



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngugi & another v Fear & 4 others (Environment & Land Case  
1321 of 2005 & Environment and Land Case Civil Suit 424 & 437 of 2011  
(Consolidated)) [2023] KEELC 16481 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16481 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 1321 OF 2005 & ENVIRONMENT  
AND LAND CASE CIVIL SUIT 424 & 437 OF 2011 (CONSOLIDATED)**

**MD MWANGI, J**

**MARCH 21, 2023**

**BETWEEN**

**PIUS NGUGI ..... PLAINTIFF**

**AND**

**HELLEN FEAR ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 424 OF 2011**

**BETWEEN**

**MUKTAR SAMAN OLOW ..... PLAINTIFF**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 437 OF 2011**

**BETWEEN**

**PIUS NGUGI ..... 1<sup>ST</sup> PLAINTIFF**

**ANGELINE NGUGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**



MUKTAR SAMAN OLOW ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH KIMANI T/A PYRAMID AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT

## RULING

### Background.

1. On February 24, 2023 when this case came up for hearing, and the plaintiffs sought to present their first witness, Mr Amany, Advocate for the 2<sup>nd</sup> defendant raised an objection to the proposed witness being the 1<sup>st</sup> witness in the plaintiffs' case. Mr Amany argued that the rules of procedure dictated that the plaintiffs' evidence be corroborated other witnesses; meaning that the plaintiffs should testify first in their case before calling other witnesses.
2. It was the 2<sup>nd</sup> Defendant's position that the rules are clear on the said issue. He insisted that the Plaintiff should introduce their case, lay basis and tender their evidence first.
3. Secondly, the Advocate for the 2<sup>nd</sup> Defendant pointed out that the proposed witness is a detective, Chief Inspector of Police whose evidence was that he was instructed by the Director of Public Prosecutions and that he is still in service. The Advocate invited the court to make a decision of investigating officers being used in civil cases.
4. Additionally, the Advocate reiterated that the evidence of the witness if at all, can only come after the Plaintiffs' testimony.
5. On the question whether experts can testify before the Plaintiff, Counsel referred the court to the decision in the case of Aden Muktar v County Government of Garissa). Counsel reiterated that there are rules that guide proceedings before the court. He pointed out that order 18 rule 1 of the Civil Procedure Rules explains who has the right to begin in a hearing.
6. It was the 2<sup>nd</sup> defendant's submissions that since the plaintiffs were not in court, the court had only two options. The 1<sup>st</sup> one being to dismiss the case. The second option was to adjourn the case.

### Response by the Plaintiffs.

7. In response to the objection by the 2<sup>nd</sup> defendant, Mr Kiragu Kimani Advocate for the Plaintiff termed the objection by the 2<sup>nd</sup> Defendant as insincere, merely calculated to occasion an adjournment of the hearing. He submitted that there is no rule of law that requires a Plaintiff to testify before calling his other witnesses or even at all.
8. Mr. Kiragu further stated that there's no property in a witness. 'Any person' can testify, including government employees. He asserted that there is no authority submitted before the court that a serving investigator cannot testify in a civil case. No law had been cited by the 2<sup>nd</sup> defendant to support the averment.
9. It was the plaintiffs' further submissions that documents are ordinarily produced by their makers, or by those most closely associated with them.
10. In any event, Mr Kiragu submitted that each witness is subject to cross-examination. The submission that the Plaintiff must testify first has no basis in law.



11. In reference to the provisions of order 18 of the Civil Procedure Rules, counsel for the plaintiffs pointed out that it only guided on which party has the right to begin. Even the party with the right to begin can elect to produce evidence through his witnesses without necessarily testifying in person. He further argued that the order 18 gives the court the discretion to guide on the order of proceedings.
12. The order of calling witnesses, the counsel for the plaintiffs concluded, is the preserve of the party.
13. Finally, Counsel referred the court to Court of Appeal decision in Julianne Ulrike Stamm v Tiwi Beach Hotel Ltd (1988) eKLR and the decision of the ELC Court sitting at Kitale in Sofie Feis Caroline Lwangu v Benson Wafula Ndote (2022) eKLR in support of his position.

#### **Response by the 4<sup>th</sup> and 5<sup>th</sup> Defendants**

14. On his part, Mr Allan Kamau, Advocate for the 4<sup>th</sup> and 5<sup>th</sup> Defendants supported the Plaintiffs' position that a party can appear in court either in person or by a recognized agent. He too made reference to the Court of Appeal decision in the Julianne Ulrike Stamm case (supra) and averred that the court was clear that a Plaintiff can prove his case through his witness(s).
15. Section 125 of the Evidence Act, according to counsel for the 4<sup>th</sup> & 5<sup>th</sup> defendants is clear on the competence of witnesses unless there be impediments cited therein.
16. Mr. Kamau submitted that it was upon the party on whom the burden of proof lies to choose how to discharge the burden.

#### **Rejoinder by the Advocate for the 2<sup>nd</sup> Defendant.**

17. In his brief rejoinder, Mr Amanyia submitted that the facts in the Court of Appeal decision cited by the Plaintiffs and the 4<sup>th</sup> & 5<sup>th</sup> Defendants were different from what was before the court. He denied that his objection was meant to occasion an adjournment as alleged by the Plaintiffs' Advocate.
18. Mr Amanyia reiterated that the Plaintiffs ought to testify first in their case. He submitted that under order 18, the rules were clear that it was the Plaintiff to begin. The documents that were to be produced in the case belonged to the Plaintiff and he is the one who should produce and present them to court. The basis of the case needed to be laid down before the court by the Plaintiff himself.
19. Mr Amanyia emphasized that his objection was not on the production of documents, which issue is governed by the rules anyway. Further, the competency of the witness was not the issue at that point in time too.
20. Counsel for the 2<sup>nd</sup> defendant urged the court to uphold his objection and direct that either of the two Plaintiffs testify first but the other witnesses to testify thereafter after the Plaintiffs had laid the basis of their case.

#### **Issues for determination .**

21. Having keenly listened to the objection by the Advocate for the 2<sup>nd</sup> Defendant and the responses by the Advocates for the Plaintiffs and the 4<sup>th</sup> & 5<sup>th</sup> Defendants respectively, the issues for determination in this case are two, namely: -
  - i. Whether the Plaintiffs are obligated to testify in their case first before calling any other witness (s).
  - ii. Whether a serving Criminal Investigation Officer can testify in a civil case.



## **Analysis and Determination .**

22. Conscious that this is a live matter before me, I will be deliberately economical with my words in this ruling in order not to prejudice or embarrass the hearing of the case in any way.

### **A. Whether the Plaintiffs are obligated to testify in their case first before calling any other witness (s).**

23. On the first issue, this court's decision is that a plaintiff does not have to personally be present or personally testify in his case. It is allowable in law that a party may be represented by his recognized agent or by an Advocate duly appointed to act on his behalf. This applies to a defendant too or a party in a case before the court for that matter. A party can prove his case by the evidence of a witness (s) other than himself or by any other means. The Court of Appeal was clear on this point in the case of [\*Julianne Ulrike Stamm v Tiwi Beach Hotel Ltd\*](#) (1988) eKLR.

### **B. Whether a serving Criminal Investigation Officer can testify in a Civil Case.**

24. On the 2<sup>nd</sup> issue, section 125 of the [\*Evidence Act\*](#) suffices. It provides that: -

“ All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”

25. The phrase “any persons” in the said section does not exclude serving public officers nor Criminal Investigating Officers for that matter.

26. The conclusion therefore is that the plaintiffs are at liberty to call any witness they wish in the order they deem appropriate to their case. It is upon them to prove their case in the best manner they know how to.

27 It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2023.**

**MD MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr Kiragu Kimani with Mr Opere for the plaintiffs.

No appearance for the defendants.

Court Assistant: Yvette.

