



Kcb Bank Kenya Limited v Gillys Security & Investigations Limited & 2 others (Commercial Case E046 of 2023) [2026] KEHC 682 (KLR) (Commercial & Admiralty) (23 January 2026) (Ruling)

Neutral citation: [2026] KEHC 682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E046 OF 2023
MN MWANGI, J
JANUARY 23, 2026**

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

GILLYS SECURITY & INVESTIGATIONS LIMITED 1ST DEFENDANT

JOHN WALTER OWINO 2ND DEFENDANT

BEATRICE AKINYI MBOYA 3RD DEFENDANT

RULING

1. The defendants/applicants filed a Notice of Motion application dated 30th July 2024 pursuant to the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, Section 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The defendants pray for orders that the plaintiff's pleadings as filed be struck out, and consequently the plaintiff's suit against the defendants be dismissed with costs. In the alternative, the defendants pray for orders that the plaintiff be compelled to produce the documents requested in the Notice to Produce dated 8th May 2023 within a period to be stipulated by the Court.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. John Walter Owino, the 2nd defendant herein and a Director of the 1st defendant company. Mr. Owino averred that the plaintiff instituted this suit alleging breach of contractual obligations and claiming a sum of Kshs.82,282,005.41 arising from an alleged banker-customer relationship, in which the 1st defendant is accused of having overdrawn funds against uncleared effects in January 2016. He contended that the overdraft was subsequently converted into an unsecured term loan following an application by the 2nd & 3rd defendants, culminating in a letter of offer dated 22nd February 2016.



3. Mr. Owino stated that the defendants' case however, is that the alleged overdrawn amounts were not the result of any facility applied for by the 1st defendant, but were fraudulent transactions perpetrated by the plaintiff's own officers stationed at its Prestige Plaza Branch. According to Mr. Owino, the plaintiff's officers unlawfully credited and withdrew funds from the 1st defendant's accounts without instructions, after which the plaintiff coerced the 2nd & 3rd defendants, through duress and threats including adverse credit listing and recall of properly serviced facilities, to execute letters of offer intended to sanitize the alleged fraud. He deposed that although the plaintiff promised to investigate the fraud allegations and reconcile the accounts, once the investigations implicated the plaintiff's staff, the report was withheld, the implicated officers were transferred, and the plaintiff intensified pressure on the 1st defendant by draining its operational accounts, thereby crippling its business.
4. Mr. Owino further averred that following the filing of this suit, the defendants served the plaintiff with a Notice to Produce dated 8th May 2023, seeking documents that are solely within the plaintiff's possession and are critical to the fair determination of the dispute. He contended that despite the lapse of over one year, the plaintiff has failed or refused to supply the requested documents, an omission Mr. Owino described as prejudicial, unfair, and inimical to the defendants' right to a fair hearing.
5. In opposition to the instant application, the plaintiff filed Grounds of Opposition dated 30th September 2024, raising the following issues-
 - i. The instant application is incompetent, misconceived and devoid of any merit in view of its own content and the supporting affidavit;
 - ii. The orders sought in the application are untenable, as the same are based on grave misconceptions of law and fact;
 - iii. The orders sought therein are unsustainable and are therefore unavailable to the applicants;
 - iv. The application is tantamount to trifling with the Court and is an abuse of the process of this Honourable Court;
 - v. The application is incurably defective in law and ought to be struck out; and
 - vi. The basis of the whole application is misguided and will waste precious judicial time for little significance.
6. The plaintiff also filed a replying affidavit sworn on 3rd January 2025, by Joseph Muli, the plaintiff's Corporate Recovery Manager. Mr. Muli deposed that all documents in the plaintiff's possession relating to the claim were duly produced in the plaintiff's list and bundle of documents dated 27th January 2023. He stated that following internal inquiries within the plaintiff bank, it was established that the documents sought by the defendants are not in the plaintiff's possession, save for a Forensic Report relating to Account No. 1111592314, which was annexed to the replying affidavit. He further averred that the defendants' application seeks to strike out the plaint solely on the basis of alleged non-production of documents, and that the issues raised therein are matters that ought to be ventilated at trial rather than through an interlocutory application.
7. Mr. Muli claimed that the 1st defendant has an outstanding loan balance of Kshs.84,282,005.41 which became due upon failure to honour the terms of a loan restructure agreement dated 7th March 2019 and that this indebtedness forms the basis of the plaintiff's claim. He asserted that the defendants have not demonstrated that the plaint discloses no reasonable cause of action, or that it is frivolous, vexatious, or an abuse of the Court process. He maintained that the 1st defendant has not denied obtaining the loan facility, nor its inability to repay it, and that it sought restructuring through letters dated 21st July 2017



and 7th March 2019. He further averred that the defendants, through their Advocates, acknowledged the outstanding debt in July 2022 and sought time to resume payments.

8. In a rejoinder, the defendants filed a further affidavit sworn on 19th February 2025 by Mr. John Walter Owino, the 2nd defendant herein and a Director of the 1st defendant company. Mr. Owino deposed that while the plaintiff claims that the documents being sought are not in its possession, it has failed to provide any explanation as to why the documents are unavailable. He contended that this omission amounts to deliberate suppression of material evidence intended to advance a false narrative before the Court. He further averred that even the Forensic Report produced by the plaintiff is incomplete and by listing annexures that have not been produced, demonstrated that the documents sought do exist and are within the plaintiff's knowledge or control.
9. He reiterated the defendants' position that no loan facility was applied for and that the transactions in question arose from fraudulent activities by the plaintiff's own officers. He contended that the Forensic Report lends credence to the defendants' narrative by showing that the alleged facility was in fact monies fraudulently siphoned by the plaintiff's staff. He asserted that the plaintiff's reluctance to comply with discovery is motivated by an intention to conceal incriminating documents, and that without full disclosure, both the Court and the defendants would be denied material evidence necessary for the fair determination of the dispute herein. He asserted that the plaintiff should be estopped from prosecuting this suit while deliberately withholding documents that demonstrate that no facility existed.
10. The instant application was canvassed by way of written submissions. The defendants' submissions were filed by the law firm of Kinuthia Anthony & Company Advocates on 28th November 2024, whereas the plaintiff's submissions were filed on 15th July 2025 by the law firm of Simba & Simba Advocates.
11. Mr. Kinuthia, learned Counsel for the defendants submitted that it is grossly unfair and prejudicial for the plaintiff to pursue a claim founded on matters that can only be properly interrogated through documents in its exclusive possession, while simultaneously refusing to produce those documents or meaningfully address the Court on their existence. He contended that such conduct violates the defendants' right to a fair hearing and gravely prejudices their ability to mount a credible defence. He maintained that the documents being sought are material and central to the issues in dispute, including whether any valid facility existed, whether there were overdrawn amounts against uncleared effects, the conduct of the parties in relation to the transactions, and whether fraud, duress, or non-compliance occurred.
12. Counsel cited the case of Jibril Konse Ali v Aig Kenya Insurance Company Limited [2021] KEHC 12823 (KLR) and the Court of Appeal case of ABN Amro Bank N.V v Kenya Pipeline Company Limited [2019] KECA 499 (KLR), and argued that discovery is a fundamental tool for ensuring access to information and the right to a fair hearing. He asserted that the purpose of discovery is to ensure that all documents necessary for the fair and just determination of a suit are made available to both the parties and the Court. In view of the foregoing, Mr. Kinuthia urged this Court to allow the application herein in the interest of justice and equity, and to compel the plaintiff to produce the documents being sought.
13. Ms Muga, learned Counsel for the plaintiff cited the provisions of Section 22 of the [*Civil Procedure Act*](#) and submitted that this Court is clothed with jurisdiction to order discovery, production, and inspection of documents, but that such power is discretionary and guided by the principles of relevance, materiality, and possession. She further submitted that discovery is intended to assist parties in accessing non-privileged, relevant documents, but it is not meant to facilitate fishing expeditions



or the introduction of new or unpleaded issues. Counsel relied on the cases of Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited [2019] KECA 313 (KLR) and M/S Ramji Meghji v Kisii University [2016] KEHC 3293 (KLR), and argued that discovery will only be ordered where the documents sought are relevant to the issues in dispute and are shown to be in the possession or control of the opposing party.

14. Ms Muga stated that following internal inquiries, the plaintiff filed a replying affidavit sworn on 3rd January 2025 confirming that the documents being sought are not in its possession, save for the Forensic Report on Account No. 1111592314, which was duly produced. She maintained that the documents the plaintiff intends to rely on in prosecuting this suit are those contained in its list and bundle of documents dated 27th January 2023. On the prayer for striking out of the plaint, Counsel referred to the case of D.T. Dobie & Company (K) Ltd. v Joseph Mbaria Muchina [1982] KLR 1), and submitted that the issues raised by the defendants are matters that ought to be interrogated at a full trial and not at an interlocutory stage. She asserted that for the Court to strike out the plaint in this suit, the defendants must demonstrate that the suit is plainly and obviously unsustainable, which threshold has not been met.
15. Counsel stated that the plaintiff's plaint discloses a clear and sustainable cause of action founded on an outstanding loan of Kshs.84,282,005.41 advanced to the defendants and subsequently defaulted upon. She asserted that the defendants' assertions of fraud and irregular transactions are matters of defence that can only be determined upon the taking of evidence at trial. Ms Muga further stated that the application herein does not allege that the plaint in this suit is frivolous, vexatious, or an abuse of the Court process, or that the plaint is incapable of being sustained in law. She submitted that the defendants cannot seek to have this suit dismissed on the basis that the documents they wish to rely on in mounting their defence have not been produced to their satisfaction, as the burden of proof rests upon the party alleging fraud or impropriety.

Analysis And Determination.

16. Upon consideration of the instant application, the grounds on the face of it, and the affidavits filed in support thereof, the grounds of opposition and the replying affidavit by the plaintiff and the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether the defendants have made out a case to warrant the striking out of the plaint filed in this suit; and
 - ii. Whether the plaintiff should be compelled to produce the documents requested in the Notice to Produce dated 8th May 2023.

Whether the defendants have made out a case to warrant the striking out of the plaint filed in this suit.

17. It has been held by Court, that the striking out of a suit and/or pleading is a draconian and drastic measure which should be used sparingly, with caution and as the very last resort, and that it is used only where a pleading cannot be salvaged by an amendment that Courts will utilize this procedure. This position was elucidated by the Court in the case of Geminia Insurance Co. Ltd v Kennedy Otieno Onyango [2005] KEHC 374 (KLR) as hereunder -

It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.



18. In the often cited case of Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000) the Court of Appeal stated thus–

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

19. Striking out of pleadings is provided for under Order 2 Rule 15 of the Civil Procedure Rules, 2010, which states that –

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.
3. So far as applicable this rule shall apply to an originating summons and a petition.

20. The instant application has been brought under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010. The application does not however specify the particular sub-rule or the precise grounds under sub-rule (1), upon which the prayer to strike out the plaintiff’s plaint is founded. A perusal of the grounds on the face of the application herein and the affidavit in support thereto reveals that the request to strike out the plaintiff’s plaint is premised solely on the plaintiff’s alleged failure to produce the documents listed in the Notice to Produce dated 8th May 2023, a ground which is not envisaged or contemplated under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010.

21. A careful reading of Order 2 Rule 15 of the Civil Procedure Rules, 2010, shows that where an application is brought under sub-rule (1)(a), no evidence is admissible and the application is required only to state concisely the grounds upon which it is made. In an application seeking to strike out a plaint on the ground that it discloses no reasonable cause of action, the applicant is neither expected nor required to adduce evidence. It is notable that Order 2 Rule 15(2) is expressly limited to applications brought under sub-rule (1)(a), whereas applications founded on sub-rules (1)(b), (c), & (d) of Order 2 Rule 15 of the Civil Procedure Rules, 2010, necessarily require the presentation of evidence.

22. This Court is therefore of the considered view that the failure by the defendants to specify the particular sub-rule and the precise grounds under Order 2 Rule 15 of the Civil Procedure Rules, 2010, upon which the application to strike out the plaintiff’s plaint is founded constitutes a fatal defect, rendering the application inappropriate and unsustainable. The Court of Appeal in the case of Olympic Escort



International Co. Ltd. & 2 others v Parminder Singh Sandhu & another [2009] KECA 258 (KLR), considered an application made under the former Order VI Rule 13 (i) (a) held as follows–

“We think for our part that it was inappropriate to combine the two prayers, one which requires evidence before a decision is made and one that does not... I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

23. Although the foregoing decision was rendered prior to the promulgation of *the Constitution* of Kenya, 2010, which introduced Article 159 and enjoined Courts to determine matters without undue regard to procedural technicalities, the Court in the case of Milenium Chuma Limited v Platinum Steel Limited [2017] KEHC 5429 (KLR), in dealing an application similar to the instant one held that –

As the provisions of Order 2 Rule 15 (2) are capped in mandatory form, an application that cites all grounds thereunder, some that require evidence and others which do not require evidence, it fatally defective and susceptible to striking out. Although provisions of Article 159 of *the Constitution* of Kenya, 2010 requires that, the court decide matters without undue regard to technicalities, the issue herein, is not a technical issue. It is a serious issue of procedural requirement of the law.

24. From the analysis I have made and legal precedents cited herein, this Court finds that the defendants’ application seeking to strike out the plaint in this suit is fatally defective for failure to specify the particular sub-rule of Order 2 Rule 15 of the Civil Procedure Rules, 2010, on which its application is premised, and for failing to anchor the application on any of the grounds contemplated therein. Consequently, this Court finds that the said prayer is incompetent and cannot succeed as is.

Whether the plaintiff should be compelled to produce the documents requested in the Notice to Produce dated 8th May 2023.

25. The law on discovery and production of documents is well settled. Discovery is intended to ensure that parties go to trial on an equal footing and that the Court has the benefit of all material necessary for



the fair and just determination of a dispute. The Court's power to order discovery and production of documents is anchored on Section 22(a) of the Civil Procedure Act, which provides that -

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party -

a. make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

b.”

26. It is trite law that the said discretion is to be exercised judiciously and guided by the principles of relevance, materiality, and possession or control of the documents sought. The Court of Appeal in the case of *ABN Amro Bank N.V v Kenya Pipeline Company Limited* (supra) held that –

“The purpose of discovery is mainly to ensure that all documents or information necessary for the just determination of the suit are made available to all the parties as well as to the court. In Halsbury's Laws of England, 4th Edition Volume 13 at paragraph 1 the function of discovery of documents is set out as follows:

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

27. From the affidavits and documents on record, it is not in dispute that the defendants served the plaintiff with a Notice to Produce dated 8th May 2023. It is also not contested that the documents sought are central to the dispute between the parties, including the nature of the transactions in issue, whether a valid loan facility existed, the manner in which the alleged overdrawn amounts arose, and the conduct of the plaintiff's officers in relation thereto. These issues go to the very core of the parties' competing interests and cannot be said to be peripheral or irrelevant.

28. In response to the Notice to Produce, the plaintiff averred that following internal inquiries, the documents sought are not in its possession, save for the Forensic Report relating to Account No. 1111592314, which has since been produced. The plaintiff further averred that it has already produced all documents it intends to rely on at trial in its list and bundle of documents dated 27th January 2023, thus it has no documents left to produce.

29. This Court is cognizant of the fact that while a party cannot be compelled to produce documents that are genuinely not in its possession, custody, or control, the Court must interrogate such a claim against the totality of the evidence on record. In this case, it is evident from the Forensic Report produced by the plaintiff itself, that the plaintiff in support of the said Report refers to, and relies on several documents which form part of the Notice to Produce but were not annexed to the plaintiff's replying affidavit or produced as requested by the defendants. This raises a legitimate question as to whether the documents indeed do not exist or are not within the plaintiff's knowledge or control, as alleged.



30. In addition to the foregoing, this Court notes that the plaintiff has not provided any cogent explanation as to the fate of the documents being sought. A bare assertion that documents are not in the plaintiff's possession without more, particularly, where the documents are referenced in a Report commissioned or relied upon by the plaintiff, does not sufficiently discharge the plaintiff's duty of candour in the discovery process.
31. This Court is also mindful that discovery is not meant to be a fishing expedition. However, in this case, the documents being sought are clearly identified, pleaded to, and tied directly to the issues in controversy. They are neither speculative, nor are they being sought to enable the defendants to formulate a new case. To the contrary, they are sought to enable the defendants respond meaningfully to the plaintiff's claim and to allow the Court to determine the dispute between the parties herein on the basis of complete and accurate information.
32. In light of the above, this Court is persuaded that the interest of justice favours compliance with the Notice to Produce. Since the plaintiff maintains that certain documents are not in its possession or control, it bears the burden to explain on oath, the efforts made to trace the documents and their current status. Such transparency is essential to preserve the integrity of the discovery process.
33. Accordingly, this Court finds that the instant application is partly merited to the extent of the prayer seeking production of documents. As a result, I make the following orders –
- i. The plaintiff is hereby directed to produce and supply to the defendants all documents specified in the Notice to Produce dated 8th May 2023 that are within its possession, custody, or control within thirty (30) days from the date of this Ruling;
 - ii. In respect to any documents not produced, filed and served, a detailed affidavit explaining their non-availability shall be filed and served on the defendants within the said duration of time; and
 - iii. Costs shall be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 23RD DAY OF JANUARY, 2026.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kinuthia for the defendants/applicants

Ms Muga for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

