



**Kenya Power & Lighting Company Limited v Spedag Interfreight Kenya Limited  
(Civil Case 58 of 2017) [2023] KEHC 2052 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2052 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 58 OF 2017  
OA SEWE, J  
MARCH 17, 2023**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... PLAINTIFF**

**AND**

**SPEDAG INTERFREIGHT KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The notice of motion dated April 25, 2022 was filed by the plaintiff under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and order 51 of the [Civil Procedure Rules](#) for orders that:
  - (a) Leave be granted to the plaintiff to file a supplementary list and bundle of documents as well as a supplementary list of witnesses and accompanying witness statements, and to call additional witnesses to testify.
  - (b) The evidence of the additional witnesses be taken at plot No 571 Section V Mainland North, Mikindani where the defendant is said to have tripped the plaintiff's 132 KV line.
  - (c) The Court Administrator, Mombasa Chief Magistrate's Court be summoned to avail the court file for Mombasa Chief Magistrate's Criminal Case No 4085 of 2014.
  - (d) The defendant be granted corresponding leave to file additional documents and witness statements if need be.
  - (e) Costs of the application be provided for.
2. The application is premised on the grounds that the supplementary documents will assist the court arrive at a fair determination of this matter; and that by visiting the property, the Court will be in a position to ascertain the number of electricity lines passing over the suit property and the line that was tripped by the defendant. It was further contended that the proceedings in Mombasa Chief



Magistrate's Criminal Case No 4085 of 2014 are relevant to this suit because they relate to the same incident that gave rise to this suit.

3. The grounds aforementioned were explicated in the Supporting Affidavit sworn by Irene Walala Odhiambo, the plaintiff's Legal Officer, in which she averred that both parties have presented copies of the subject wayleave agreement which are not legible; and therefore that the plaintiff seeks that a clearer copy be availed to the Court. In the same vein, Ms Odhiambo deposed, at paragraphs 12 to 15 of the supporting Affidavit, that the defendant's officers were charged in Mombasa Chief Magistrate's Criminal Case No 4085 of 2014 over the subject incident; and that photographs taken at the scene were produced in the criminal matter. She therefore averred that it is only fair that the court file in the criminal matter be produced before this Court for perusal.
4. In connection with the proposed scene visit, Ms Odhiambo averred that it will enable the plaintiff's witnesses demonstrate which line was tripped by the defendant's employee. She added that no prejudice will be suffered by the defendant if it is equally given the opportunity to file documents and call additional witnesses in rebuttal, if need be. Copies of the proposed witnesses, additional documents and statements were annexed to the Supporting Affidavit for the Court's perusal.
5. The application was opposed by the respondent vide the Grounds of Opposition dated July 4, 2022 and filed on September 15, 2022. The contention of the defendant is that the application is highly prejudicial to it in so far as it is an attempt to plug-in deficiencies that have arisen out of the evidence of the plaintiff's two witnesses who have already testified. It was further averred that it is an attempt at piecemeal litigation by ambush and therefore ought not to be allowed, as the defendant may not be able to secure the attendance of witnesses to rebut the contents of the report that the plaintiff seeks to introduce six years after the incident. The defendant also resisted the request for a site visit contending that there will be little value added, particularly since two decisions in connection with the incident have been rendered already. Thus, the defendant was of the posturing that the Court is being placed in a very unwarranted and embarrassing position, at the risk of making findings inconsistent and contradictory to those already made by courts of competent jurisdiction.
6. The application was canvassed by way of written submissions pursuant to the directions given herein on September 19, 2022. Accordingly, learned counsel for the plaintiff, Mr. Mugambi, filed his written submissions on October 4, 2022. He relied on *Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others* [2022] KECA 25 (KLR) and *NSG v SCG* [2014] eKLR for the proposition that courts have power to allow adduction of evidence even where the case has been concluded, but before judgment, if it is judicious to do so. At paragraphs 10 to 17 of his written submissions, Mr Mugambi endeavoured to convince the court that the plaintiff has made out a good case to warrant the grant of the orders sought. He concluded his submissions by asserting that the primary duty of the court is to hear parties so as to arrive at a just and fair determination of the disputes before it. He accordingly prayed that the application dated April 25, 2022 be allowed.
7. Mr Khagram for the defendant filed his written submissions on October 26, 2022. He urged the Court to note that, in the Wadhwa Case, the Court of Appeal was categorical that whilst courts have power to allow adduction of additional evidence, the discretion to do so must be exercised judiciously and that each case must be considered on its individual circumstances. He was of the view that the plaintiff must first cross the preliminary hurdle of explaining why the evidence now sought to be introduced was not called at the hearing stage; and that it is only if this hurdle is surmounted would the Court consider the other factors in exercising its discretion. Counsel directed the attention of the court to the applicable principles as discussed in *Techbiz Limited v Royal Media Services Limited* [2021] eKLR; *Emily Cherono Kiombe v Jacob Kamoni Kari* [2018] eKLR and *Odoyo Osodo v Rael Obaja Ojuok & others* [2017] eKLR to buttress his arguments that:



- (a) the plaintiff's present application is inordinately delayed and is only intended to fill the gaps and lacuna in its evidence;
  - (b) the plaintiff appears to have been aware of the existence of the purported investigation report, yet no reasons have been given for the failure to adduce it or disclose the same earlier;
  - (c) the additional evidence shall prejudice the defendant's defence and infringe on its right to a fair trial;
  - (d) no or no proper reasons have been given for the plaintiff's failure to avail or disclose the evidence at an earlier stage.
8. Accordingly, Mr. Khagram prayed that the application be dismissed with costs, taking into account the provisions of order 11 of the Civil Procedure Rules as to the important place of pre-trial disclosure.
9. I have given due consideration to the plaintiff's application dated April 25, 2022. It principally seeks leave for the adduction of additional evidence. This would entail the filing of an additional List of Witnesses and witness statements as well as an additional List and Bundle of Documents. The second limb of the application seeks an order for a site visit. The application was made under Articles 48 and 50 of the *Constitution*, which speak to access to justice as well as the right to fair trial. The applicant also cited Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, which underpin the overriding objective of the Act and the need for expeditious disposal of disputes, among other objectives.
10. Ordinarily, it is expected that parties adhere strictly to the provisions of the *Civil Procedure Rules* as to pre-trial disclosure; including Order 3 Rule 2 of the Civil Procedure Rules, which states: -
  - All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—
    - a. the affidavit referred to under Order 4 rule1(2);
    - b. a list of witnesses to be called at the trial;
    - c. written statements signed by the witnesses excluding expert witnesses; and
    - d. copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.
11. Thus, where a justifiable cause has been shown, the Court retains the discretion to grant leave for the filing of additional statements and documents even after the pre-trial conference has been held and the matter proceeded with to hearing, so long as judgment is yet to be pronounced in the matter. I note that in this instance, the plaintiff initially indicated it would call only two witnesses. Those 2 witnesses, one of whom was substituted, have already testified. At the conclusion of the evidence of PW2, Mr Mugambi filed the instant application, seeking leave to file additional witness statements and documents to pave way for the adduction of additional evidence that was not shared beforehand.
12. The significance of pre-trial disclosure was emphasized by the Supreme Court in *Raila Odinga & 5 others v IEBC & 3 others* [2013] eKLR thus:

“The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the



court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided...if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”

13. Similarly, in the Wadhwa case, the Court of Appeal, after reviewing the applicable law came to the conclusion that:

“From the cited law and cases, it is clear that courts have power to allow adduction of additional evidence, even at the appeal stage. The Evidence Act stipulates that the court may in all cases permit recalling of witnesses. It is therefore not too late for the high court and courts of equal status to allow such an application, if in exercise of its discretion it is judicious to do so, even where the case has been concluded but before judgment.”

14. Applying the foregoing principles to the circumstances of this case, it is manifest that, one of the additional documents sought to be presented is simply a more legible copy of the wayleave agreement between the plaintiff. It is a document common to the parties and copies thereof appear at pages 1 to 3 of the plaintiff’s List and Bundle of Documents, as well as pages 2 to 4 of the defendant’s List and Bundle of Documents. Having looked at the copies filed, there is no denying that they are faint and that what the plaintiff proposes to introduce is just but a fairer version thereof. I agree with Mr. Mugambi that no prejudice will be suffered by the defendant in having the fairer version admitted.
15. The plaintiff also seeks leave to have an investigation report prepared by the plaintiff’s Safety Engineer produced as an exhibit herein. Although there appears to be no explanation in the Supporting Affidavit as to why the document was not filed in the first instance, a copy of the report was annexed to the application and therefore the defendant had an opportunity to peruse the same and assess its tenor and effect. As has been pointed out herein above, the duty of the Court is to ensure a just decision is arrived at, after having taken into account all the available evidence. It is therefore my finding that from the standpoint of Articles 48 and 50(1) of the Constitution, the justice of the case would require that the plaintiff be given an opportunity to present the report as proposed. The defendant will, of course, be entitled to call rebuttal evidence, if need be. In the same vein, and for the same reason, there is no valid reason to block the request that proceedings in Chief Magistrate’s Criminal Case No 4085 of 2014 be presented herein. Indeed, at paragraph 13 of the Plaintiff dated May 17, 2017, the existence of the criminal case was pleaded.
16. I however find no basis at all for site visit, noting that this suit was filed in 2017, in respect of an incident that occurred on May 26, 2014. It was imperative therefore that the delay in seeking a site visit be explained; which the plaintiff failed to do. There is no assurance that the site has remained intact over the years; and therefore there is a real danger of prejudice being visited on the defendant as a consequence of the proposed site visit. I would accordingly decline the request for a site visit at this late stage of the proceedings.
17. In the result, the orders that commend themselves to me, and which I hereby grant, are as hereunder:
- (a) That leave be and is hereby granted to the plaintiff to file a supplementary list and bundle of documents, a supplementary list of witnesses as well as accompanying witness statements; and to call the two additional witness to testify as prayed. The same be filed and served within 7 days from the date hereof.



- (b) The defendant be, and is hereby granted corresponding leave to file additional documents and witness statements, if need be. The same be done within 7 days of service of the plaintiff's additional witness statements and documents.
- (c) The Court Administrator, Mombasa Chief Magistrate's Court, be and is hereby summoned to avail the court file for Mombasa Chief Magistrate's Criminal Case No 4085 of 2014.
- (e) Costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023**

**OLGA SEWE**

**JUDGE**

