

2013

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURT

CIVIL SUIT NO. E168 OF 2013

FRANCIS NGANGA MUNDIA.....

..... PLAINTIFF

VERSUS

CFC STANBIC BANK.

..... DEFENDANT

RULING

1. This is a Ruling arising from the Defendant’s application by way of a Notice of Motion dated 24.3.2025. The Defendant/Applicant seeks the following reliefs:

- (1) *Spent.*
- (2) *This Honourable Court be pleased to review and/or set aside its orders of 24.10.2024 and grant leave to the Defendant/Applicant to file a verifying affidavit to its counterclaim, a replacement witness statement and an up to date statement of accounts for the Plaintiff in support of the Defendant’s counterclaim.*
- (3) *This court be pleased to admit on record the verifying affidavit of Elizabeth W. Mbugua sworn on 6.11.2024, the witness statement of Elizabeth W. Mbugua dated*

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7.11.2024 and the Plaintiff's statement of accounts for the period 1.1.2007 - 26.2.2024 filed in the Defendant's trial bundle dated 8.11.2024 and deem the said documents as being properly on record.

4. *Any other order in the interest of justice.*
5. *Costs of this application be provided for.*

Background Facts

2. The matter relates to a dispute between the Bank's customer and the Bank. The same was scheduled for trial that had been adjourned severally. The Defendant had moved this Court seeking a review of the Court's previous orders of 24.10.2024. It now seeks to file a Verifying Affidavit to its Counter-claim, replacement of a witness statement and introduction of a statement of accounts to support the Counter-claim.
3. The application is strongly opposed by the Plaintiff. He has all along been ready to go on with the trial. He blames the Defendant for the many adjournments in this matter.
4. The Plaintiff maintains that the Defendant had been given an opportunity to file a trial bundle, but is now producing fresh evidence, very late in the day.

Issues for determination

5. The Court has considered the application, the response, the written submissions filed as well as the oral highlights by Counsel for the parties. The Court frames a single issue for determination;
 - (a) *Whether the Court should grant the Defendant leave to introduce fresh evidence/documents after pre-trials.*

Analysis

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6. The Court is aware as has been pointed out by the Plaintiff that this is an old case. It was filed in the year 2013. It is officially part of the backlog in the Division. So many other cases have been filed and concluded after the filing of this case, yet it continues to stay put in the Division.
7. Looking at the record of the Court, the Court is not to blame for the state of affairs. The Judges who have handled this matter have always been keen to hear and determine it. The Plaintiff had equally been ready to prosecute the suit. The delay points to the door steps of the Defendant.
8. This matter is partly heard before this Court. the Plaintiff prosecuted his case on 11.2.2025 and closed his case.
9. On that particular date, the Defendant represented by Counsel Wafula had 1 witness and was ready to proceed. It is the Court that was unable to proceed with the defence case on that day. This is because the Court was engaged in a meeting outside the Court premises. The matter was fixed for further hearing on 8.4.2025.
10. The Court directed the parties to engage further in **Alternative Dispute Resolution**, through Mediation. This is because the previous mediation engagement did not have full participation.
11. Come the 8.4.2025, the Defendant's Advocate on record Mr. Ogunde sought an adjournment. He stated that Associate who had previously handled the matter had left the firm. He was granted an adjournment so that he could appraise himself with the matter and prepare for the defence hearing on 3.6.2025.
12. The Court did not sit on 3.6.2025 on account of a bereavement.

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13. The next date fell on 20.9.2025. The Defendant expressed the wish to further prosecute its application dated 24.3.2025 now under consideration. The Court gave directions at to filing of submissions and effectively granted the Defendant another adjournment.

(a) **Whether the Court should grant the Defendant leave to introduce fresh evidence/documents after pre-trials.**

14. The Court notes that the present application was filed long after the Court issued pre-trial directions on several dates on 29.10 2013; 15.11.2013; 3.12.2013 and 20.12.2013.

15. The purpose of pre-trials, case conference and case management is to guide the litigants in preparation for the trial. It is also to ensure that the Court has an over view of the cases in its docket. The cases certified as ready move on to trial. Those that need more time for preparation do not go for hearings. The parties who need orders or directions to facilitate getting ready to trial, are expected to obtain such orders at this stage.

16. Once the Court certifies the matter for trial, the parties are expected to truly and actively get ready to prosecute their cases. The Court does retain the discretion and control over admission of documents, additional witnesses, amendments etc. This involves the invoking of the Courts discretion and would be determined on a case-to-case basis.

17. It should not be lost to the Court that once a matter has been certified as ready for trial, then a party wishing to file new evidence or documents has to provide the Court with cogent reasons to do so.

18. This is because the general expectation is that parties had more than ample time to do so during pre-trials. Pre-trials

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allow the parties to re-evaluate their case and evidence. If they wish to drop a witness and introduce a fresh one, they can do so. If they notice that they omitted certain documents, they can move the Court for admission of such documents.

19. After the pre-trials and the matter has been certified as ready for hearing, the Court can still consider issues like death, transfer or resignation from work of witnesses. The Court may allow the filing of fresh witness statements or substitution of witnesses and filing of statements of such witnesses. All this entails the exercise of discretion and will be determined on a case-to-case basis. The Court as well as Counsel for the parties should at all times keep an eye on the ball. Keeping the game alive, the ball at play moving towards the goal posts of a hearing and determination. Any actions that suspend the game or lead to long stoppage are to be frowned upon. All the parties have a duty to assist the Court move the matter to a hearing and determination or any other form of resolution. The game changer in the manner in which trials are conducted, especially in the Commercial and Tax Division of the High Court, is that the Court is no longer a long-term parking space for disputes. The Court users have expressed themselves time and time again that they wish to have their disputes heard and resolved as quickly as possible. That they are in commercial businesses and their core business is not litigating endlessly. That they come to Court for quick resolutions of their disputes. That time is money and they can quantify it in terms of interests, levies, penalties, demurrages, lost opportunities etc. This is the language spoken by the Court users at the **Commercial Justice Court Users Committee (CJCUC)**.

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20. The Court notes that in this particular case, the trial has already commenced and the Plaintiff has testified, called a witness and closed his case.
21. This Court is guided by the decision by the Court made in **Okwara vs Ouma [2024] KEHC 13392 (KLR)** and **James Muigai Thungu vs County Government of Trans - Nzoia & 2 Others (2021) KEHC 845 (KLR)**. It is clear that the Courts frown or take a dim view of such application made after closure of the other party's case.
22. The simple explanation would be that parties are granted sufficient time during pre-trials to bring out all their documents. Our system of pleadings is such that parties must make full disclosure of their case, at all times.
23. The Court is concerned that allowing the application will prejudice the Plaintiff. It is not enough to state that the Plaintiff can be allowed to re-open his case and call his witnesses.
24. The Defendant cannot blame any party for having failed to file its verifying affidavit to the Counter-claim, at the same time when it filed the Counter-claim. To do so at such time after the close of Plaintiff's case is a case of fixing or filing the gaps exposed during the hearing. Such an application should have been made before the trial commenced.
25. As to the fresh statements to replace the previous one by **Peterson Ratemo Awaro**, the Court has noted the reason given. It is said that **Mr. Awaro** is no longer dealing with debts declared as provisional by the Bank.
26. The Court notes that it is not said that **Mr. Awaro** is no longer an employee of the bank or unavailable to testify. He is still working for the same bank. The Court notes with concern that on 24.10.2024 that particular witness was

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ready to proceed save for bereavement. The Plaintiff's Advocate strenuously challenges this issue of bereavement. The Court has no way of knowing if the witness was bereaved or not and will give him the benefit of doubt.

27. As matters stand the Court notes that the witness **Mr. Peterson Ratemo Awaro** did prepare and file a witness statement. This signified his readiness to testifying to the matters set out in the witness statement. The Court has not been convinced of any good reasons to excuse the witness from the trial or substitute his statement with another witness. Filing a witness before a Court has to mean something. That a party is ready to assist the Court arrive at the truth so as to resolve a dispute or arrive at a just decision. That the witness offers himself/herself ready to attend Court to testify. That the witness will avail himself/herself when called upon to do so by the Court. That the witness will take that heavy responsibility of taking the steps up the witness stand. That the witness will solemnly take the oath at times with trembling lips and limbs, that before God, the Judge and all those present he/she will tell the truth and nothing but the truth. That the witness is ready to lay himself/herself bare and forego their privacy by giving his/ her testimony in a very public space and withstand the rigours and adversarial scrutiny of cross examination. That a witness is ready to go toe to toe with Counsel in Court. Offering to give a witness statement has to mean something. It is not just scribbling a signature on a pre-approved draft statement.
28. Looking at the long winded and convoluted history of this matter, the Court is convinced that allowing the application with prejudice the Plaintiff. The Court should be seen as leaning towards expeditious hearings, rather than facilitating

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delays and adjournments. The proper exercise of discretion is to ensure the trial is concluded soonest.

29. The Court proceeds to dismiss the application.
30. As to costs the same are awarded at the discretion of this Court. Ordinarily costs follow the event. In this matter they are awarded to the Plaintiff as the successful party.

Determination

31. The Defendant/Applicant's application by way of a Notice of Motion dated 24.3.2025 is HEREBY disallowed for lack of merits.
32. The costs are awarded to the Plaintiff/Respondent.
33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
16TH DAY OF APRIL, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Mr. Juma for the Plaintiff.

Mr. Ogunde for the Defendant.

Mr. Peter Wabwire - Court Assistant.