



Nyoro Construction Co. Ltd v Kenya Pipeline Co Ltd & another (Civil Suit 144 of 2015) [2024] KEHC 5397 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 144 OF 2015
FG MUGAMBI, J
MAY 14, 2024**

BETWEEN

NYORO CONSTRUCTION CO. LTD PLAINTIFF

AND

KENYA PIPELINE CO LTD 1ST DEFENDANT

PRASHANTH PROJECTS LTD 2ND DEFENDANT

RULING

1. This ruling determines the application dated 15th September 2023 by which the 2nd defendant seeks to have the following documents in the plaintiff's bundle of documents expunged from the record:
 - i. Results of mandatory requirement (pg. 407-498) of the Plaintiff's Bundle of documents;
 - ii. Memo of the 2nd Defendant dated 15th September 2014 (pg. 30-34);
 - iii. Internal minutes of meeting held on 13th June 2014 (pg. 505-507);
 - iv. 2nd Defendant's letter to the Commercial Bank dated 6th January 2015 (pg. 508);
 - v. Internal minutes of meeting held on 26th January 2015 (pg. 509-512); and
 - vi. Paragraph 12 of the Complaint dated 24th March 2023.
2. The application further seeks to set aside the orders issued by this Court (Majanja, J) on 21st February 2023 and to have the 2nd defendant's statement of defence dated 16th July 2023 reinstated. The application is supported by the affidavit of Flora Okoth, the Company Secretary of the 2nd defendant, sworn on 15th September 2023.



3. The 2nd defendant argues that the documents referenced in the application, which the plaintiffs seek to adduce as evidence have been unlawfully obtained in breach of sections 6(1) and 8 of the [Access to Information Act](#) and the [Evidence Act](#). The 2nd defendant argues that these documents entail confidential and internal communications and records which have never been requested for or availed to the plaintiff within the proper channels of the law.
4. The 2nd defendant further argues that it stands to suffer great financial risk and exposure should their statement of defence not be reinstated noting that it is a public entity and the matter before Court is a matter of public interest. The 2nd defendant acknowledges that the Court struck out its defense due to severally changing witnesses. This, they argue was inevitable, as a result of several staff changes since the matter was instituted in 2015.
5. The application is opposed by way of a replying affidavit sworn by Josiah Njuguna, a director of the plaintiff on 20th September 2023. Besides prompting the Court that the application had been brought under the wrong provisions of the law, the plaintiff submits that the argument on reinstatement of the defense was considered and determined in the ruling by Majanja, J on 21st February 2023. The 2nd defendant had not applied for a review neither had they appealed against the said orders.

Analysis and determination

6. Having carefully considered the pleadings, submissions and evidence filed by the opposing parties, I shall first deal with a preliminary issue raised by the plaintiff, as to whether the application herein is fatally defective.
7. The application before the Court is premised on Article 50 of the [Constitution](#) and section 3A of the [Civil Procedure Act](#). This is notwithstanding the fact that the substantive prayers sought are in the nature of review and setting aside orders, which fall under Order 45 of the [Civil Procedure Rules](#).
8. The question that I am required to answer is whether this makes the application fatally defective. I find it necessary to point to some judicial pronouncements on the matter. In *Dominion Farm Limited v African Nature Stream & another*, Kisumu HCCC No. 21 of 2006 the Court held that:

“Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.”
9. Moreover, the Court of Appeal in [Trust Bank Limited V Amalo Company Limited](#), Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350 cited its decision in [Central Bank of Kenya v Uhuru Highway Development Ltd & others](#), Civil Appeal No. 75 of 1998 and held that:

“The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right...”
10. Aligning myself to the reasoning by the Court in these decisions, I am of the view that no prejudice has been caused to the plaintiff by the obvious omission of citing order 45 of the [Civil Procedure Rules](#) in addition to any other relevant provision. The transgression by the applicant is not so grave as to render



the application before the Court incurably defective. While noting that, I shall therefore proceed to consider the substantive merits of the application.

Whether this Court should reinstate the statement of defense filed by the 2nd defendant:

11. The 2nd defendant seeks to set aside the Orders issued by this Court vide the ruling of 21st February 2023. Order 45 rule 1 of the [Civil Procedure Rules](#) provides for review of decisions. For a party to succeed they must prove:

“... the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, without unreasonable delay.”

12. I begin by observing that the ruling and/or orders issued by Majanja J which the 2nd defendant seeks to review have not been placed before the Court. Upon perusing the Court file, I note that this Court already addressed the issue on 18th July 2023 when the matter came up for hearing. The Court declined to adjourn the matter and in an extract of the proceedings stated as follows:

“I have taken the liberty to peruse the court file upon hearing the counsel and I confirm that indeed the 2nd Defendant’s Defence was struck out as a consequence of failure to comply with Pre-Trial Directions. This was on 21st February 2023. It is now four months later when the 2nd Defendant seeks leave to file an application to reinstate the Defence. I note the numerous appearances at which the 2nd Defendant failed to comply with the Pre-trial Directions resulted to striking out the Defence.

The casualness with which the 2nd Defendant treats the proceedings is evident and will not be allowed. There are no good or justifiable reasons that have been given for the four months lapse and if indeed the 2nd Defendant intended to make this Application they ought to have done so earlier. The prayer for adjournment is declined. The matter will proceed to hearing.”

13. I agree with the plaintiff that vide the ruling of 21st September/February 2023 this Court pronounced itself on this issue. Having failed to convince the Learned Judge to review his orders striking out the statement of defense, this Court cannot entertain a similar application. The argument that the changes in witness statements was caused by the constant changes in staff is one that if true was within the knowledge of the 2nd defendant at the time the defense was struck out and should therefore have been raised then.
14. In any case this suit had already proceeded to hearing and when the court adjourned the hearing on 18th July 2023, it was for the sole purpose of determining whether the documents identified by the 2nd defendant should be expunged from the record and not to revisit the issue of reinstatement of the statement of defense which had already been dealt with to finality by this Court.
15. To reopen further litigation on the issue at this point would be in breach of the rule on concurrent jurisdiction and would also amount to this Court sitting on appeal in its own decision. The defendants have not stated on what grounds they seek to review the decision by Majanja J. It appears to me that they seek to challenge the merit of that decision. If this is the case, this is not a matter for review but appeal. That said, this issue is otherwise sub judice by dint of section 7 of the [Civil Procedure Rules](#).



Whether the documents highlighted by the applicant should be struck out of the record:

16. The 2nd defendant relies on section 6(1) and 8 of the [Access to Information Act](#) which sets out the limitations on the right to access to information. They also rely on section 67 of the [Public Procurement and Assets Disposal Act](#) (PPAD) which provides for confidentiality of information in the following terms:

- “ 1. During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following:
- a. information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
 - b. information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
 - c. information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
 - d. the contents of tenders, proposals or quotations.
2. For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.”

17. The protection under section 67(1) is not without limitations. Under section 67(3), there are circumstances when confidentiality of information may be waived. It provides as follows:

- “(3) This section does not prevent the disclosure of information if any of the following apply—
- a. the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
 - b. the disclosure is for the purpose of law enforcement;
 - c. the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;
 - d. the disclosure is pursuant to a court order; or
 - e. the disclosure is made to the Authority or Review Board under this Act.
- (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).



- (5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.”
18. While this Court notes that the plaintiff chose to remain tight-lipped on this accusation, the 2nd defendant too has not proved to this Court in what way section 67(1) applies to the present circumstances and why the documents sought to be expunged should be cannot be considered as exceptions under section 67(3), whose purpose is to balance between protection of confidentiality and substantive justice.
19. I do not need to belabour the point that the 2nd defendant waited until the hearing of the suit had commenced to ask the Court to strike out the plaintiff’s documents. This is a matter that ought to have been raised during case management conference. No good reason has been given as to why the 2nd defendant waited this long to have the documents struck out.
20. Order 11 of the Civil Procedure Rules provides for case management steps ahead of the hearing with the aim of ensuring the expeditious hearing of suits. This is dictated by the overriding objectives in sections 1A, 1B and 3A of the *Civil Procedure Act*. It would be prejudicial for the plaintiffs for the Court at this time, to strike out the plaintiffs’ documents on which the case has been built on and which the defendants did not object to earlier.

Disposition

21. The application dated 15th September 2023 is devoid of merit and the same is dismissed with costs to the plaintiff. The hearing of the matter shall proceed without any further delay.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

