



Kaburu (Suing as the guardian ad litem and heir of the Estate of the Late Isaiah Mabellini) v Mabellini & 3 others (Environment & Land Case 65 of 2018) [2025] KEELC 1424 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 65 OF 2018
FM NJOROGE, J
MARCH 20, 2025**

BETWEEN

ANN KANANU KABURU (SUING AS THE GUARDIAN AD LITEM AND HEIR OF THE ESTATE OF THE LATE ISAIAH MABELLINI) PLAINTIFF

AND

ORIANO MABELLINI & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS DEFENDANT

RULING

1. The objection subject matter of this ruling was raised by Ms Chepkwony for the plaintiff. She objects to production of 4 documents intended to be produced by DW1. These are as follows:
 - a. DMFI (C) - a document at page 39 said to be an instruction signed by Isaia Mabellini which is in Italian language;
 - b. DMF(D) - a document said to be an instruction signed by Isaia Mabellini and others;
 - c. DMFI (E) – an acknowledgment said to have been signed by Isaiah Mabellini and two others;
 - d. DMFI (F) - a purported sales contract said to have been signed between Isaiah Mabellini and Oriano Mabellini.
2. Her objection is premised on the following reasons: the documents are not certified or authenticated or translated by a recognized person as required by Section 83 of the *Evidence Act* 1851 of the UK which forms part of our laws which requires certification of foreign documents by a notary public, that Section 83 presumes the genuineness of documents once they comply with Section 7 of that Act. She argued that the documents in question can not help the court as they are in a foreign language; she applied for them to be struck out. Mr Munga had no objection to their production. Mr Abubakar too.



3. In reply Mr Muchoki for the 1st defendant argued that the documents were filed in 2019 and on January 2019 the parties went through pre trials and with no objection from the plaintiffs. Further that the documents were introduced by the plaintiff in her bundle and that the Italian versions are to be located at page 541 -564 of the plaintiff's consolidated bundle. Mr Muchoki stressed that the essence of translation is to have the documents in a language that the court and the parties understand, and nothing takes away the court's discretion to admit the said documents. Further, Articles 50 and 159 are meant to facilitate the court in the exercise of its discretion to admit the documents or not; that the court's focus is on relevance or irrelevance; that translation does not go into the substance; that the context should be taken into consideration; that even in the plaintiffs' pleadings, it is not stated that the translations do not reflect the true content of the originals. Further, he argued that the mere admission does not mean that a document has been proved; that the court can even order a translation; that the question is the veracity of the document; that the 1st defendant attempted to avail certified copies and this court declined; that the defendants will be disadvantaged on a technicality.
4. Mr Abubakar supported Mr Muchoki's arguments, stating that no objection should be raised once the hearing begins; that under Part 3 of the Evidence Act there is no provision for certification or translation; that only public foreign documents require certification under Section 83 KEA; that the English Act cited is inapplicable in Kenya; that translation is merely a procedural requirement.

Order 7 rule 5 is as follows:

5. Documents to accompany defence or counterclaim [Order 7, rule 5]

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

5. On a preliminary basis and having regard to Order 7 rule 5 CPR, I must decline to attach any importance to Mr Muchoki's arguments that the same documents Ms Chepkwony has objected to are also exhibited by the plaintiff, as that exhibition is for a different purpose: proof that the signatures on them were not made by Isaia Mabellini. To that extent, they were not meant to be produced as exhibits to prove the defendants' case and to consider them as such is an injustice to the plaintiff. It is just fair to have each party rely on the integrity of their own bundle of documents.
6. The next point to be addressed is that this court declined to allow the translations to be filed. This is an admission by the 1st defendant that they attempted to roll back the clock in this case in order to introduce documents that they had not produced at the discovery stage. On that aspect this court can not be blamed for the defendant's default, but the admission points to an acknowledgment that there is something wrong with the documents intended to be produced by the 1st defendant, which they unsuccessfully tried to correct; they are in a foreign language and have not been translated. Article 7(2) of the Constitution of Kenya 2010 provides that the official languages of this country are English and Kiswahili. The documents, while not translated, are neither of any help to any of the parties who do not understand the Italian language, nor to the court. They are only of help to the defendants. The failure to avail translations is the defendants' fault. The translations that would have been recognized



are those that would be certified by a person well versed in Italian language. The ones provided are not so certified. The court is not able to know whether there is any truthful translation. The court can not await the defendant to go about seeking certified translations he ought to have obtained before the trial began. It does not bring any honour and dignity and respect for the letter and spirit of *the Constitution* of Kenya 2010, or for the disadvantaged persons who do not know Italian, to have documents in a foreign language admitted into evidence, and then start seeking a way in which the documents can be translated by a credible interpreter, all this while the case is at a standstill, with the plaintiff, who has closed his case being compel to wait longer for the eventual fate of the litigation journey, whatever it may be. Contrary to the opinion of defence counsels Abubakar and Muchoki for the defendants, much prejudice would be occasioned to the plaintiff due to the delay of this case filed in 2018, now clocking its 6th year of age. Accepting the untranslated versions now is of no value to the court and to the parties. There is no manner in which the contents therein would be proved as they are in a language the court does not understand and which is not constitutionally recognized for official purposes. Even the filing of those documents without a certified translation was a complete error in the first place. Also, their inclusion in the bundle did not imply that they have to be accepted by the court as exhibits. The court accepts documents it thinks will help in the determination of the case. Anything else is as good as a blank sheet of paper in the case. Argument has been made that the court can order a translation. That is foisting the defendants' task on the shoulders of the court and it will not be permitted, more so because it leads to a picture of a skewed arena in which the court is no longer an impartial arbiter in the eyes of the party who may feel it has gone overboard in assisting the defendant land some otherwise unattainable evidence into this ship of this case. Applying Articles 50 and 159 as urged by Mr. Muchoki to cure ineptitude on the defendants' part is unacceptable precedent likely to encourage sloppiness in handling of litigation while the defendants knew the acceptable language all along. Consequently, I uphold Ms. Chepkwony's objection and I order that the said documents shall not be produced by DW1. Hearing shall proceed on the dates earlier scheduled that is 19th May, 2025 and 16th and 17th June 2025.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 20TH DAY OF MARCH 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

