



Continental Credit Finance Limited (In Liquidation) v Wanjohi & 2 others (Environment & Land Case 339 of 2011) [2025] KEELC 944 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 339 OF 2011
OA ANGOTE, J
FEBRUARY 27, 2025**

BETWEEN

CONTINENTAL CREDIT FINANCE LIMITED (IN LIQUIDATION) PLAINTIFF

AND

ISAAC GATHUNGI WANJOHI 1ST DEFENDANT

IGAINYA LIMITED 2ND DEFENDANT

PRINCIPAL REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1. When this matter came up for hearing on 19th February, 2025, Counsel for the 1st and 2nd Defendants objected to the Plaintiff's intention to produce the Gazette Notice No 150-Entry No 294 at page 70, contained in the Kenya Gazette Vol C-No 5 dated the 16th January, 1998 and the Index Register. This Ruling is in respect to the said objection.
2. The parties submitted orally on the matter.
3. The advocate for the 1st and 2nd Defendants submitted that the issue of admissibility of the gazette notice and the Index Register the Plaintiff was proposing to produce in evidence has never been determined; that Counsel for the Plaintiff has admitted to not having given them the documents to enable them inspect them, before making their application on the same and that the present objection is not a review of the previous decisions of this court and the court needs to make a determination on whether the documents are admissible.
4. It was the Defendants' advocate's position that the issues that the Plaintiff seeks to prove by way of the Index and the Gazette Notice are not admissible; that as set out in Section 5 of the [Evidence Act](#), admissibility of a document is determined by its relevance; that the question of whether the company



- shown in the gazette notice ever existed or not was never raised in the pleadings and that consequently, the evidence seeking to deal with the same is irrelevant.
5. According to Counsel, vide their Defence, the 1st and 2nd Defendants' stated that they purchased the suit property from Jamu Impex Enterprises Ltd in 1990; that this was the first time the said company was mentioned in the pleadings; that the Plaintiff should have denied the existence of the company then but did not do so by way of a reply to the Defence and that the matter proceeded on the premise that the said company existed.
 6. It was submitted that pursuant to Order 2 Rule 11(3) of the Civil Procedure Rules, where a party seeks to traverse an allegation, they must do so and when a party has admitted a fact, they must not produce evidence to contradict what they have admitted. In the circumstances, it was submitted, the Gazette Notice contradicts the Plaintiff's own pleadings.
 7. According to the Defendants' counsel, the Gazette notice was signed by Mr Omondi Mbago, who was the then Registrar of Companies, who appeared and testified in the lower court; that vide his testimony reproduced in the Judgment, he confirmed that he signed the transfer of the suit property in favour of the 2nd Defendant and that the said transfer confirmed the existence of Jamu Impex Enterprises Ltd.
 8. Counsel contented that the transfer of the suit property was anchored on the Assignment by Jamu Impex Enterprises Ltd to the 2nd Defendant; that Mr. Omondi Mbago confirmed the Assignment by Jamu Impex Enterprises Ltd and that he cannot later on state that the company did not exist.
 9. The Defendants' counsel urged that admitting the Gazette Notice in evidence and the Index Register will muddle up the case; that the Index Register is not part of the supplementary documents by the Plaintiff and as such, there is no way it can be received into evidence and that the Defence has not in any event been given an opportunity to peruse the Register despite the court's directions in that regard.
 10. Counsel submitted that three crucial witnesses of the Plaintiff have testified; that the Defendant has not been given an opportunity to cross-examine those witnesses on these crucial documents and that nonetheless, these events happened in 1997 and that it is improper for the Plaintiff to have waited for 28 years before raising the issue.
 11. In response, the Plaintiff's counsel stated that they seek to produce the Gazette Notice; that the Index Register only explains the context of the entries in the Gazette Notice; that the issue being raised now was raised before the court [Okongo J] on the 7th December, 2022 whereas the issue of admissibility of the documents was addressed by the court [Mogeni J] on the 3rd June, 2024 who allowed the documents to be produced and that the issue of relevance will be addressed in the Judgment.
 12. Counsel for the Plaintiff submitted that the office of the Official Receiver should be differentiated from that of the Registrar of Companies; that the only document they are producing is the Gazette Notice, not the Index Register and that they are willing to recall all the witnesses if the Defence so wishes.
 13. In a rejoinder, Counsel for the 1st and 2nd Defendants stated that the question of relevance and admissibility have never been argued before the court and that as regards the Ruling by Okong'o J, the same was with respect to whether the Plaintiff had the right to introduce the documents at that stage and did not deal with the admissibility of the documents.
 14. Counsel relied on the Court of Appeal decision in Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015]eKLR, where the court noted that the filing of a document does not dispense with formal proof and that a document is filed first and thereafter produced as an exhibit and the mere admission is not proof of the document. Counsel submitted that a document is proved or disproved when the court applies its mind to it.



15. It was urged that whether a document is public or not, the document must adhere to the right of a fair hearing; that the right is violated when it is not possible for it to be tested at the hearing; that the Plaintiff had the opportunity to rebut the issue in a rejoinder within 7 days but failed to do so and that the Plaintiff admitted the existence of the company.

Analysis and Determination

16. The court has considered the pleadings, the proceedings and the rival arguments by the parties. The two issues that arise for determination are:
- i. Whether the Objection is res judicata,? and if not?
 - ii. Whether it is merited?
17. It was submitted by the Plaintiff that the objection by the 1st and 2nd Defendants' counsel was already dealt with vide the Rulings of 7th December, 2022 and 3rd June, 2024. This contention, if correct, means that any attempt to re-determine the issue will contravene the principle of res judicata.
18. Set out in Section 7 of the *Civil Procedure Act*, the doctrine of res judicata prohibits the re-determination of a suit, or, like in this instance, an issue between the same parties litigating under the same title where the issue has been heard and finally determined. [See John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)]
19. The court has considered the record. The Ruling of 7th December, 2022 (Okongo J) was pursuant to the Motion dated 2nd July, 2021 where the Plaintiff sought, inter-alia, to re-open its case and be allowed to file its supplementary bundle of documents dated 21st June, 2021.
20. This application was objected to by the 1st and 2nd Defendants on the grounds that there was no sufficient basis for the court to exercise its discretion to re-open the Plaintiff's case; that the evidence sought to be adduced did not qualify as new evidence having at all times been in the Plaintiff's custody and that the same should have been produced by the Plaintiff before it closed its case.
21. Vide its determination, the court found that the Plaintiff had made a case for the re-opening of its case and the production of the Gazette Notice. The court noted that the Defence would not be prejudiced, its case having not proceeded and they would have an opportunity to respond to the same while conducting their defence. The court, Okongo J, held as follows:

“The Plaintiff has demonstrated that the said Gazette Notice is material and relevant to its case...

I am of the view that having found that the document is relevant to the issues before the court and that no prejudice would be occasioned to the Defendants by taking further evidence in relation thereto, it would amount to suppression of evidence if I was to decline the request by the Plaintiff for the re-opening of its case. To level the playing field, I will grant corresponding leave to the Defendants to file further or additional list and bundle of documents and/or witness statement if necessary.”

22. The Ruling of 3rd June, 2024, Mogeni J, arose after the 1st and 2nd Defendants' Counsel objected to the production of the Index Register, and the Kenya Gazette Notice by Mr Felix Naphtali Mutethie, a clerk at the Business Registration Service. The objection was on the basis that the supplementary bundle of documents which the Plaintiff had adduced only had one of the four documents sought to



- be adduced being the Gazette Notice, and that the witness was adducing the said documents without having sworn a witness statement.
23. The Defendants further sought to be given an opportunity to examine the documents to enable them cross-examine the witness, and lastly that that the documents should be produced by their makers.
 24. The court, in overruling the objection noted that the Plaintiff had already been granted leave to file a supplementary bundle of documents; that pursuant to Section 147 of the *Evidence Act*, a party could adduce evidence without being a maker and that no prejudice would be occasioned to the production of the documents which are public documents.
 25. The Ruling of 7th December, 2022 (Okongo J) was concerned with the re-opening of the case and filing of additional evidence. On the other hand, the Ruling of 3rd June, 2024 dealt with the issue of whether the documents could be produced by a person who had not recorded a statement, and whether it was necessary to call the person who authorized/authored the publication to testify.
 26. The Ruling of Okongo J dealt with the issue of the relevance of the Kenya Gazette that was annexed on the supplementary bundle of documents. In its Ruling, the court stated that the said Gazette Notice was relevant and material to the Plaintiff's case.
 27. However, the relevance of the Index Register, which is not part of documents that were filed by the Plaintiff was not addressed. That being so, save for the Index Register, this court will not revisit the issue of whether the said gazette notice is relevant or not, the court having already addressed the same.
 28. The objection before this court turns on the admissibility of documents sought to be produced by the Plaintiff, being the Gazette Notice and the Index Register, an issue that was not raised before Okongo J and Mogeni J. The court has keenly considered the Ruling of 7th December, 2022, and noted that the court allowed the Plaintiff to file supplementary documents as per their bundle of 21st June, 2021.
 29. Vide its oral submissions on this matter, Counsel for the Plaintiff has informed this court that it only intends to produce the Gazette Notice. That should be the position. Indeed, no leave has been sought for the filing of any other additional document. This court will therefore limit its determination to the admissibility of the Gazette Notice.
 30. Counsel for the 1st and 2nd Defendants contended that what is sought to be proved by the document, being the non-existence of Jamu Impex Enterprises Ltd, is irrelevant and consequently, inadmissible; that the Plaintiff should have denied the existence of the company by way of a reply after being served with the Defence and that having failed to do so, the matter proceeded on the premise that there was an admission by the Plaintiff that the company existed.
 31. Counsel asserts that the 1st and 2nd Defendants' rights to a fair trial will be violated if the gazette notice is produced by the Plaintiff, and on that basis, it was argued, the document is not admissible.
 32. The general restriction of admissibility of evidence is found in Section 5 of the *Evidence Act*, which provides as follows:

“Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.”



33. Discussing this, the Indian Supreme Court of India in the case of Arjun Panditrao Khotkar vs Kailash Kushanrao, (2020) 3 SCC 216 observed as follows:

“Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-i. admissibility; ii. Relevancy and iii. Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with.”

34. Halsbury’s Laws of England (4th Ed) Vol 17 at para 5 states that:

“The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (i) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another.”(emphasis mine)”

35. As to the manner of determining relevance, the court in Concord Insurance Co Ltd vs NIC Bank Ltd[2013] KEHC 3571 (KLR), opined that relevance must be tested by the pleadings.

36. By way of brief background, the Plaintiff instituted this suit seeking among others permanent injunctive orders restraining the registration of the transfer of L.R No 209/8161 comprised in Grant L.R 27771/1 (the suit property) to the 1st and 2nd Defendants, and a declaration that any transfer in respect thereof is null and void, orders restraining the Defendants from receiving rent from the suit property and orders compelling the Defendants to deliver to the Plaintiff the original grant in respect of the suit property.

37. It is the Plaintiff’s case that they held a charge over the suit property; that the borrower failed to repay the principal sum and asked the Plaintiff to recover the debt by collecting rents from the ten maisonettes erected on the property and that sometime in December, 2002, the original grant to the suit got lost during its delivery from the firm of Advocates who had custody of the same to the Office of the Official Receiver at Sheria House.

38. The Plaintiff states that the 1st and 2nd Defendants appeared with the original grant before the Office of the Registrar of Titles and thereafter lodged a caveat on the property. The Plaintiff contends that it did not transfer the suit property to the 1st and 2nd Defendants and as such, they were in illegal possession of the title to the suit property.

39. Vide their Defence, the 1st and 2nd Defendants stated that they acquired the suit property from Jamu Impex Enterprises Ltd which had acquired the same from a public auction in which the Plaintiff sold the property in exercise of its statutory power of sale; that after the sale aforesaid, Jamu Impex Enterprises Ltd assigned its rights thereunder to the 1st and 2nd Defendants and that pursuant to the execution of an Assignment, the Plaintiff handed over to Jamu Impex Enterprises Ltd the title document, who in turn gave the same to the Defendants.



40. The Plaintiff's counsel argued that the Plaintiff should have filed a reply to the Defence and denied the existence of Jamu Impex Enterprises Limited, and that having not done so, the Plaintiff admitted the existence of the said company.
41. Order 2 Rule 11(3) of the Civil Procedure Rules makes reference to denial of allegations made in a plaint or counterclaim which must be specifically traversed. Order 2 Rule 12 (3) of the Civil Procedure Rules provides that "there can be no joinder of issue on a plaint or counterclaim."
42. In respect to a reply to a Defence, Order 2 Rule 12 (1) of the Civil Procedure Rules provides that if there is no reply to a Defence, there is a joinder of issue on that Defence. The reading of those provisions shows that its only allegations of fact made in a Plaint and Counterclaim that must be specifically traversed, and not those made in a Defence.
43. Given that the Plaintiff asserts in the Plaint that it did not sell the suit property at all, and the Defendants having asserted in the Defence that the land was purchased by Jamu Impex Enterprises Ltd before Assigning the same to the 2nd Defendant, it follows that there is a joinder of issue on whether indeed the Plaintiff sold the suit property as alleged by the Defence.
44. A 'joinder of issue' in a civil suit occurs when the parties have clearly stated their opposing positions, and the dispute is ready for trial. It happens when the Defendant has responded to the Plaintiff's claims with a pleading, such as a Defence, and there are material facts or legal issues in dispute that need to be decided by the court. These could be either 'joinder of issue on facts' or 'joinder of issue on law' or both.
45. Once the 'joinder of issue' is complete, the case is considered "at issue," meaning it is ready to proceed to trial. That is what happened in this case when the Defendant filed its Defence. The Plaintiff was not under any legal obligation to deny the issues raised in the Defence by way of a reply.
46. Indeed, the fact that the issues raised in the Defence were not responded to by way of a reply does not amount to admission of those issues. However, the same would have been different if the Defendants had filed a counterclaim, which is not the case.
47. In any event, the court is well minded of its duty to, in determining a matter, disregard any evidence that it ultimately considers to be contrary to the pleadings put forth by a party. This can be done at the time the court is writing its Judgment, and after framing the issues for determination.
48. As to the contention regarding a breach of the right to a fair hearing, it is noted that after the Plaintiff was granted leave to file the Gazette Notice, corresponding leave was granted to the 1st and 2nd Defendants to file any other documents in response. Additionally, the Plaintiff has expressed its willingness to recall any witnesses, if required, for purposes of cross-examination on this new evidence.
49. Ultimately, the court finds the objection to the admissibility of the Gazette Notice on grounds of irrelevance to be unmerited. However, to enable the Defendants prepare for the evidence that will be adduced by the witness who will produce the Gazette Notice, it is imperative that the witness files and serves a witness statement.
50. The Defendants are at liberty to recall any witness for cross examination limited to the contents of the Gazette Notice. For avoidance of doubt, the only document to be produced by the witness is in respect of the documents in the Plaintiff's Supplementary List of Documents dated 21st June, 2021.
51. For those reasons, the objection by the Defendants' counsel is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.



O. A. ANGOTE

JUDGE

In the presence of;

Ms Osicho and Ms Mumo for Plaintiff

Ms Maina and Dr. Arwa for 1st and 2nd Defendant

Court Assistant: Tracy

