



REPUBLIC OF KENYA



**Royal Apartments Limited v Shah & another (Civil Suit 472 of 2017)
[2024] KEHC 11106 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 472 OF 2017
PM MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

ROYAL APARTMENTS LIMITED PLAINTIFF

AND

VRAJBHUSHAN D SHAH 1ST DEFENDANT

SAPNA V SHAH 2ND DEFENDANT

RULING

1. The plaintiff filed the Notice of Motion dated 3rd July 2023, under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and Orders 11 and 51 of the [Civil Procedure Rules](#), seeking that the Court be pleased to grant it leave to file a supplementary list and bundle of documents.
2. The application is supported by the grounds on its face, the supporting affidavit sworn by the plaintiff's director, Arul Mudaliar and written submissions dated 15th March 2024. The grounds are:
 - a. The supplementary documents composed of an agreement for sale, demand for payment of outstanding sums and terms of settlement between the plaintiff and the defendants are pivotal for the just determination of the issues in dispute.
 - b. Despite due diligence, neither the plaintiff nor its Advocates could timely trace the supplementary documents as they could not be retrieved from its conveyancing advocates, Taibjee & Bhalia Advocates until the date of filing of the application.
 - c. No prejudice will be suffered by the defendants if the application is allowed as they will have the opportunity to cross examine the plaintiff.
 - d. The application has been brought without unreasonable delay.



- e. It is in the interest of justice that the orders be granted.

Response

3. The defendants opposed the application through a Replying Affidavit sworn by the 1st defendant on 11th March 2024, written submissions dated 21st June 2024. The main depositions were that the plaintiff's application has been brought with delay, six years after filing of the suit on 20th November 2017; that the plaintiff instituted the suit by a plaint together with a list and bundle of documents which were in the custody of its conveyancing advocates; that the plaintiff has not sufficiently explained the delay considering the ample time that it had since filing the suit in 2017 up to 2021 when pre-trial conference was concluded and parties were ready for the hearing; that the plaintiff has not sufficiently explained the delay but merely stated that it could not retrieve them in a timely manner and that the plaintiff has never previously intimated that it intended to file any other additional documents.

Analysis and determination

4. I have considered the application and the opposing affidavits. The issue for determination is whether the plaintiff has made a case for leave to file additional documents.
5. Order 3 Rule 2 of the *Civil Procedure Rules* stipulates that all suits filed shall be accompanied by copies of documents to be relied on at the trial including a demand letter before action. This ought to be done during the pre-trial stage before the matter has been certified ready for hearing.
6. Article 159(2) of the *Constitution* mandates courts to administer justice without undue regard to procedural technicalities. This includes facilitating the right to fair hearing and the right to be heard which are guaranteed under Article 50 thereof. It entails allowing a party, before the hearing starts, to file documents that they intend to rely on during the hearing unless the request is shown to be frivolous or intended to delay the just and expeditious hearing of the suit. (See *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR).
7. In *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, cited in the plaintiff's submissions, the Court noted that where additional evidence can be adduced without causing undue prejudice to the other party, the Court ought to allow the application so as to allow such party to present its case in full.
8. Guided by the above, I have looked at the documents sought to be introduced which are composed of an agreement for sale, demand for payment of outstanding sums and terms of settlement between the plaintiff and the defendants. It is my view that these documents are relevant to the matter.
9. The defendants asserted the plaintiff's objective in filing the present application was to delay the hearing of the matter but there is no evidence of this. I note the suit has been severally certified ready for hearing but has not proceeded for one reason or the other. The plaintiff stated that it obtained the documents on the same date that it filed the present application. Therefore, there is no inordinate delay.
10. I am not persuaded that by seeking to file the additional documents, the plaintiff is attempting to steal a march as submitted by the defendants. The plaintiff asserted that they were not able to obtain the documents earlier despite due diligence. I am also not convinced that the admission of the documents will prejudice the defendants as they will be afforded an opportunity to cross examine the plaintiff's witnesses on the documents during the trial.
11. In the circumstances, I find that the plaintiff's application dated 3rd July 2023 is merited and is allowed with costs in the cause.

Orders accordingly.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Kubai h/b for Mr. Oyatta for plaintiff/applicant

Ms. Sheundu h/b for Mr. Osundwa for defendants

Court Assistant: Carlos

