



REPUBLIC OF KENYA



KENYA LAW
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**Trust Bank Limited v Shah & 8 others (Civil Case 73 of 2001)
[2023] KEHC 18998 (KLR) (Commercial and Tax) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 73 OF 2001
A MABEYA, J
JUNE 26, 2023**

BETWEEN

TRUST BANK LIMITED PLAINTIFF

AND

**AJAY SHAH 1ST DEFENDANT
VINOD CHAUNDRY 2ND DEFENDANT
ARUN JAIN 3RD DEFENDANT
PRAVIN MALKAN 4TH DEFENDANT
JAGNESH DESAI 5TH DEFENDANT
NAYAN MURTHI SABESAN 6TH DEFENDANT
RENKA SHAH 7TH DEFENDANT
PRAFUL SHAH 8TH DEFENDANT
NITIN CHANDARIA 9TH DEFENDANT**

RULING

1. This is a suit that was commenced in February, 2001. The plaintiff sought judgment against the defendants in the sum of Kshs. 288,223,053/= together with interest at 25% p.a. The defendants filed their defences as appropriate.
2. On 28/4/2006 and 31/5/2007, respectively, the plaintiff delivered two bundles of its documents being “PMF1” and “PMF2” respectively. These were swiftly met with the 1st defendant’s Notice of non-admission dated 28/4/2006 and 11/6/2007, respectively.



3. After many false starts, the trial finally commenced before me on 22/5/2023. PW1 Micah Lekiwani Bori testified but when he attempted to produce the plaintiff's said bundle of documents, the same was objected to by the defendants. The objection was upheld for reasons on record. The bundles were then marked for identification. PW1 completed his testimony on 24/5/2023.
4. At that juncture, Mr. Oyatsi Learned Counsel for the plaintiff applied for adjournment to enable him call a second witness for purposes of producing the documents that had been marked. He submitted that it was in the interests of justice that he is allowed to call a second witness because the court had disallowed the production of the plaintiff's documents. That the plaintiff had prepared its case based on the rejected documents. That the new witness will not produce any new evidence. That the constitutional right to a fair hearing dictates that the plaintiff be allowed to call a second witness.
5. The application was opposed by all the defendants. It was submitted that the case was very old. The Notices of non-admission were served way back in 2006 & 2007, respectively. That according to the pre-trials undertaken in the case, the plaintiff was to call only 1 witness who had testified. That the plaintiff cannot be allowed to change the route midway.
6. I have considered the rival submissions. The issue is whether in the circumstances of this case, I should permit the plaintiff to call a 2nd witness.
7. Article 50 of the Constitution of Kenya provides for fair trial. A party must be accorded all the necessary opportunity to put his case forward and have his dispute properly determined. The same constitution also directs that justice should not be delayed.
8. This is a 22-year-old case. The plaintiff knew the case it was to present. It delivered its bundle of documents in 2006 and 2007, respectively as required under the rules. That was at the stage of discovery and pre-trial. The said documents were fiercely and swiftly met with Notices of admission. The plaintiff was put on notice that it would be required to strictly prove each document as per the provisions of the Evidence Act. Indeed, the said Notices were followed with a Notice to produce. That showed the seriousness with which the defendants sought the plaintiff to prove its case.
9. PW1 made his statements on 27/5/2019 and 18/2/2022. That was 12 and 14 years, respectively. Since the plaintiff was put on notice that it would be required to strictly prove its evidence. PW1 did not bother to follow the dictates of the Evidence Act on production of evidence. He casually made his statement without bothering to prove the said documents. One of the reasons for rejecting the said documents was that, they were not only photocopies, but most of them were feint. The question that begs, what documents would the 2nd witness produce? No originals were delivered to court before the trial.
10. The other issue is, under order 10 of the Civil Procedure Rules, parties are supposed to finalize with pre-trials before proceeding for trial. It is at that point that all disclosures are done. The number of witnesses together with their statements and documents to be relied on disclosed. It is upon such full disclosure that a Certificate of Compliance is to be issued to certify that a matter is now ripe for trial.
11. The reason for the lengthy pre-trial sessions is to enable all the parties to disclose as much of their cases as possible. No new evidence, material or additional witnesses are to be allowed after that stage. This is to avoid unnecessary delays and surprise.
12. In the present case, the plaintiff has been under notice for over 16 years that the bundles of documents it had submitted are challenged and would require strict proof. The case itself is over 22 years old. The plaintiff submitted only 1 witness PW1 who has already testified. Does the right to a fair trial extend to a lethargic litigant? A litigant who has to take forever to put his case in order? I do not think so.



13. In my view, the defendants prepared the case on the basis of the witness statement and bundle of documents on record. To allow the introduction of a new witness would be prejudicial to the defendants. While I appreciate that this is a public interest litigation, the same cannot however be allowed to bend all the known rules and procedure that are the handmaids of justice. Granting the plaintiff its request would lead to further delays in the determination of this matter contrary to article 159 (2) (b) of the Constitution. Further, it would be prejudicial to the defendants who had prepared the trial on the basis of the material on record.
14. Accordingly, the application to call a second witness who is not known, who has not yet filed any witness statement is hereby declined.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE

