Almasi Bottlers Limited v M'Mbijiwe & 3 others (Civil Suit E012 of 2022) [2025] KEHC 8726 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E012 OF 2022

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

ALMASI BOTTLERS LIMITED ..... PLAINTIFF

AND

CAROLYNE KANANA M'MBIJIWE ..... 1ST DEFENDANT

DANIEL MANEGENE GITARI ..... 2ND DEFENDANT

JOHNMARK NDUNGU NDETTO ..... 3RD DEFENDANT

GRACE WANGECI MUGO ..... 4TH DEFENDANT

RULING

1. By a Notice of Motion application dated 18.6.2024, the 3rd Defendant sought the following reliefs:
    a. That the Honourable Court be pleased to issue an order directed at the Plaintiff to produce and avail clear copies to the 3rd Defendant of the various documents in regard to the matters in in question, particularly:
        (i) The audited statements of account for the years 2020, 2021 and 2022.
        (ii) All documents particularized in the 3rd Defendant's notice to be produce dated 13.7.2023 and served on the Plaintiff on 14.7.2023.
        (iii) The Plaintiff's finance, procurement, ICT, and risk management policies.
2. The application is based on the grounds on the face of it and the Supporting Affidavit of the 3rd Defendant as follows:
    a. There is no remotest connection between the 3rd Defendant and the claims in the suit.

b. The documents were requested vide a Notice to Produce but the Plaintiff has declined to avail them.

c. The Plaintiff has sole custody of the documents.

d. The 3rd Defendant has right of access to information under Article 32 (1)(b) of *the Constitution*.

3. The Plaintiff opposed the application through a Replying Affidavit sworn on 28th February, 2025 by the Plaintiff's Financial Controller, one Christina Nzyima as follows:

i. That the documents sought by the 3rd Defendant in his Notice to Produce dated 13th July, 2023 were supplied on 23rd November, 2023 through an email dated 23rd November, 2023. Annexed as "C.N. 1" to the Affidavit is the "Response to the Notice to Produce" and an email dated 23rd November, 2023; explaining documents which are not in the Plaintiff's custody/ possession due to, among other reasons, passage of time;

ii. Two computers named in the Notice to Produce, which are non-existent;

iii. Audited Account statements for the Plaintiff Company for years 2020, 2021 and 2022.

iv. The Plaintiff's Finance, Procurement, ICT and Risk Management Policy were served as part of the Plaintiff's bundle of documents, at page 1447 to 1450 of the Plaintiff's List & Bundle of Documents filed on 12th August, 2022 and served upon the Defendant.

4. The 3rd Defendant also filed a supplementary affidavit sworn on 15.4.2025 by which he reiterated that the documents sought to be produced were in the hands of the Plaintiff and the Plaintiff had refused to produce them despite the notice to produce hence this application. It was further deposed that the 3rd Defendant did not seek to be produced documents that were supplied to him.

5. It was contended that the Orders were issued on 30th November 2023 for compliance and the Plaintiff complied on 6th December 2023 by filing the supplementary list of documents and witness statement.

6. The 1st, 2nd and 4th Defendants did not file responses to the application.

Submissions

7. The 3rd Defendant filed submissions dated 15.4.2025 by which it was inter alia submitted that the Plaintiff ought to be compelled to produce the documents. Reliance was placed on Section 60 of the *Evidence Act*, Cap 80. He further relied on the decision of Kimondo J in Oracle Productions Limited v Decapture Limited & 3 others [2014] KEHC 8658 (KLR) to submit that pretrial discovery is central to litigation and noncompliance should be met with consequences. In the matter the court posited as follows:

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 the trial. This is aptly captured in Halsbury's Laws of England Vol. 13 paragraph *1*:

> "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. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the

case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation".

That position was aptly captured by Havelock J in Concord Insurance Co Limited Vs Nic Bank Limited Nairobi, High Court case 175 of 2011 [2013] eKLR. Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. Halsbury's Laws of England (supra) paragraph *38*. See also Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475, Oluoch Vs Charagu [2003] 2 E.A 649.

8. The Plaintiff filed submissions dated 30.4.2025. It was submitted that it was impractical for the court to make a blanket order for production of items, which are not in the custody/possession of the Plaintiff. Reliance was placed on ABN Amro Bank N.V -vs- Kenya Pipeline Company Ltd [2014] KEHC 8701(KLR) as follows:

> "Discovery and other disclosure processes are expected to elicit voluntary response once they are issued by and between the parties. But where a party has failed to make discovery voluntarily, the Court renders its coercive process to compel discovery of information and documents which are relevant and necessary to the resolution of the dispute before the Court."

9. The Plaintiff also submitted that the notice to produce was premature and disruptive to the proceedings. Reliance was placed on the decision of Gakeri J in the case of Yves Preissler v Daluga Investments Limited t/a Easy Gym Kenya & another [2022] KEELRC 676 (KLR), where the court held as follows:-

> 13. It is not in contest that the suit herein is at the hearing stage. The veracity of the Claimant's allegations and the rebuttals by the Respondent will be tested by the evidence adduced in Court and the Court will give appropriate directions during the hearing.
>
> 14. While pretrial discovery is central to effective and speedy litigation, a notice to produce during hearing could expedite or impede litigation and should in the Court's view be allowed in very exceptional circumstances such as when the document could not be accessed during pretrial discovery. It is otherwise disruptive.
>
> 15. In the instant case, since the deponent of the affidavit in question will testify as a witness. The Applicant herein will have the opportunity to obtain the information required on oath and through documentary evidence as contemplated by the notice to produce.

Analysis

10. Whether or not the court should order discovery and production of documents is a matter of discretion to be exercised in a judicious manner for purposes of fostering justice of the case. Section 22 of the *Civil Procedure Act* Cap 21 provides as doth:

> 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-

> 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. The court has the power to summon any person to produce such documents or adduce evidence as the case may be.

11. The duty to produce documents in one's possession is sacrosanct. There is however no duty to produce documents not in possession of a party. Further, the materials must be shown to be materials sought on discovery and are relevant and necessary. Blanket order for discovery is not contemplated.

12. In Concord Insurance Company Limited v NIC Bank Ltd [2013] eKLR the court defined discovery as follows: -

> The disclosure by the defendant of facts, titles documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a case or action pending or to be brought in another court, or as evidence of his rights or title in such proceedings.

13. The purpose of and threshold to be met by an applicant for an order of discovery: - discovery was discussed in ABN Amro Bank N.V. v Kenya Pipeline Company Ltd [2019] eKLR as follows: -

> " The purpose of discovery is mainly to endure that all documents or information necessary for the just determination of the suit are made available to the parties as well as the court
>
> ....The application I am faced with is essentially one of disclosure of information held by another person which the applicant says is relevant and necessary to these proceedings, for, they are directly connected with the suit and will assist the court to determine the real issues in controversy completely and effectually. 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 the 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. Needless to state primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production of documents etc. But such application seeking information and documents is measured on a new yardstick; the applicant must; a) identify the information and documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. The latter enjoins the applicant to show the information is relevant and necessary to determination of the suit. This constitutional test must be met before orders of discovery are issued."

14. Learned authors of Halsbury Laws of England Vol 13 opine at paragraph *38* that, discovery will not be ordered in respect of irrelevant allegations in the pleadings, which even if substantiated could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars, nor will discovery be allowed to enable a party to fish for witnesses or for a new case, that is to enable him start a new case.

15. The single issue for determination is whether the Plaintiff should be compelled to produce the documents sought by the 3rd Defendant. It is admitted that some documents have been supplied. The plaintiff maintains that some documents are not available or nonexistent. In this regard I classify type, nature and categories of documents sought as follows:

    a. Documents already provided

    b. Documents not provided

    c. Nonexistent documents

    d. Irrelevant and unnecessary documents

16. This is a fairly straight forward application. The 3rd Defendant applied that the Plaintiff be compelled to produce:

    a. The audited statements of account for the years 2020, 2021 and 2022.

    b. All documents particularized in the 3rd defendant's notice to produce dated 13.7.2023 and served on the plaintiff on 14.7.2023.

    c. The plaintiff's finance, procurement, ICT, and risk management policies.

17. The reasons relate to failure to comply with the 3rd Defendant's notice to produce dated 13.7.2023 on furnishing further and better particulars. Each of the documents sought must be relevant to the case before it and should not be a wild goose chase or a bid to gain materials that are irrelevant to the case. From the outset, I find that the applicant did not show the necessity and relevancy of the audited statements of account for the years 2020, 2021 and 2022. Further, the relevance of the plaintiff's finance, procurement, ICT, and risk management policies cannot be seen. It is not the duty of the court to order discovery of all and any documents. The discovery must be necessary for meeting the ends of justice. The second and more crucial need is to comply with Sections 68 and 69 of the *Evidence Act*.

18. Discovery is by its very nature a shield and a sword. The documents sought by the 3rd Defendant might be inadmissible in evidence and also may contain information which may either directly or indirectly enable the 3rd Defendant to advance his case or damage the adversary's case or may lead to a trail of enquiry which may have either of these two consequences. In M. L. Sethi vs R. P. Kapur, 1972 AIR 2379, 1973 SCR (1) 697, the Supreme Court of India observed thus:

> The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences.

19. The aim of discovery and production of documents appears to me to be for upholding the case of the party seeking discovery and production and in order to destroy or weaken the opponent's case. In that regard, the 3rd Defendant has a duty to establish that the discovery is aimed at fair disposal of the matter and that the facts to be elicited will assist in establishing his case.

20. The Plaintiff's explanation of the failure to produce the documents is as detailed below:

i. That the documents sought by the 3rd Defendant in his Notice to Produce dated 13.7.2023 were supplied on 23rd November, 2023 through an email dated 23.11.2023 explaining documents which are not in the Plaintiff's custody/possession due to, among other reasons, passage of time.

ii. Two computers named in the Notice to Produce, are non-existent.

iii. Audited Account statements for the Plaintiff Company for years 2020, 2021 and 2022 were provided as Annexture "CN 2" to the Replying Affidavit.

iv. The Plaintiff's Finance, Procurement, ICT and Risk Management Policy were served as part of the Plaintiff's bundle of documents, at page 1447 to 1450 of the Plaintiff's List & Bundle of Documents filed on 12.8.2022 and served upon the Defendant

21. The 3rd Defendant however responded vide his supplementary affidavit that the bank reconciliation statements, system approval for journal entries made and timestamps were not provided.

22. The parties descended into describing the documents. The court is alive to the risk of venturing into the details of the evidence that would prejudice the justice of the case. It is not upon this court to prematurely decide which documents have what evidentiary and probative value in supporting the respective party's cases and the court cannot therefore also take a trajectory that analyses the various documents at this juncture.

23. Regarding the centrality of discovery, the court observed in Oracle Productions Ltd v Decapture Ltd & 3 Others [2014] eKLR that pre-trial discovery is so central to litigation that the entire Order 11 of Civil Procedure Rules (2010) has substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings, while Order 14 empowers the Court to order production, impounding and return of documents. The court was emphatic that discovery should be limited solely to matters in contention and relevance will only be gauged or tested by pleadings or particulars provided.

24. Discovery should be approached with due care. It is my considered view that it is not to be left for a party to determine the witnesses and documents that the adverse party should call or produce in evidence. A party has the freedom to draft their pleadings the way they want and bring out their case the way they want. After all, the burden lies on whoever asserts the truthfulness of a fact to prove its existence. The concern of law and justice is whether the case as framed stands the test of the legal-factual wholeness and is supported by the evidence needed to prove the allegations by either party.

25. There is no obligation on the part of the Plaintiff to file a suit and produce evidence that must win, or the Defendant to file a Defence and provide evidence that must win. A party is entitled to take advantage of phenomenal legal norms that have evidentiary underpinning; such like the burden and standard of proof and the general principle that crucial but not called witness or produced evidence may lead to an inference that if called or produced would adversely affect the party expected but who failed to avail. In Five Forty Aviation limited v Tradewinds Aviation Services Limited [2015] eKLR the Court of Appeal, citing its previous decisions stated as follows:-

> "We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said: "In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

26. The 3rd Defendant had the duty to demonstrate that the documents sought are in the exclusive possession of the Plaintiff and that could not in any other way access those documents other than through discovery and production. The court is in doubt that the Plaintiff is in possession of the material that the 3rd Defendant seeks. The explanation that the two computers are nonexistent and due to lapse of time or some information may be unavailable in reasonable. The basis for timestamps as sought by the 3rd Defendant is not necessary at this juncture as the same issue will be ripe at trial when the affected documents are sought to be tendered in evidence.

27. The court finds that the documents that were available were provided to the parties. The plaintiff has no obligation to produce nonexistent documents or computers.

28. There is another aspect of discovery that the 3rd defendant needs to fathom. When a party has not filed documents, the 3rd defendant may produce secondary evidence of those documents. Before doing so, he must issue notice to produce. Default of complying with the notice is to rely on secondary evidence. It has no effect on the suit itself.

29. Section 68 provides for proof of documents by secondary evidence as follows:

    1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases-

        a. when the original is shown or appears to be in the possession or power of-

            i. the person against whom the document is sought to be proved; or

            ii. a person out of reach of, or not subject to, the process of the court;

            iii. or any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

        b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

        c. when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

        d. when the original is of such a nature as not to be easily movable;

        e. when the original is a public document within the meaning of section 79 of this Act;

        f. when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

        g. when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

    2. In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

        (b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.

30. When circumstances obtaining in Section 68 of the *Evidence Act* are such that secondary evidence could be issued, a notice to produce is issued in terms of Section 69 of the *Evidence Act*. The said section provides as follows:

> 69. Notice to produce a document. Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases-
>
> i. when the document to be proved is itself a notice;
>
> ii. when from the nature of the case, the adverse party must know that he will be required to produce it;
>
> iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
>
> iv. when the adverse party or his agent has the original in court;
>
> v. when the adverse party or his agent has admitted the loss of the document;
>
> vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
>
> vii. in any other case in which the court thinks fit to dispense with the requirement.

31. The documents in contention in this matter are those documents not provided but are said to be either nonexistent documents or irrelevant and unnecessary documents. Though I have found certain documents not to be shown to be necessary to the determination of the suit, they are already produced as per the notice. The only limb remaining are those documents that are nonexistent documents. By their very nature, it is impossible to prove non-existence as it is a negative. The applicant did not lay basis that the non-existent documents are both in existence and necessary for the determination of the suit.

32. There is no duty to prove a negative. Christine Ochieng J, in her decision in James Gatoru Kamande v Ntari Ole Sankaire & another [2020] KEELC 2147 (KLR), stated as follows regarding the duty to prove a negative:

> Wish to refer to section 109 of the *Evidence Act* which provides that:' The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'
>
> In the case of Francis Maina Njogu v Nicolas Kiragu Ngacha [2017] eKLR the Court held that:' Therefore the plaintiff having pleaded and testified that the transfer of the suit land to

the defendant was fraudulent, it was the duty of the defendant to demonstrate that in fact the plaintiff executed a sale agreement to that effect because the plaintiff cannot be expected to prove the negative. And since the defendant's testimony is that he paid Ksh. 680,000 for the suit land and an agreement was executed by a lawyer to that effect, nothing would have been easier than to produce that agreement.'

Further in the case of *Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that:- "We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

33. The burden of proof is always on a party who asserts. Sections 107-109 of the *Evidence Act* provides as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

34. This is therefore to say that a party who alleges what a document has not been supplied, is under duty to prove both its existence and its necessity or relevancy. The burden of proof is not on the plaintiff but on the party that alleges. Therefore, any party setting forth an allegation is bound to prove them. The standard is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed This succinctly addressed in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party

bearing the burden of proof will lose, because the requisite standard will not have been attained."

35. Ipso facto, if a document is lost or unavailable, or where the adverse party or its agent has admitted the loss of the document, cannot be ordered to be produced. The documents that were sought to be produced were largely produced. The ones not produced were those said to be unavailable. There was no document sought which was shown to be necessary and available but was not produced.

36. The primary duty of the applicant was to prove the existence of the documents that the plaintiff stated to be nonexistent. The other option is for the 3rd defendant to file the secondary documents in its possession and produce then at the hearing.

33. In the circumstances, the application lacks merit and is accordingly dismissed.

33. The next issue is who is to bear costs of the application. It must be recalled that the application has held the suit for the last two years or so. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

37. Costs are at the discretion of the court seized up of the matter, the Court of Appeal in the case of Farah Awad Gullet V CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

38. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is

> eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

39. Given that the plaintiff took all steps to supply documents and the 3rd Defendant was persistent even when full compliance was made, the plaintiff is entitled to costs. A sum of Ksh 15,000/= will suffice in the circumstances. The other parties were bystanders. They will have no costs.

Determination

40. The upshot of the foregoing is that I make orders as follows:

    a. The application dated 18.6.2024 lacks merit and is accordingly dismissed.

    b. Costs of Ksh. 15,000/= to the Plaintiff/Respondent borne by the Applicant.

    c. The 1st, 2nd and 4th defendants to bear their own costs.

    d. The suit shall be listed forthwith for trial directions on 29.07.2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Cheya for the Applicant

Ms. Nyandieka for the 1st Defendant

No appearance for the plaintiff

Court Assistant – Jedidah