



REPUBLIC OF KENYA



Langat & 2 others v Atticon Limited & 7 others; Kitany (Interested Party) (Commercial Case E201 of 2021) [2025] KEHC 4718 (KLR) (Commercial and Tax) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 4718 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E201 OF 2021
DO CHEPKWONY, J
FEBRUARY 18, 2025
(AS CONSOLIDATED WITH HCCOMM NO.E138 OF E029)

BETWEEN

ARNOLD KIPKURUI LANGAT 1ST PLAINTIFF
BARONS ESTATE LIMITED 2ND PLAINTIFF
NONIKO HOLDINGS LIMITED 3RD PLAINTIFF

AND

ATTICON LIMITED 1ST DEFENDANT
FRANKLIN MITHIKA LINTURI 2ND DEFENDANT
EMILY NKIROTE BUANTAI 3RD DEFENDANT
BRENDA MITHIKA 4TH DEFENDANT
FAMILY BANK LIMITED 5TH DEFENDANT
LAND REGISTRAR, MERU 6TH DEFENDANT
LINKIT LIMITED 7TH DEFENDANT
REGISTRAR OF COMPANIES 8TH DEFENDANT

AND

MARIANNE JEBET KITANY INTERESTED PARTY



RULING

1. On 30th January, 2025, the matter came up for defence hearing whereby the defence called DW3 to testify. He adopted his witness statement and lists and bundles of documents dated 15th November, 2021, 28th July, 2022 and 3rd July, 2023 respectively as his evidence in-chief and Defendants exhibits in support of his case.
2. In the course of cross-examining DW3, it came out that the Plaintiffs' list and bundle of documents was never produced as their exhibits in support of their case.
3. This prompted the Plaintiffs' counsel Mr. Lorot to apply for leave to re-open the Plaintiffs' case and have a witness for the purpose of producing certain documents, which although included in the Plaintiffs' bundle of documents, were inadvertently not produced in evidence when the Plaintiff's case was closed.
4. According to the Plaintiff's counsel, the omission resulted from an oversight by the previous counsel on record. He contends that the error was inadvertent hence should not be allowed to undermine the pursuit for justice.
5. In support of the application, the Plaintiffs' counsel referred to the constitutional mandate under Article 159 of the *Constitution* as well as the overriding objectives of civil procedural rules which emphasize that justice should not be thwarted by technicalities in the court of the need for all relevant evidence to be considered on its merits. Furthermore, counsel argues that the Defendants are unlikely to be prejudiced by the production of the said list and bundle of documents since they were already part of the record having been no objection raised on reference of any of the other documents contained therein during cross examination of the witness statements.
6. The Defendants' counsel objected to this application on the ground that it appears to be a tactic designed to disrupt the ordered progress of the trial, particularly since the witness in the dock is the only remaining witness expected to testify in their case and they close the same.
7. Having listened to counsel for all parties herein in their argument on whether or not to recall a witness to produce the Plaintiffs' list and bundle of documents, this Court appreciates that it is a fundamental principle of court proceedings that cases should be determined on their substantive merit rather than on technical or procedural errors.
8. Courts have consistently maintained that "substantive justice must prevail over mere technical error". In the case of *Kandie v Kasongo* [2019]eKLR, the Court held that:-

"inadvertent omissions in evidence may be rectified to ensure that the truth is ascertained".
9. In the instant case, the Plaintiffs' counsel has demonstrated that their list and bundle of documents in question is both relevant and part of the record and failure to have the same produced as exhibits was not intended to mislead the court or any party but rather it was an honest mistake on the part of counsel. Also, a perusal of the trial proceedings show that the Plaintiffs' witness identified documents in the said bundle and some even produced some documents therein. Equally, the Defendants' counsel in cross-examination of the Plaintiffs' witnesses referred to documents contained in the said list and bundle of documents.



10. Furthermore, it is worth-noting that by virtue of the court's inherent powers under the *Civil Procedure Act*, it is empowered to manage cases in a manner that avoids unnecessary delay and ensure justice and fairness to all parties. In this Court's view, the exercise of such discretion includes permitting the production of evidence which may have been omitted inadvertently. As such, a procedural oversight ought not be allowed to defeat the ends of justice, especially when the evidence in question is already part of the court record.
11. Upon reviewing the oral submissions by counsel for the parties herein and the applicable principles analyzed above, the court is satisfied that the failure to produce the Plaintiffs' list and bundle of documents, was indeed an inadvertent mistake by counsel who had the Plaintiffs' witnesses in laying out their evidence. The fact that the affidavit intended to be referenced to in cross examination was included in the Plaintiffs' bundle of documents indicates that the evidence was never lost and was intended to be relied upon by the Plaintiffs. On the other hand, the Defendants had access to the said affidavit in the course of all the trial proceedings. Consequently, the Defendant has not been materially deprived of an opportunity to contest, interrogate and or examine the document. In view of this, any alleged prejudice is speculative rather than demonstrative.
12. It is an axiom of justice that a party should not be unduly prevented from adducing evidence which is integral to establishing the truth in a case. The Plaintiffs' counsel's submission that the production of the document is necessary to ensure that the case is decided on its merit is therefore persuasive. In circumstances where a crucial piece of evidence has been omitted inadvertently, it is more appropriate to cure the defect rather than allow a technical oversight to decide the outcome of the case.
13. Therefore, while the Defendants' counsel has argued that recalling the witness will disrupt the continuity of the trial, the court notes that any minimal disruption is far outweighed by the fundamental need to ensure that all relevant evidence is properly adduced and examined by court in the interest of fairness and justice.
14. In the ultimate, the application by the Plaintiffs' counsel to recall the witness for the purpose of producing the document in the Plaintiffs' list and bundle of documents, which were inadvertently not produced is hereby granted. However, so as to safeguard the Defendants' right to a fair hearing, the following conditions are imposed:-
 - a. The witness shall be recalled forthwith solely for the purpose of producing the omitted document. The Plaintiffs' counsel shall ensure that any reference to these documents during further examination is strictly confined to their evidentiary value without introducing any extraneous arguments.
 - b. Subject to a demonstration for further clarification, the Defendants to cross-examine on the documents produced in the committal bundle.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18TH DAY OF FEBRUARY , 2025

D.O CHEPKWONY

JUDGE

In the presence of;

Mr. Kitolo appearing alongside Mr. Lorot counsel for Plaintiffs

Mw. Wanyonyi Njoroge holding brief for Mr. Karanja for 1st, 2nd, 3rd 4th and 5th Defendants.



