



Pevans East Africa Ltd & 4 others v Nation Media Group Ltd & 7 others (Civil Case E018 of 2022) [2025] KEHC 1921 (KLR) (Civ) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E018 OF 2022

JN MULWA, J

FEBRUARY 6, 2025

BETWEEN

**PEVANS EAST AFRICA LTD 1ST PLAINTIFF
MILESTONE GAMES LTD 2ND PLAINTIFF
RONALDO KAMWIKO KARAUARI 3RD PLAINTIFF
NIKOLOV GERASSIM NIKOLOV 4TH PLAINTIFF
GENE GRAND 5TH PLAINTIFF**

AND

**THE NATION MEDIA GROUP LTD 1ST DEFENDANT
JOHN KAMAU 2ND DEFENDANT
FINANCE UNCOVERED LTD 3RD DEFENDANT
PAUL WAFULA 4TH DEFENDANT
PAUL WANDERI NDUNGU 5TH DEFENDANT
GOOGLE LLC 6TH DEFENDANT
YOUTUBE LLC 7TH DEFENDANT
GOOLE KENYA LTD 8TH DEFENDANT**

RULING

1. The Application before the court dated 20/05/2024 is between the plaintiffs as the Respondents and the 5th defendant Paul Wanderi Ndungu as the Applicant, SEEKING Orders:-



1. Spent
 2. That the witness statements by Gene Grand dated 31st January 2024, Nkolov Guerassim Nikolov dated 30th January, 2024, Ronald Kamwiko Karauri dated 1st February, 2024 and Denis Kaggia dated 15th February, 2024, all served Ms Gatheru Gathemia & Co. Advocates on 22nd March, 2024 be struck out.
 3. That costs be provided for.
2. The application is premised upon provisions of Order 8 Rule 5 of the Civil Procedure Rules and upon the applicants Supporting Affidavit sworn on an even date.
 3. By the supporting affidavit the applicant depones that the new witness statements filed by the Plaintiffs were filed out of time and without leave of court and a few days to the hearing of the suit and that the said fresh witness statements raised new issues necessitating the deponent/applicant to file supplementary witnesses statements dated 16/02/2024.
 4. The applicant further deposes that the fresh witness statements are starkly dissimilar to the earlier statements filed in 2022 and are in response to the supplementary affidavit sworn by the applicant and therefore as they are not pleadings, they lacked leave of court and therefore are an abuse of court process and ought to be struck out, specifically statements stated at prayer no. 2 of the motion.
 5. In opposition to the application the plaintiffs the respondents filed grounds of opposition dated 4/06/2024 stating;
 1. That the Application is bad in Law, misconceived, incompetent and incurably defective
 2. That the application dated 20th May, 2024 by the 5th Defendant is meant to delay the expeditious, timely conclusion of this suit which has been engulfed with applications by the 5th Defendant
 3. That the application and the supporting affidavit thereto dated 20th May, 2024 is a misrepresentation of facts and contains falsehoods.
 4. That the 5th defendant has not by the application dated 20th may, 2024 demonstrated the reason of striking off the witness statements by the plaintiffs
 5. That the application dated 20th may, 2024 and the Supporting Affidavit thereto is meant to demean this Honourable court and abuse the independence of the Judiciary and Judicial Officers.
 6. That the 5th Defendant's Application dated 20th may, 2024 is therefore bad in law, an abuse of the Court process and ought to be dismissed.
 6. Additionally the respondents/plaintiffs have filed written submissions.
The court has considered the parties pleadings, the application, affidavits for and in opposition thereto and the grounds of opposition as well as the submissions.
 7. The issues that the court flags for determination are informed by the grounds of opposition and the applicant's dispositions.



Analysis and Determination

8. Pursuant to court orders issued on 23/01/2024 for leave to the parties to regularize their pleadings and documents the plaintiffs proceeded to file three further witness statements by the 5th plaintiff Gene Grand dated 15/02/2024 and all were served upon the defendants and specifically the 5th defendant.
9. There is no dispute that these further witness statements were filed barely two weeks to the hearing of the suit. This was the case of the applicant the 5th defendant who also filed his supplementary witness.
 1. To that end should the applicants supplementary witness statement be expulged from the court record?
 2. What is the purpose of a witness statement?
10. Order 3 Rule 2 of the Civil Procedure Rules provides for documents that parties must file together with the plaint.

Rule 2(a) proviso provides that statement under rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.
11. Order 11 provides for pre-trial directions and conferences. These pre-trial procedures are made to facilitate expeditious disposal of cases and case management. It is during a pre-trial conference like on the 23/01/2024 when upon parties request for leave to file further witness statements the court granted the same despite the age of the case, for reasons that every litigant ought to be granted fair hearing before the court as ably stated at Article 50 of [the Constitution](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#):-

See Christopher Shirambo Karamoja & 2 others v. Jane Njeri & 2 Others [2017]eKLR, Hohana Kipkemei Too v. Hellen Tum [2014]eKLR where the court held while discussing filing witness statements outside timelines provide at Order 3 Rule 7 and Order 7 Rule 5 that, the provisions are meant to prevent trials by ambush as follows;=

There is no clear cut provision setting out the consequences of failure to comply. The rules do not state that such a party will be barred from relying on witnesses or documents which were not furnished at the filing of the pleadings or later filed with leave of court....”

12. Order 11 CPR provides exhaustive pretrial procedures. The court is empowered under Order 50 Rule 6 Civil Procedure Rules to enlarge time for taking any action in any proceedings under the Rules as the justice of the case may require.

This is further anchored under Rule 7 of the order.

By the above therefore, there is no truth whatsoever as deposed to by the applicant that the plaintiffs further witness statements were filed out of time and without leave of court. Even if they were filed out of time, the court under Section 1A, 1B and 3A of the [Civil Procedure Act](#) is mandated under its inherent powers to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.

In addition, Article 159 (2) (d) of [the Constitution](#) employs the courts to dispense justice without undue regard to procedural technicalities see *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others* Petition NO 14 of 2013.



13. As to the purpose of witness statements and parties documents, these are very vital documents as they contain the parties evidence, particularly witness statements and all give life to a suit as held by the Court of Appeal in *Lalfi v Diamond Hasham Lalfi & 2 other* (2023) KECA 853.
14. Further the court rendered itself that during case management process the court is empowered to limit the issues for determination and if possible to assess the strength of the case before certifying the same as ready for trial.
15. It is further to be noted that witness statements and documents aid the court to determine a suit. They are subject to the law of evidence as proof of their evidential value lies with the makers.
16. At the interlocutory stage of a suit, the court will not concern itself with the truth or otherwise of either of the parties witness statements or documents. Only at the stage of hearing does the authenticity and relevance of documents will the court get involved so that a witness statement cannot be expulged from the court record for the only reason that one of the parties holds an opinion that they are false, scandalous untruthful and introduce new causes of action.
17. At the trial stage, the witness upon cross examination of his statement and/or documents will be called upon to support them. They are not pleadings in the true sense of the word but evidence which would be tested through cross examination.
18. Striking out pleadings or documents from court record is draconian more so after the imperatives to the courts stated at Articles 50 of *the Constitution* on fair hearing and Article 159 (2) (d) of *the constitution* and Section 1A, 1B and 3A of the Civil Procedure Rules.
19. The court of Appeal in the case of *Blue Shield Insurance Company vs. Joseph Mboya Ogutu* [2009] held that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham; and should be avoided.
20. The above is driven by realization that rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice more so at the interlocutory stage of a a suit citing the old age case of *DT Dobie & Company (Kenya Limited) vs. Muchina* [1982].
21. For the plaintiff whereas in their spirited submissions maintained that amendments of witness statements ought not be allowed by the court (and remains an unsettled issue) this court holds the view that each case ought to be litigated upon its own peculiar circumstances.
22. Citing the case of *Jaribu Credit Traders Limited v. Fidelity Bank Limited & Another* [2024]eKLR for the proposition held by Sifuna J, adopting a restrictive approach to Order 8 on amendment of pleadings holding that even applications could not be amended, this is debatable. Though a persuasive holding it is not binding to this court, the court therefore declines the invitation to strike out the further supplementary witness statements filed by both the Applicants and the Respondents.
23. Additionally buttressed by the requirements and purpose for amendments in suits, at Halsbury's Laws of England, 4th Edition, Par. 76 it is stated:

“...Th purpose of amendments is to facilitate the determination of the real questin in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document either on application by any party to the proceedings or of its own motion.”
24. For the foregoing, the 5th defendant's application dated 20/05/2024 is devoid of merit. It is dismissed with all partis to bear own costs of the applicaton.



DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH DAY OF FEBRUARY 2025.

JANET MULWA

JUDGE

