



**Estate & another v National Bank of Kenya & 3 others (Civil Case 102 of 2019)  
[2024] KEHC 4224 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4224 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 102 OF 2019  
A MABEYA, J  
APRIL 19, 2024**

**BETWEEN**

**THUGI RIVER ESTATE ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL MUIITE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**REGISTRAR OF LANDS ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA ..... 2<sup>ND</sup> DEFENDANT**

**SOUTH & CENTRAL (THIKA) LTD ..... 3<sup>RD</sup> DEFENDANT**

**WAGATHAGU LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. *Vide* a Motion on Notice dated 19/3/2024, the 2<sup>nd</sup> and 4<sup>th</sup> defendants sought leave to be allowed to produce additional evidence in the form of a title search for LR No. 10744. The Motion was predicated upon sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*.
2. The grounds thereof were set out in the body of the Motion and the supporting affidavit of Thomas Gichuhi sworn on even date. These were that on 6/2/2024, the said defendant's Advocates had sought a certified copy of the title LR No. 10744, Thika Greens which was supplied. That the same showed that the said property was sold at Kshs. 637,500,000/= and it measured 728 acres.
3. That the new evidence was crucial as there is an issue of the value of the suit property in 2008. That the plaintiffs' valuer, PW1 is still under cross examination and will be assisted to refresh her memory on the value of the suit property. That there was no delay in bringing the application and it will not derail the trial set for 3/6/2024.



4. The Motion was opposed vide a replying affidavit of Paul Kibugi Muite sworn on 28/3/2024. He averred that this was a second attempt to re-open the evidence and cause conflict, a similar Motion having been rejected on 5/9/2023. That the intended evidence has no probative value and will not assist PW1 to refresh her memory and it is not a valuation report.
5. He further averred that the purchase price of Thika Greens is unknown to the Court and the terms of the sale remains a mystery. That the Motion was a gross abuse of the Court process and should be dismissed.
6. The parties filed their respective submissions which the Court has considered. It was submitted for the applicants that the valuation report and witness statement which PW1 is relying on refers to Thika Greens property. That the same was being used as a comparable to show the value at which the suit property should have been sold at. That it would not be prejudicial to the plaintiffs as PW1 is yet to conclude her cross examination.
7. For the plaintiffs, it was submitted that the issue at hand is resjudicata as the first attempt was rejected by this Court on 5/9/2023. The case of *Henderson v Henderson* [1843-60] AII ER 313, was cited as an authority for that proposition.
8. That in order to allow additional evidence, such evidence must be directly relevant to the matter before Court, whether a party would reasonably have been aware of and procured the further evidence in the course of the trial. That the evidence should not be used to remove a lacunae or fill gaps in the evidence. Finally, that the Court should consider the proportionality and prejudice of allowing such additional evidence. The case of *Mohammed Abdi Mohammed v Ahmed Abdillabi & 3 Others* [2019] KLR was relied on in support of those submissions.
9. That the certificate of title sought to be produced is irrelevant to the case. That it sought to fill the gap in the applicants' case. That the application was a gross abuse of the process of the Court.
10. This is an application to allow the introduction and or production of a search to a title known as LR No. 10744. The first objection is that the application is resjudicata a similar application having been rejected on 5/9/2023.
11. I have seen the ruling of this court of 5/9/2023. In that ruling, the Court was dealing with an application to permit the 2<sup>nd</sup> and 4<sup>th</sup> defendant to enter the suit property; collect evidence to counter the testimony of PW1. At paragraph 21, the Court observed: -
  - “ 21. In any event a party cannot be allowed to adduce fresh evidence every time he thinks that he needs to patch up his case. In the present case, it is argued that the testimony of PW1 is misleading and the applicants should be allowed to enter the suit property, collect evidence to counter that testimony. In my view, that would be tantamount to the Court assisting the applicants collect evidence at the middle of a trial, to buttress their case”.
12. In the present Motion, the 2<sup>nd</sup> and 4<sup>th</sup> defendant seek to introduce a search for a property known as Thika Greens. I am not in agreement with the proposition that this Motion is similar to the one that was dismissed on 5/9/2023. The previous one sought the Court's assistance to enable the 2<sup>nd</sup> and 4<sup>th</sup> defendant's collect evidence to counter PW1's testimony. The present one seeks the introduction of a document from the Lands Offices. I reject the submission that the application is *res judicata*.
13. While the Court frowns at the notion that the 2<sup>nd</sup> and 4<sup>th</sup> defendant seek to introduce a document at the middle of a trial, the Court is alive to the fact that the parties seem not to have complied with



the provisions of Order 11 before the trial commenced. It is clear that the parties were putting their respective houses in order on the 1<sup>st</sup> day of the trial of this suit.

14. I have considered the decision of the Supreme Court of Kenya in the Case of *Mohammed Abdi Mohamud v Ahmed Abdillahi & 3 Others* [supra]. Although the Supreme Court was dealing with admission of evidence post trial, the principles set out therein are apt.
15. One of the principles is that the evidence sought to be admitted should be directly relevant to the matter before Court. No doubt that the issue before Court is the suit property and not LR No. 10744. However, PW1 testified at length about the property known as Thika Greens. She stated that the suit property is adjacent to Thika Greens. The issue that is central in this case is the value of the suit property as at 2008. The value of the adjacent properties at the time, in my view is relevant. Title LR No. 10744 is for that Thika Greens property.
16. As to whether the 2<sup>nd</sup> and 4<sup>th</sup> defendant are seeking to patch up gaps in their case, I do not think so. They have not yet produced their evidence and it is alleged that the document being sought to be produced is meant to be shown to PW1 to enable her refresh her memory.
17. As to prejudice, I think none will be suffered since PW1 is yet to conclude her testimony. The production of the document in my view will not lead to the delay of the trial and would only assist the Court determine the issue before it.
18. In view of the foregoing, I find the Motion dated 19/3/2024 to be merited and I allow the same. The costs of the application to the plaintiffs in any event.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

