



Dee-Em Investments Ltd v Siimol Investments Limited & 7 others (Environment and Land Case Civil Suit 306 of 2019 & Environment & Land Case 139 & 145 of 2019 (Consolidated)) [2025] KEELC 767 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE CIVIL SUIT 306 OF 2019 &
ENVIRONMENT & LAND CASE 139 & 145 OF 2019 (CONSOLIDATED)**

JA MOGENI, J

FEBRUARY 20, 2025

BETWEEN

DEE-EM INVESTMENTS LTD PLAINTIFF

AND

SIIMBOL INVESTMENTS LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

MINISTRY OF LANDS & PHYSICAL PLANNING 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

KARSAN MEGHJI RABADIYA 5TH DEFENDANT

NARAN MEEGHJI RABADIYA 6TH DEFENDANT

BLUE NILE ROLLING MILLS LIMITED 7TH DEFENDANT

NATIONAL LAND COMMISSION 8TH DEFENDANT

RULING

1. Before me is the Application dated 19/11/2024 brought under Article 50 and Article 159 of the [Constitution](#), Sections 1A, 1B, 3A and 95 of the [Civil Procedure Act](#), Order 34 Rule 3, Order 11 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules by the 1st Defendant seeking the following prayers:-
 1. Spent
 2. That this Honourable Court be pleased to stay the proceedings in this matter and more specifically the Further Hearing scheduled for 20th November 2024.



3. That this Honourable Court be pleased to grant leave to the 1st Defendant/Applicant to file and serve further and additional documents to aid his case to file
4. That upon Prayer 3 above being allowed, this Honorable Court be pleased to allow the supplementary list of documents and documents marked as annexure SIL 2 into record and the same be deemed as properly filed.
5. That cost of the Application be provided for.
2. In its grounds in support of the Application together with the Supporting Affidavit sworn by Gerald Kariuki Wabacha on even date, the 1st Defendant/Applicant blames his Advocate for failing to file the documents critical to its case. That he had now changed Advocates and that the ills and failure of an Advocate should not be blamed on the litigant.
3. The Application is opposed by both the Plaintiff and the 7th Defendant who filed Grounds of Opposition. The 7th Defendant filed Grounds of Opposition dated 19/11/2024 and has averred that the 1st Defendant did not file any Defence in the instant suit and therefore the Application is not grounded on any pleadings. Further that the Application is brought after inordinate delay and no explanation has been proffered and that it is time-barred. That the Application should be dismissed for being an abuse of the Court process.
4. On its part, the Plaintiff's Grounds of Opposition dated 20/11/2024. The Plaintiff contends that the 1st Defendant has always had a Counsel since the filing of this suit in 2018 and that their request to file documents six years after the filing of the suit and way after the close of the pleadings is an afterthought.
5. At the same time, the Application is filed after the Plaintiff has substantially prosecuted its case and so the import of the Application is to seal loopholes established during examination of the Plaintiff's witnesses.
6. The Plaintiff contends that it had no benefit of perusing the alleged documents prior to the commencement of the Plaintiff's case nor its witnesses and allowing the 1st Defendant to file the documents will necessitate the Plaintiff's witnesses being recalled and this will be detrimental to the Plaintiff.
7. That the Application by the 1st Defendant is unmerited since it seeks to further delay the determination of the matter contrary to Article 159(2) (b) of the Constitution as was held in the case of Bloggers Association of Kenya (Bake) Vs. Attorney General & 5 Others [2018]eKLR and that the Application is an abuse of Court processes and should be dismissed.
8. In response to the Plaintiff's Grounds of Opposition and the 7th Defendant's Grounds of Opposition, the 1st Defendant filed a Further Affidavit sworn on 31/01/2025 by one Gerald Kariuki Wabacha the Director of the 1st Defendant.
9. In the Further Affidavit, the 1st Defendant reiterated the contents of the Supporting Affidavit and also added that it filed a Defense plus a witness statement and that the instant Application is premised on the issue of the insufficiency of the said Defense and witness statement.
10. That the insufficiency came about following the consolidation of the proceedings on 12/07/2023 where the matters were consolidated and the lead file in the matter became ELC 306 of 2018 and the rest of the parties in the other matters became Defendants. Consequently the respective claims in the consolidated matters will be determined within the consolidated file. The 1st Defendant states that the



Plaintiff has claimed that the title initially issued to the 1st Defendant was done irregularly and is thus challenging its validity. That the documents it seeks to file address and challenge the Plaintiff's position.

11. Further that no party will be prejudiced in the matter as they will be accorded such opportunity to cross examine witnesses. Further the Plaintiff will not be prejudiced since from the proceedings it only closed its case on 20/11/2024 upon realizing that the 2nd, 3rd and 4th Defendants were calling the same expert witness as itself. That in any case the 1st Defendant would have no objection to have the Plaintiff reopen its case despite having closed it.
12. The 1st Defendant has averred that the accusations in the Plaint are grave since they are founded on particulars of fraud and that it is trite that such allegations cannot be defended without getting to the root of the title. It is further averred by the 1st Defendant that the documents it seeks to introduce will greatly aid this Court in getting to the root of the title hence determine its authenticity and genuineness hence the importance that the supplementary documents be allowed onto the record.
13. It is the 1st Defendant's case that in the event this Application is not allowed and the orders sought not granted, the 1st Defendant stands to suffer irreparably by dint of the matter proceeding to hearing without proper documents to support the defense. That there is no prejudice that will befall the Respondent since investigation of title will aid this Court dispense justice and get to the truth of the matter.
14. The parties agreed to canvass the Application vide written submissions and the Court issued directions on the filing of submissions. The Applicant filed their submission dated 10/02/2024 and the Plaintiff filed their submissions dated 16/02/2025.

Analysis and Determination

15. I have considered the Affidavit evidence, the annexures thereto, the submissions by Counsels and the applicable law. This Honourable Court and precedents from the Superior Courts have rendered themselves on the import of Order 7 Rule 5 of the Civil Procedure Rules on the principles for introducing new or additional evidence. However, there are exceptions to the rule where it is shown that the Application has been made very late in the day, where the opposite party had testified and called all his witnesses some of whom may have died or their memories have failed or that the proposed new documents if allowed would be prejudicial to the opposite party.
16. The provisions of Order 7 rule 5 of the Civil Procedure Rules provide as follows:-

“The defence and counter claim filed under rule 1 and 2 shall be accompanied by –

 - a. An affidavit under Order 4 rule 1(2) where there is a counter claim;
 - b. A list of witnesses to be called at the trial.
 - c. Written statements signed by the witnesses except expert witness; and
 - d. Copies of documents to be relied on at the trial.

Provided that statement under sub-rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under order 11.”
17. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the Court to file the said documents before the hearing of the case commences. That is one of the



purposes for the directions that a Court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the Court to file such statements and/or documents before the hearing of the Plaintiff's case.

18. In the present case, the Counsel on record did confirm to Judge Kemei that they were ready to proceed with the hearing right from the first day of hearing on 26/07/2023 and that they had complied with Order 11 of the Civil Procedure Rules. It was on the basis of the information given to the Court that the Judge scheduled the subsequent hearing dates and the case commenced hearing on 18/03/2024 even on this date Counsel for the 1st Defendant Mr Ndungu Mwaura confirmed that they were ready to proceed with one witness.
19. In the case of P.H. Ogola Onyango t/a PittsConsult Consulting Engineers Vs. Daniel Githegi g/a Quantalysis [2002] eKLR Waweru J. when faced with a similar situation stated as follows:-

“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the Court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has closed its case. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.
20. In this case, the hearing of the Plaintiff's case commenced on 18/03/2024 and closed on 20/11/2024. The supplementary documents that the 1st Defendant seeks to produce have been in the custody of the 1st Defendant spanning a period of over ten years since 1991 to 2019 this include Letter of Allotment, Part Development Plan, correspondence between 1st Defendant and National Land Commission, copies of cheques dating back to 2016, Deed Plans, Bundles of Receipts, Maps among others. It has not been shown by the 1st Defendant that these documents were not in their custody. All the documents were made and were within the custody of the 1st Defendant before this case was filed. Except for the letters dated 4th and 5th November 2024 which were forwarding copies of the PDP and the second letter was confirming the folio and deed plan number of the suit property, which information as earlier stated was in the custody of the 1st Defendant all along.
21. In making my decision I will rely on the Supreme Court decision of Raila Odinga & 5 Others Vs. IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR where the Court considered the prejudice that would be occasioned to the adverse parties and thereby declined to allow additional evidence filed outside the contemplation of the rules. Justice Sila Munyao in the case of Johana Kipkemei Too Vs. Hellen Tum [2014] eKLR, declined an Application by the Defendant for leave to furnish a supplementary list of witnesses and documents after the Plaintiffs had testified and closed their case. I am of the convicted view that this is the correct decision and position in a matter such as this one I am handling. I am thus convinced by the position taken by the Plaintiff and the 7th Defendant that allowing the supplementary documents would be prejudicial to the Plaintiff if I allowed the instant Application.
22. As already stated these documents have been in the custody of the 1st Defendant since 1991 so the question that begs to be answered is why did the 1st Defendant not file them and share with the Plaintiff during pre-trial conference? This is clear ambush and a gap filling strategy which is not healthy in civil cases and if allowed would lead to greater backlogs since matters would never be concluded, since every so often parties would be making a case for production of additional documents which they have had



all along in their custody so as to have the so called last laugh. God forbid that this Court would be used to perpetuate such injustice.

23. It is interesting that the 1st Defendant chooses to blame his lawyer. This issue has come up many times and the Courts have pronounced themselves on it. Mine would just but be an additional voice to amplify the position louder if not for all but for the 1st Defendant to understand; that although it is trite law that mistakes of Counsel should not be visited upon an innocent Applicant, yet like many other rules, this rule does have an exception to wit that a litigant would be bound by the errors and omissions of Counsel if the litigant participated or remained indifferent over the errors and omissions of his Counsel. I am persuaded by the Court's view on this that was made in the case of *Rukenya Buuri Vs. M'arimi Minyora & 2 Others* [2018] eKLR. That a case belonged to a litigant and if an Advocate was in breach of his or her professional duties, there were avenues to seek remedy.
24. Indeed the Overriding Objective of this Court is as provided for under Section 3 of the *Environment and Land Court Act* is:-

“ ... to facilitate the just, expeditious, proportionate and accessible resolution of disputes ...”
25. Thus, litigation has to be carried out efficiently and also timeously which cannot happen if we keep entertaining Applications such as this one whose purpose is solely to delay the timely delivery of justice. Land matters can be taxing, emotionally and economically draining and the faster we settle the disputes in an efficient, effective and timely manner the better for all those involved.
26. It is therefore my considered opinion that these documents do not form new and compelling evidence that would persuade this Court to exercise its discretion to allow the same to be relied upon by the 1st Defendant at this stage of the trial.
27. If I were to allow the Application then this Court would be perpetrating injustice and would prejudice the Plaintiff's case. I therefore find the Application dated November 19, 2024 unmerited and dismiss it altogether. I award costs of the Application to the Plaintiff and the 7th Defendant.
28. This being a part-heard matter the hearing shall be on May 14, 2025. Plaintiff to serve parties absent.
It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

Judgment read in virtual Court in the presence of:

Mr. Mola for the Plaintiff

Mr. Gachau for the 1st Defendant

2nd – 6th Defendants – Absent

Mr. Bundotich for the 7th Defendant

8th Defendant – Absent

Mr. Ojoo for the 9th Defendant



Ms Lillian - Court Assistant

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MOGENIJ

JUDGE

