



**Registered Trustees of the Sisters of Mercy v Sanlam Life Assurance
Limited & another (Environment and Land Case 108 of 2017)
[2025] KEELC 8597 (KLR) (10 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 108 OF 2017
CA OCHIENG, J
DECEMBER 10, 2025**

BETWEEN

THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY PLAINTIFF

AND

SANLAM LIFE ASSURANCE LIMITED 1ST DEFENDANT

SEYANI BROTHERS & COMPANY (K) LIMITED 2ND DEFENDANT

RULING

1. What is before Court for determination is the 1st Defendant's Notice of Motion application dated 8th July 2025 where it seeks the following Orders:
 - a. Spent.
 - b. That the Applicant/1st Defendant be granted leave to avail/produce a supplementary list of witnesses and their respective witness statements filed herewith be admitted post conclusion of the pre-trial procedures.
 - c. That upon grant of prayer 2 above, the supplementary Witness Statements and List of Documents annexed to the Affidavit in support of this Application be deemed duly filed and served upon the payment of the requisite court fees.
 - d. That the costs of this Application be in the cause.
2. The application is premised on grounds on its face and on the supporting affidavit of Emma Muthoni Wachira, the Group Legal Officer at the 1st Defendant. She avers that the matter is scheduled for hearing on 10th December 2025 and that in the course of hearing, it came out that the Plaintiff alleges that they were not aware of the erection of the underground sub-structural beams to infill the foundation when the boundary walls collapsed.



3. He points out that the Plaintiff and the 1st Defendant need to disclose that they worked in collaboration, under their respective experts to agree on the methodology to infill and reinstate the boundary wall. Further, that the Plaintiff did appoint their own independent structural and civil engineers (Xenocon Consulting Engineers) who were in constant communication and correspondence contrary to the statements and testimony of the Plaintiff.
4. She claims that the Plaintiff's said structural and civil engineers (Xenocon Consulting Engineers) drew a report in September 2015, which was not brought to the attention of this Court. Further, that the 1st Defendant should be allowed to produce it in Court in order to make a fair and just determination of the issues at hand. She insists that no great prejudice shall be occasioned to the parties as hearing is yet to conclude.
5. The application is opposed by the Plaintiffs who filed Grounds of Opposition and a replying affidavit sworn by Sister Anne Itotia. She avers that pleadings in this case closed nine (9) years ago and that the Plaintiff's four (4) witnesses have already testified. She contends that the 1st Defendant did not demonstrate that its proposed new witnesses were not available at all times and that it did not have access, knowledge and possession of the documents listed in its proposed list of documents, thus it will be prejudiced if the application is allowed.
6. Further, that the 1st Defendant did not plead the issues sought to be introduced in its Statement of Defence dated 19th March 2017 and that in the supporting affidavit to the motion, it is confessed that the said issues have "stood out", "in the course of the hearing and attempts to resolve the matter".
7. She acknowledges that the Plaintiff received one version of the Xenocon Consulting Engineer's report vide a CD in PDF format around October 2015 and avers that it was never formally presented or discussed with them. Further, that the document listed as No.8 on the 1st Defendant's further list of documents (Report from Mapsoft Systems Ltd dated 17th January 2025) was prepared jointly by the Plaintiff and the 1st Defendant during their failed attempts to resolve the matter out of Court, thus it ought not be produced without the Plaintiff's Consent.
8. The application was canvassed by way of written submissions.

Submissions

9. The 1st Defendant submits that this Court has discretion to ensure the just determination of proceedings and to this end, it can call additional witnesses at any stage of trial. Further, that Article 50 of *the Constitution* guarantees the right to fair hearing which includes the defence being accorded the opportunity to produce its evidence in full.
10. It also submits that the Plaintiff will not suffer any prejudice since the expert evidence is critical to determine the quantum of liability which is a matter already pleaded in the Plaint. To buttress its averments, the 1st Defendant relied on the following decisions: re Estate of the Late William Morogo (Succession Cause 12 of 2001) [2025] KEHC 3405 (KLR) (20 March 2025) (Ruling), re Estate of the Late William Morogo (Succession Cause 12 of 2001) [2025] KEHC 3405 (KLR) (20 March 2025) (Ruling), Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others (2018) ,Obado v Anayo Civil Suit E005 of 2022 [2024] KEHC 17038 (KLR),Maina Thiongo v Republic [2017] eKLR, Mutonyi Versus Republic [1982] KLR 203, Kagina v Kagina & 2 others [2021] KECA 25 (KLR), Nakuru Automobile House Limited v Lawrence Maina Mwangi & Another (2017) eKLR and Too and Tum [2014] KEELC 512 (KLR).



11. On their part, the Plaintiffs submit that the fundamental rights of a fair hearing and equal protection including equal benefit of the law, requires parties to be held to their bargain, as represented in their pleadings and since the 1st Defendant has not amended its pleadings, it should not be permitted to travel beyond its pleadings as the hearing started based on the pleadings on record, documents and witness statements.
12. It also submitted that the 1st Defendant has not given any reason why it did not move the Court for discovery and/or production by the Plaintiff of the documents listed in its proposed further List of Documents. Further, that the 1st Defendant has admitted by implication that the Application to call three (3) additional witnesses, and documentary evidence, is inspired by hindsight after the hearing of the Plaintiff's case and the failed "attempts to resolve the matter" out-of-court. It reiterates that its application has been made late in the day, after hearing and closure of the Plaintiff's case.
13. It also submits that the documents listed as No. 8 in the 1st Defendant's proposed further List of Documents (Report from Mapsoft Systems Ltd dated 17th January 2025) was jointly prepared by the 1st Defendant and the Plaintiff, for an out-of-court settlement that did not see light of day thus it is privileged under Section 23 of the Evidence Act. Further, that the 1st Defendant cannot unilaterally produce the same without its consent.

Analysis and Determination

14. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the sole issue for determination is whether this Court should exercise its discretion to allow the 1st Defendant to file additional evidence after the Plaintiff's witnesses had tendered their evidence.
15. The 1st Defendant seeks to introduce a record of eleven (11) documents including a report Xenocoon Report Consulting Engineers dated 23rd June 2016, which documents it claims will assist the Court to understand the professional methodology in the recovery of the collapse of the wall and the foundation, determine the liability for the accident and ascertain the cost to restore and re-build the foundation. It also seeks to introduce three (3) witnesses and contends that the Plaintiff will not be prejudiced as they will have an opportunity to respond.
16. The Plaintiff claims that they will be prejudiced if the orders sought are granted since their witnesses have already testified and pleadings were closed in the matter, nine (9) years ago. They also contend that the 1st Defendant did not demonstrate that the documents sought to be introduced were not available to it. Further, that document No. 8 (Report from Mapsoft Systems Ltd dated 17th January 2025) is privileged.
17. For context the Plaintiff's case is that it owns Plot LR 1870/V/73 which neighbours plot LR 1870/V/72 and that construction of an eighteen (18) storey building on the said adjacent parcel had a negative impact on their land and led to destruction of property.
18. In *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, the Supreme stated as follows on discretion to allow additional evidence:

“...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. The other issue the Court must consider when exercising its



discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, 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.”

19. Hon. Judge Boaz OLao stated as follows in *Marcus Kibuku Nimrod & Another v Nussy Kuthii Justus* 2017 eKLR:

“It is instructive to note that neither Order 3 nor Order 7 of the Civil Procedure Rules prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with Article 50 of *the Constitution* which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of Order 3 and Order 7 of the Civil Procedure Rules because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.”

20. I note the Plaintiff contended that document eight (8) (Report from Mapsoft Systems Ltd dated 17th January 2025) contained in the 1st Defendant’s intended further list of documents is privileged under Section 23 of the *Evidence Act* as it was drawn when parties were attempting to settle the matter. It was held as follows in *Charles Davy Kipngetchi Arap Kirui v Wangethi Mwangi & Another* [2007] KEHC 1396 (KLR):

“..the test to be applied is whether the said document was made in furtherance of negotiations to settle the dispute. In the absence of that, mere making of the document “without prejudice” will not afford it protection that it is envisaged by the law.”

21. From the facts before this Court while associating myself with the decisions cited, I find that it will be prejudicial to the Plaintiff if the 1st Defendant was allowed to file a further list and bundle of documents including presenting witnesses after the Plaintiff’s four witnesses had testified. I opine that it will amount to stealing a match against the Plaintiff if the 1st Defendant was allowed to present a report which had been prepared during the period the parties were negotiating out of Court. I further find that the 1st Defendant has failed to provide plausible reasons why it seeks to present fresh witnesses and documents, nine (9) years after the pre trial conference. Further, the documents sought to be produced are voluminous and seeks to remove a lacuna in the 1st Defendant’s case.
22. In the foregoing, I find the instant Notice of Motion application unmerited and will disallow it.
23. Costs will be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025



CHRISTINE OCHIENG

JUDGE

In the presence of:

Ngugi for Plaintiff

Ms Waruhiu for 1st Defendant

Mege for 2nd Defendant

Court assistant: Vena

