



Midland Emporium Limited v Housing & Industrial Development Contractors [HAIDCO] Limited & another (Civil Suit 77 of 2007) [2025] KEHC 10660 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT 77 OF 2007
S MBUNGI, J
JULY 17, 2025**

BETWEEN

MIDLAND EMPORIUM LIMITED PLAINTIFF

AND

HOUSING & INDUSTRIAL DEVELOPMENT CONTRACTORS [HAIDCO] LIMITED 1ST DEFENDANT

MASINDE MULIRO UNIVERSITY COLLEGE OF SCIENCE & TECHNOLOGY [FORMERLY WESTERN UNIVERSITY COLLEGE OF SCIENCE & TECHNOLOGY] 2ND DEFENDANT

RULING

1. This ruling is in respect of the 2nd defendants Notice of Motion application dated 15/11/2024 which is brought under Order 7 rule 5(d), Order 5, Order 18 Rule 10 of the *Civil Procedure Rules*, Section 1A, 1B and 78 of the *Civil Procedure Act* seeking the following prayers:
 - a. That the 2nd defendant be granted leave to file additional documents in support of its defence.
 - b. That costs of application be in this cause.
2. The application is based on the grounds on this face and the supporting affidavit sworn by Linda Omenya, the Applicant's Assistant Legal Officer on the 15th of November 2024.
3. The grounds are:
 - a. That the 2nd defendant/the applicant came across documents so to be introduced proving payment to the first defendant which documents at the time they were preparing for their defence and that the documents are crucial in supporting their defence; and with due diligence they could not trace them at the time of the trial



- b. That it is in the interest of justice the applicant be allowed to introduce the new documents for a just and fair determination of the dispute.
 - c. Even if the documents are introduced, the plaintiff and the 1st defendant will suffer no prejudice.
3. The application was canvassed by way of written submissions. The 2nd defendants filed their submissions on 15/11/2024 while the plaintiff filed its submissions dated 7/02/2025.
4. The 2nd defendant in its submission identified the following issues for determination;
 - a. Whether the second defendant should be granted leave to file supplementary bundle of documents.
 - b. Whether the plaintiff and the 1st defendant will suffer any prejudice.
5. In its submissions, the 2nd defendant relied on Order 11 and Order 18 Rule 10 of the *Civil Procedure Rules* and Articles 50 and 159 (2)(d) of the *Constitution* and the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR among other cases.
6. On the first issue the 2nd defendant submitted that the documents they are seeking to produce directly relate to the payment of the first defendant in 2006. These are copies of Tax Withholding Certificates 2/06/2006, 23/06/2006 and 2/04/2007 and copies of cheques dated 18/12/2007 issued to the 1st defendant. The 2nd defendant submitted that it discovered these additional documents when it was preparing for defense hearing.
7. On the second issue, the 2nd defendant submitted that the plaintiff and the first defendant will not suffer any prejudice if the orders are to be granted in that they had not filed submissions, an indication that they were not opposed to the application.
8. The plaintiff vehemently opposed the application on the following grounds:
 - a. That the application is mischievous and bad in law since this matter was filed in court in 2007, and the 2nd Defendant cannot now, purport to have come into possession of new evidence they would wish to rely on over 18 years after the institution of this suit.
 - b. That the 2 Defendant's Application is vehemently opposed to the filing of the 2nd Defendant's supplementary list of documents amounts to an afterthought and an unfair and prejudicial attempt to fill gaps in the 2nd Defendant's case, which have been exposed more particularly during the hearing of the plaintiff's case.
 - c. That the application is tantamount to trial by ambush aimed at frustrating the expeditious hearing and conclusion of this suit as no legal justification has been advanced why the documents subject of the application were not filed before the close of pleadings and prior to the commencement of the hearing of this suit.
 - d. That the application as crafted is mischievous as it is a veiled attempt by the 2nd Defendant to adduce additional evidence which was in its possession and knowledge during the penance of this case.
 - e. That the said application as presented is aimed at unfairly prejudicing the Plaintiff's case and obstructing the course of justice.



- f. That the 2th Defendant's application is an attempt to steal a match from the Plaintiff by introducing additional evidence through the back door.
- g. That the application is devoid of merit in that the 2nd Defendant has NOT demonstrated on the face of the application, as legally required, that there is any just cause to accept the documents into evidence.
- h. That the said application is fatally defective, bad in law, incompetent, mischievous. and an abuse of the court process.

Analysis and Determination

- 9. After considering the application, the response thereto and the submissions, the first issue that arises for determination is whether the 2nd defendant/ applicant has met the threshold to warrant this court grant the leave sought.
- 10. Order 7 rule 5 (d) of the [Civil Procedure Rules](#) provides as follows:

“ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

Therefore ordinarily, the applicant should have filed all the documents at the time it was filing the statement of defense and list of documents or before pre-trial directions are taken. If not so- with the leave of the court to file before the start of the hearing of the plaintiff's case.

- 11. The court in the case of [Alois Oceano D'sumba v Rajnikant Narshi Shah & another](#) [2017] eKLR held as follows:

“ 10. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of Order 11 of the [Civil Procedure Rules](#). Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case.”

The above notwithstanding, the court still has discretion to allow introduction of new documents even if the trial has began provided there is a sufficient cause.

- 12. The court in the case of [P.H. Ogola Onyango t/a Pittsconsult Consulting Engineers v Daniel Githegi t/ a Quantalysis](#) [2005] eKLR held as follows:

“Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began...”.



13. The Supreme Court of Kenya has also set out guidelines for the admission of additional evidence before appellate courts in *Hon. Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamed and 3 others* [2018] eKLR,
- “c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;”
14. Taking the above into consideration, the documents sought to be introduced by the applicant were made few months to the date of filing of the suit which was the 12th of October 2007 and in fact the last cheque was issued on 18/12/2007. Obviously, it does not seem reasonable nor realistic that the cheques and withholding tax certificates would conveniently be discovered toward the end of 2024, eighteen years from the beginning of this case for the existence was squarely within the knowledge of the applicant. So with due diligence, the applicant should have gotten the documents and filed them at the time he was filing the statement of defense or before the start of hearing of the plaintiff’s case or even during the hearing of the plaintiff’s case. Furthermore, the applicant has not disclosed whether was faced with any difficulties in getting the documents.
15. On the issue of whether the plaintiff or the first defendant would suffer prejudice, I agree with the respondent/ plaintiff that it will suffer prejudice for it has already closed its case and allowing admission of the new documents means reopening of the case which has taken eighteen years to reach where it has reached. And further that, it has not denied that the plaintiff did make the supplies subject of the suit.
16. The totality of this analysis is that there has been no demonstration of sufficient reason to warrant the grant of the application before me. In my view, no exceptional circumstances have been demonstrated to warrant the grant of the orders sought, and I, therefore, find no merit in the application. It is accordingly dismissed.
17. Costs to the plaintiff/ respondent alone for the 1st defendant did not participate in the application.
18. Right of appeal within 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT OF KAKAEMGA THIS 17TH DAY OF JULY, 2025.

S. N MBUNGI

JUDGE

In the presence of:

Court Assistant - Elizabeth Angong’a

Miss Mabalau for the Plaintiff/Respondent present online

Miss Ngei for the Applicant present online

