
49. I must state that the attachment of documents and/or annexures to written submissions, is quite unconventional and alien. For clarity, I have never come across any provision of the law, whether in the



Evidence Act, Chapter 80 Laws of Kenya or in the Civil Procedure Act, Chapter 21 Laws of Kenya and the Rules made thereunder.

50. Secondly, it is important to note that Evidence, whether oral or documentary, can only be produced before the court in the conventional manner, where the concerned witness introduces the documents and thereafter invites the court to admit same as an exhibits.
51. On the other hand, Documentary evidence can also be adduced and/or produced before a court of law by way of a consent entered into by the Parties and not otherwise.
52. Notwithstanding the foregoing, the Advocates for the Parties herein, (who are indeed seasoned Advocates) have chosen to disregard the established and conventional method of adducing evidence and same have decided to attach documentary exhibits to submissions.
53. I beg to state, that the attachment of documentary exhibits and/or evidence to the submissions by the advocates for both Parties, is not only unconventional but quite unorthodox. Quiet clearly, such kind of endeavors must be frowned upon and be discarded.
54. Be that as it may, the foregoing observation, is not only peculiar unto this court. For clarity, I must point out that other courts have also found the attachment of documentary evidence to written submissions unconventional and otherwise unlawful.
55. In support of the foregoing, this Court adopts and endorses the holding in the case of *Pyramid Hauliers Ltd v Nebemiah Kinyanjui* [2021] eKLR, where the Honourable the court at paragraph 45 observed as hereunder;

“The receipt was non-existent when the plaint was amended and, in fact, the respondent submitted before this court that he attached the documents on his submissions filed before the trial court. That is not the way of producing documentary evidence. That is; documentary evidence cannot be produced through submissions in our adversarial system. Evidence attached to submissions cannot be considered to have been properly produced for purposes of supporting a party’s case.”

56. On the other hand, the same position was also underscored in the case of *Re-Estate of Ayieko Oure (Deceased)* (2021) eKLR, where the Court similarly stated as hereunder;

“If indeed the intention of the applicant was for the court to take into consideration the s documents attached to the submissions, she should have annexed them to her supporting affidavit. The practice of attaching evidence to submissions is not supported in the law. The reason why a respondent is ordinarily given the opportunity to file a response by way of a replying affidavit is to answer to the issues raised by the applicant in their supporting affidavit which should include the annexures they rely on. At the point where the same are attached to the submissions, the respondent has no way of responding to them and if the court was to take the said annexures into consideration, then it would be prejudicial to the other party.”

57. Premised on the foregoing, I must add my voice to the jurisprudential position that Parties cannot produce documentary evidence or otherwise by annexing and/or attaching same to written submissions.
58. Consequently, it is imperative that advocates do comply with the conventional and established practice for adduction and production of evidence before the court other than resorting to dangerous shortcuts, which are not only unknown to law, but are illegal and unlawful.



59. Suffice it to say, the Documents attached to the written submissions by both the Plaintiff and the Defendant, contrary to the established rules of evidence, are devoid of probative value.
60. In short, I find and hold that the documents which have been adduced by way of attachment to the written submissions, are irregular, illegal and unlawful. Consequently, same be and are hereby expunged from the record of the court.

Issue Number 3:

Whether this court can render a Judgment on the basis of the two sets of submissions which have been filed.

61. Following the delivery of the ruling on the 24th February 2022, the advocates for the Parties herein addressed the court and informed the court that same had filed their respective submissions in the matter.
62. On the other hand, the advocates proceeded to and implored the court to craft and render a Judgment in respect of the subject matter and in particular, to ascertain and award to the Plaintiff her rightful portion of the rental income from the suit property.
63. True, both advocates have filed their respective submissions in respect of the matter and to which same has attached various documents, whose probative value, have been discussed in terms of the preceding paragraphs.
64. Nevertheless, even though the advocates for the Parties have filed written submissions, there is a serious disconnect between the submissions filed and the record of the court, more particularly, the consent which was entered into and endorsed by the court on the 3rd April 2014.
65. To my mind, the terms of the said consent were such that the Parties herein were to proceed and file the audit reports of the rental income prepared by their respective Accountants/Auditors and same were to be filed and/or placed onto court records by way of further affidavits.
66. On the other hand, once the audit reports or statements of accounts, were so filed, the Honourable court was to issue further directions on the audited reports/ statements of accounts and part of the directions, would have included the admission of the audit report as Evidence before the court and, where necessary, cross examination of the respective authors of same.
67. Nonetheless, whilst discussing issue number one herein before, I found and held that neither the Parties herein have complied with the terms of the consent order endorsed on the 3rd April 2014. Consequently, the court has not been able to issue the further directions which were due upon compliance with the terms of the consent.
68. In the premises, it is my finding and holding that the written submissions that have been filed by the advocates for the Parties herein, were filed under misapprehension of the orders of the court and in the absence of the audit accounts/statements of accounts in respect of rental income, which were ordered and/or directed to be filed vide supplementary further affidavits by both the Plaintiff and the Defendant.
69. On the other hand, it is my finding and holding that in the absence of the audited accounts of rental income prepared by qualified personnel in the manner envisaged by the consent order and in the absence of any directions deeming the audited accounts (which have not been filed as part of the evidence), it is not legally feasible and/or tenable to craft and render a Judgment in respect of the subject matter.



70. This court is alive to the fact that this is a 2013 matter and hence same ought to be dealt with and be disposed of on priority basis. However, in an endeavor to deal with and/or dispose of the subject matter, the Court cannot close its eyes to the evident and apparent shortcomings obtaining in the court record.
71. At any rate, even if the Court were to pretend to craft a judgment, it would be very difficult to craft one noting that no evidence has since been brought forth and placed in the court records in the manner stipulated vide the consent recorded on the 3rd April 2014.
72. In short, even though the Parties herein have filed submissions, the Court finds and holds that submissions cannot take the place of evidence and hence it is appropriate, nay imperative that the Parties herein re-visit the terms of the consent and thereafter comply with same. For clarity, only then shall there be evidence on record to premise the crafting of a Judgment.
73. The foregoing observation is fortified and or buttressed by the holding in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the court stated as hereunder;
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

Issue Number 4

What Directions are appropriate in the matter.

74. The Parties herein entered into various consents, particularly the consent order endorsed on the 4th March 2014 and the 3rd April 2014, respectively.
75. Having entered into the foregoing consents, it behooves the Plaintiff and the Defendant to endeavor to and comply with the terms thereof, more particularly, now that the various applications by the Defendant to impeach the consent have been declined.
76. Paramount amongst the terms of the consent, was the limb whereby the Plaintiff and the Defendant agreed to undertake an audit of the rents accounts in respect of the suit premises independently and thereafter to file the resultant Reports before the court.
77. Nevertheless, despite the said undertaking, both the Plaintiff and the Defendant have failed to comply with and/or adhere to the terms of the consent. In this regard, it is therefore imperative that the Parties herein do comply with the terms of the said consent.
78. On the other hand, it is also worthy to note that the consent order entered into and endorsed on the court record on the 4th March 2014 had a default clause, where either Party was at liberty to apply to court in the event of default.
79. Based on the foregoing, the directions that are just and expedient, would be in the nature of the Plaintiff and the Defendant engaging own auditors/accountants to undertake the audit of the rents accounts in respect of the suit property and thereafter to file same with the court vide supplementary affidavit, in the manner that was directed by the court on the 3rd April 2014.



Conclusion:

80. In conclusion, I make the following directions and/or orders;
- i. The Plaintiff and the Defendant herein have neither complied with nor adhered to the terms of the consent order entered into and endorsed on the court record on the 3rd April 2014, which required both Parties to undertake an audit of the rents accounts independently and thereafter file the resultant report.
 - ii. Pursuant to the failure, details in terms of (i) above it is imperative that the Plaintiff and the Defendant do proceed to engage own qualified auditors/accountants to undertake the audit of the rents accounts in respect of the suit property.
 - iii. The Plaintiff and the Defendant shall thereafter filed and/or caused to be filed the resultant audit/statement of accounts reports in respect of the rental income from the suit property within sixty (60) day from the date hereof.
 - iv. For the avoidance of doubt, the resultant audit of accounts/statement of accounts, shall be filed vide supplementary/further affidavit by either of the Parties.
 - v. Once the audit reports/statements of accounts are filed, in terms of clause (iii) hereof, the Parties shall be at liberty to cross examine the authors of the report.
 - vi. Consequent to clause (v) hereof, the Parties herein shall thereafter be at liberty to file written submissions and thereby pave way for the crafting and delivery of Judgment in respect of the Quantum of rents payable to the Plaintiff from the suit property in line with the consent orders which have since been found to be valid by this court, albeit differently constituted.
 - vii. Either Party is at liberty to apply, in the event there is need for further intervention, to facilitate compliance with the terms with the consent orders which were entered into by the Parties.
 - viii. Costs shall abide the cause.
81. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

N/A for the Plaintiff

N/A for the Defendant

