



Rajani & another v Rajani & 2 others (Environment & Land Case 232 of 2019) [2024] KEELC 287 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 232 OF 2019
NA MATHEKA, J
JANUARY 31, 2024**

BETWEEN

NITIN JAYANTILAL RAJANI 1ST PLAINTIFF

RAMAGAURY JAYANTILAL RAJANI 2ND PLAINTIFF

AND

SHAILESH JAYANTILAL RAJANI 1ST DEFENDANT

TRAVEL LIMITED 2ND DEFENDANT

**JEREMY NJENGA, VICTORIA WAMBUA, VIVIANNE W WACHANGA &
PHYLLIS KIRAGU T/A J M NJENGA & CO ADVOCATES 3RD DEFENDANT**

RULING

1. The application is dated 13th September 2023 and is brought pursuant to sections IA, 1B, 3A and Section 22(a) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules 2010, Articles 35(1)(b), 159 of *the Constitution* of Kenya, 2010 seeking the following orders;
 1. That the Honourable Court hereby certify this Application as urgent, service thereof be dispensed with and the same heard ex parte in the first instance;
 2. That within 14 days of this Order, the 1st Defendant/Respondent be compelled to produce, make discovery on oath and deliver and/or avail copies of: -
 - a. The Sale Agreement, Transfer and all Conveyance Documents entered into, executed and or registered and or in any other manner transacted by the 1st Defendant on behalf of the Plaintiffs in the alleged transaction between the Plaintiffs and 2nd Defendant for purchase of the Suit Property.



- b. All correspondence with, either received, forwarded or exchanged with the 3rd Defendant related to the transaction between the Plaintiffs and 2nd Defendant.
 - c. The comprehensive and full statement of the entire account of all monies received and or paid out to and from all or any parties of whatever description and or any balance thereof held or remaining with the 1st Defendant/Respondent in relation to the said property and the transaction(s) relating thereto.
 3. That within 14 days of this Order, the 2nd Defendant/Respondent be compelled to produce, make discovery on oath and deliver and/or avail copies of the transaction documents related to its alleged purchase of the Suit Property including but not limited to: -
 - a. The offer made by the 1st Defendant to purchase the Suit Property by private treaty.
 - b. The Sale Agreement, Transfer and all Conveyance Documents entered into, executed and or registered and or in any other manner transacted by the 1st Defendant on behalf of the Plaintiffs in the transaction between the Plaintiffs and 2nd Defendant for purchase of the Suit Property.
 - c. All correspondence with, either received, forwarded or exchanged with the 1st and 3rd Defendant related to the transaction between the Plaintiffs and 2nd Defendant.
 4. That within 14 days of this Order the 3rd Defendant/Respondent be compelled to produce, make discovery on oath and deliver and/or avail copies of the transaction documents related to the sale of all that property known as PLOT NO. MN/1/588, located in Nyali, Mombasa including but not limited to: -
 - a. The Sale Agreement, Transfer and all Conveyance Documents entered into, executed and or registered and or in any other manner transacted between the Plaintiffs and 2nd Defendant for purchase of the Suit Property.
 - b. All correspondence and the entire file of documents related to the transaction between the 2nd Defendant and 3rd Defendant.
 - c. The comprehensive and full statement of the entire account of all monies received and or paid out to and from all or any parties of whatever description and or any balance thereof held or remaining with the 3rd Defendant in relation to the said property and the transaction(s) relating thereto.
 - d. Records and proof of payment of any and all payments and or the balance of the purchase price to the 1st Defendant.
 - e. All the contents of all that file held by the 3rd Defendant cited as Reference No. 330/CONV/116/06 in its correspondence.
 5. That in the event of non-compliance with Orders 2, 3 and 4, the Defendants' respective Defences be struck out with costs.
 6. That this Court grant any other orders it may deem fit to grant
 7. That costs of this application be provided for.
2. It is supported by the annexed affidavit Nitin Jayantilal Rajani and upon the following grounds that the Plaintiffs/Applicants have filed the present suit challenging the purported sale of all that property



known as Plot Number MN/1/588 (hereinafter "the Suit Property"), as the Suit Property's legal and beneficial owners. The 1st Defendant has alleged, that acting on behalf of the Plaintiffs, he sold the Suit Property to the 2nd Defendant by private treaty for the sum of KES 50,000,000 to offset a loan with Barclays Bank of Kenya (now Absa Kenya PLC) of KES 40,000,000 wherein he instructed the 3rd Defendant firm to act for the Plaintiffs in the said transaction. The 2nd Defendant has alleged that it purchased the Suit Property from the Plaintiffs having acquired it through a Transfer Instrument dated 31st October 2017 executed by the 1st Defendant on behalf of the Plaintiffs pursuant to a Power of Attorney issued by the Plaintiffs to the 1st Defendant. The 3rd Defendant has alleged that it acted for the Plaintiffs through the 1st Defendant and effected instructions pursuant to the Power Attorney issued by the Plaintiffs to the 1st Defendant. The Defendants have provided scanty information and documents considering the substantial sums and moving parts involved in the transaction. For instance, it is alleged that the 1st Defendant made an offer to the 2nd Defendant to purchase the Suit Property and did so yet none of the Defendants has produced either proof of the offer and what the offer was based on. Neither was a Sale Agreement or correspondence confirming the arrangement for the payment of KES 40,000,000 by the 2nd Defendant and KES 10,000,000 directly to the 3rd Defendant. It was the Plaintiffs/Applicants' reasonable belief that if at all the transaction was legitimate which the Plaintiffs categorically deny was legitimate, then at the very least, the complete transaction documents, correspondence, and breakdown on the use of funds ought to be produced to enable the Court to conclusively determine the dispute. It is only after the 2nd Defendant finally filed its documents on 8th June 2023 that it became abundantly clear that neither of the Defendants had any intention of supplying all the transaction documents and information. The documentation and information sought is in the custody, control and possession of the Defendants respectively, who despite request, have failed to provide the same to the Plaintiffs or to produce them in Court.

3. The 1st defendant stated that the Plaintiffs strategy is to delay the hearing of the case has been not to attend court and subsequently challenge the proceedings to achieve delay. One such instance is 27th October 2021 when the Plaintiffs' advocates did not attend court which led to the striking out of the suit further delaying the determination of the case. That the transaction giving rise to this case was done in the year 2007, 16 years ago. Despite the considerable passage of time and moving houses, he has produced the documents of the transaction that he has managed to trace after due diligence, including a transfer dated 31st October 2007, and accounted for the sale amount in his witness statements and documents. The fact the Plaintiffs have not produced the charge and further charge and valuations for the charge and further charge of the suit property is clear proof of the difficulties of tracing the documents and gathering recollections with passage of time.
4. The 2nd defendant stated that the said Application is one of the unending disingenuous methods devised by the Plaintiffs, to frustrate the efficient and expedient disposal of the instant case. That it is in the 1st Defendant's Defence that the information and documents regarding the transaction in question was always provided to the Plaintiffs by the 1st Defendants. The information is not in exclusive the control of the Defendants. That there is no clarity on what the Plaintiffs seek to be produced by the Defendants. The particulars of documents sought are vague and indecisive. That the documents sought are of no relevance to the subject matter of the suit.
5. This court has considered the application and the submissions therein. The plaintiffs vide an application dated 13/9/2023 sought for orders of discovery on oath and production of various documents which the 1st plaintiff believes is being withheld by the defendants and the plaintiffs in the alternative want the defences struck out failure to the discovery. The 1st defendant in his replying affidavit sworn on 5/10/2023 avers that this application is a delay tactic by the plaintiff to muddle the expeditious disposal of the suit. He further states that the cause of action arose in 2007 and



it has been difficult in obtaining some documents such as the charge and further charge and their valuations. The 2nd defendant through its director Sukhminder Kaur Chima swore an affidavit dated 23/11/2023 stating inter alia that discovery of documents is a pre trial process and ought to have been filed before the instant suit was certified ready for hearing. Further, the above Mr. Sukhminder also stated correspondence between the 2nd & 3rd defendant is privileged documents and concluded by stating that they do not intend to ambush the plaintiff with any other documents apart from what the 2nd defendant has filed.

6. Counsel for the 1st defendant submitted that some of the documents requested have been provided such as the Transfer and correspondence on the transaction and proof of payment. Further, counsel accused the plaintiffs of being guilty of laches for not bringing the application immediately after filing this instant suit. Counsel labels the- said application as a fishing expedition and an afterthought. Counsel also argued that the application is meant to circumvent the hearing of this suit and relied in the case of *Eastern Radio Service vs Tiny Tots* (1967 EALR 392) the court held:

"It is not.....in dispute that a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or setting up his Defence unless his failure to comply was done to willful disregard of the order of the court nor is itin dispute that willful means intentional."

7. Counsel for the 2nd defendant also accused the plaintiff of laches and relied on cases such as *Thugi River Estate & Another v National Bank of Kenya & 3 others* (Civil Case 102 of 2019) (2023) KEHC 22007 (KLR) the court held:

"It is at the pre trial 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. However, discovery will be ordered at the appropriate stage, not at the trial as is being sought in this case".

8. Further, Counsel submitted that the documents requested do not pertain to the main issues of the suit and relied on *Magdarine Njeri Kuria vs Kenya Commercial Bank Limited & 2 others* (2021) eKLR . Counsel also reiterated that some documents are privileged as provided by section 134 of the [Evidence Act](#) and concluded that the instant application is a fishing expedition.

9. Having perused the application and the reply thereto and respective submissions, the issue that arises is whether the court can allow the prayers or not? In *Halsbury's Laws of England Vol 13* paragraph 1:

"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".

10. In *Oracle Productions Limited v Decapture Limited & 3 others* (2014) eKLR Kimondo J. held:

"This court is now enjoined to do substantial justice to the parties: it must disregard technical procedures and aim at settling the root of the dispute. That is the spirit and letter of



article 159 of the Constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

11. It is the court’s opinion that the suit will and must have a determination and hearing will proceed subject to the constitutional rights of the plaintiff’s fair hearing as enshrined in Article 50 of the Constitution and I also reiterate Article 159 as quoted in the Oracle case above where justice shall be administered without undue regard to procedural technicalities such as the ones pointed out by both the 1st and 2nd defendant where they aver that pretrial is closed and the matter is certified for hearing. This matter being an old matter and the court will indulge the applicant this time. I shall partly allow the application in that the defendant is to avail the documents mentioned above which can be traced and are in their possession within 14 days from the date of this ruling save for those privileged documents. Costs in the cause.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

