



**Thugi River Estate & another v National Bank of Kenya & 3 others (Civil Case 102 of 2019)
[2023] KEHC 22007 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 102 OF 2019
A MABEYA, J
SEPTEMBER 5, 2023**

BETWEEN

THUGI RIVER ESTATE 1ST PLAINTIFF

PAUL MUIITE 2ND PLAINTIFF

AND

NATIONAL BANK OF KENYA 1ST DEFENDANT

WAGATHAGU LIMITED 2ND DEFENDANT

REGISTRAR OF LANDS 3RD DEFENDANT

SOUTH & CENTRAL (THIKA) LTD 4TH DEFENDANT

RULING

1. This suit was commenced vide a plaint dated 6/5/2013. On 20/4/2015, Onguto J directed all the parties to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days. It is not clear from the record the parties complied with that order or not.
2. Nevertheless, the matter landed before this court on 13/10/2022 when the court directed that the same be mentioned on 5/12/2022 for parties to take hearing dates. On 20/12/2022, the court allocated the matter 3 days for hearing, to wit 30th and May 31, 2023 and June 5, 2023.
3. On 30/5/2023, the matter commenced and the court held a mini pre-trial conference to confirm the pleadings and documents that the respective parties would be relying on in the trial. A total of 20 or so documents were identified most of which were in the bundle supplied by the plaintiffs.



4. At the conclusion of the said mini pretrial conference, the court directed as follows:-

“Court

The bundle lodged by the plaintiffs containing 19 documents is hereby marked as agreed bundle subject to the defendants verifying any document therein that may not have been included in the earlier documents filed and exchanged. There shall be admitted the witness statement of Jane K. Miriti dated 16/7/2021 with the valuation of even date, the witness statement of Thomas Mara Gichui dated 29/6/2021 and a witness statement of one John Mulwa to be filed and served for and on behalf of the 1st defendant within 14 days of the date hereof.”

5. Immediately thereafter, the plaintiffs submitted their first witness Jane Kinanu Miriti (PW1) who testified in chief and produced her valuation report dated 8/7/2019 as PExh1.
6. Before cross examining her, both Mr Miller for the 1st defendant and Mr. Sheth for the 2nd and 4th defendant applied for adjournment to enable them take instructions on the said report. The matter was therefore adjourned to the following day. Come the following day, the record reads:-

“Mr. Sheth

The agreed bundle has missing pages. I have prepared my own bundle which I would like to use.

Signed

Court

For completeness, the 2nd and 4th defendant shall rely on the bundle submitted by Mr. Sheth.

Signed

Mr. Miller

We also noticed there were 3 letters missing from the Agreed Bundle. We shall proceed with our own bundle.

Signed

Court

Orders accordingly

Signed.”

7. Thereupon, PW1 was submitted for cross examination and was cross examined at length by both Mr. Miller and Mr. Sheth. The witness was then stood down for further cross examination on 19th, 20th, 26th, 27th and July 28, 2023.
8. On 05/7/2023, the 2nd and 4th defendant took out a motion on notice seeking that its own valuers and quantity surveyor be permitted to enter the property known as LR No. 8747 Thika (“suit property”) and prepare a valuation report. The Motion was brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#).
9. The grounds were that the witness statement relied on by Pw1 on 30/5/2023 had not been served upon the 2nd and 4th defendants previous Advocates. That the valuation report by PW1 had major flaws as Pw1 had testified that there was no quarry in the suit property yet satellite images of the property



- showed existence of quarries. That the measurement of the buildings on the suit property as per PW1 varied a lot as compared to those of the valuer for the 1st defendant. That a valuation report by the 2nd and 4th defendant would be able to clarify the matter. Finally, that no prejudice would be suffered by the plaintiffs while the 4th defendant would be highly prejudiced if the orders sought were not granted.
10. The application was strenuously opposed by the plaintiffs and the 3rd defendant. The plaintiffs relied on the replying affidavit of Paul K. Muite sworn on 18/7/2023. He averred that the application offended key constitutional provisions, the Civil Procedure Act and the rules of natural justice. That the orders sought were against the plaintiff's right to property. That the same sought access to the suit property to collect evidence on the 10th hour.
 11. That an opportunity had been presented to the applicant's advocates to cross examine Pw1. That no objection was raised against PW1's report. That the application was being made at a very late stage of the proceedings. That it was an attempt to adduce additional evidence contrary to the provisions of section 78 of the Civil Procedure Act.
 12. The 3rd defendant opposed the application vide his grounds of opposition dated 18/7/2023. He contended that the application was in breach of order 7 rule 5 of the Civil Procedure Rules. That if the prayers sought are granted, it would lead to unfair trial. That it shall lead to delay of the trial contrary to article 159 (2) (b) of the Constitution.
 13. I have considered the contestations and oral submissions on record. This is an application to grant access to the 2nd and 4th defendant's valuer and quantity surveyor to the suit property for purposes of preparing a valuation of the suit property.
 14. At the beginning of this ruling, I set out the history of the suit. Firstly, it is a requirement of the law that the evidence to be relied on by a party be lodged with the court at the earliest opportunity. Indeed, as submitted by Mr Kamau for the 3rd defendant, order 7 rule 5 requires that such evidence accompany the parties' pleadings at the time of filing either the statement of claim or defence.
 15. Order 7 rule 5 of the Civil Procedure Rules provides, inter alia that:-
 - “ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by –
.....
d) copies of documents to be relied on at the trial.
....”
 16. Order 11 rule 3 of the Civil Procedure Rules, on the other hand provides:-
 - “ 3
(1) with a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall-
 - a. Consider compliance with order 3 rule 2 and order 7 rule 5;
.....”



17. It is therefore crystal clear that there are 2 steps in which a party is granted an opportunity to offer its evidence. If for any reason, a party was unable to deliver its documents at the time of filing its statement of claim or defence, it has an opportunity of doing so, with leave of court, at the pre-trial stage.
 18. Secondly, as early as 20/4/2015, Onguto J had directed the parties to undertake pretrials within 30 days. The applicants have not explained why they did not apply for discovery before the trial commenced. It is at the pretrial stage that parties are supposed to undertake all and every possible discovery to avoid a delayed trial. I am in agreement with the decision relied on by the applicants of [*Concord Insurance Ltd vs NIC Bank Ltd*](#) [2013] eKLR on the importance of discovery.
 19. However, discovery will be ordered at the appropriate stage, not at the trial as is being sought in this case.
 20. It was submitted that the witness statement of PW1 and her report (PEXh 1) had not been served upon the applicant's previous Advocates. That may be so but when the court adjourned on 30/5/2023 to give time to both Mr. Miller and Mr. Sheth an opportunity to take instructions on PEXh 1, the applicants did not inform the court the following day that they needed to rebut the contents of that exhibit.
 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.
 22. In [*Trust Bank Limited vs Shah & 8 others*](#) [2023] KEHC 21017 (KLR), the Court held that:-

“I think a party cannot be allowed to litigate in instalments. I do not think that section 146 (4) of the evidence (sic) was meant to assist a party to correct mistakes that he has committed in the course of the trial. A party is not to be allowed to keep correcting his case as the trial progresses in order to strengthen his case.

....”
 23. I reiterate the foregoing herein even though the court was considering an application under section 146 of the [*Evidence Act*](#). The application is being made to counter evidence that has already been tendered.
 24. In my view, allowing the application would be prejudicial to the plaintiffs. It would lead to a delay in the trial of the suit. Indeed, as a result of the application, the dates of 19th, 20th, 26th, 27th and July 28, 2023 when the suit was slated for further trial were lost.
 25. Accordingly, I find the application to be without merit and dismiss the same with costs.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER, 2023.

A. MABEYA, FCIArb

JUDGE

