



**Omanwa v Kanyuku & 2 others; Maina (Plaintiff to the Counterclaim);
Omanwa & 4 others (Defendant to the Counterclaim) (Environment & Land
Case E078 of 2022) [2023] KEELC 17834 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E078 OF 2022**

**JO MBOYA, J
MAY 11, 2023**

BETWEEN

HEDRICK MASAKI OMANWA PLAINTIFF

AND

JULIUS KANYUKU 1ST DEFENDANT

CYRUS KIBERA MAINA 2ND DEFENDANT

EMBAKASI RANCHING CO LTD 3RD DEFENDANT

AND

CYRUS KIBERA MAINA PLAINTIFF TO THE COUNTERCLAIM

AND

HEDRICK MASAKI OMANWA DEFENDANT TO THE COUNTERCLAIM

EMBAKASI RANCHING CO LTD DEFENDANT TO THE COUNTERCLAIM

NATIONAL LAND COMMISSION ... DEFENDANT TO THE COUNTERCLAIM

CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM

HON ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

RULING

1. Vide Notice of Motion Application dated the 9th February 2023, the 2nd Defendant/Applicant (who is also the counter claimer) has approached the Honourable court seeking for the following reliefs;
 - i.(Spent).



- ii. The Honorable court be pleased to issue witness summonses to the chairperson of the 3rd Defendant/2nd Defendant in the counterclaim, Lucy Nyokabi Mathenge and to the Chief Surveyor of the 3rd Defendant/2nd Defendant in the counterclaim John Muhia Kanotha to attend the Honorable court as witnesses and to produce all records relating to plot Number V919 and V920 within the Embakasi Ranching Co. Ltd subdivision scheme, later designated as Title Number Nairobi Block 105/6129 and Nairobi Block 105/6130 including all survey maps, the member registers and the certificates of ownership and all other relevant documents in their possession relating to ownership of the said properties from the date of the allocation of the suit property to the 2nd Defendant/Plaintiff in the counterclaim in 1999 to date.
 - iii. That this Honourable court do make such other and further orders as it may deem fit, necessary and expedient in the interests of justice.
 - iv. The costs of this application be provided for.
2. Invariably, the instant application is premised and anchored on various grounds, which have been alluded to and enumerated at the foot of the Application. Besides, the Application is supported by the affidavit of the 2nd Defendant sworn on the 9th February 2023 and in respect of which the deponent has annexed two documents.
 3. Inevitably, upon being served with the instant application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 28th February 2023. For clarity, the Plaintiff/Respondent disputed the claim and the reliefs sought at the foot of the Application.
 4. Be that as it may, the subject application came up for hearing on the 9th March 2023, on which date, the advocates for the respective parties agreed to canvass and dispose of same, by way of oral submissions. Consequently, the court proceeded to and issued directions in line with the request by the respective advocates.

Submissions by the Parties

a. Applicant's Submissions

5. Learned counsel for the Applicant adopted and reiterated the grounds contained at the foot of the application as well as the depositions contained in the supporting affidavit. In addition, learned counsel raised, highlighted and canvassed four issues for consideration by the Honourable court.
6. Firstly, Learned counsel submitted that the dispute before the Honourable court touches on and concerns ownership of the suit properties, which properties trace their origin to the 3rd Defendant, who was hitherto the owner/proprietor of the suit properties, prior to their allotment to the various members/purchasers.
7. Furthermore, Learned counsel submitted that insofar as the suit properties traced their origin from the 3rd Defendant, who has failed to enter appearance and file defense, it is therefore imperative that the named officials of the 3rd Defendant, be compelled to attend court and testify on behalf of the Applicant.
8. In any event, Learned counsel added that the 3rd Defendant herein has in her custody various documents touching on and concerning the suit property and which documents, would be useful in helping the Honourable court to unravel the ownership dispute beforehand.



9. Secondly, Learned counsel has submitted that the issuance of the orders sought at the foot of the Application will no doubt help the cause of justice. In any event, counsel added that this Honourable court does exist to do justice to the parties, regardless of procedural technicalities, which may hamper the administration of justice.
10. Thirdly, Learned counsel has submitted that the current application has not been made in connivance or collusion with the 3rd Defendant, with a view to defeating the interest of the Plaintiff/Respondent, either as alleged by the Plaintiff/ Respondent or otherwise.
11. To the contrary, Learned counsel submitted that the application has been made in good faith and solely calculated to arrive at the truth pertaining to the ownership of the suit property.
12. Fourthly, Learned counsel has submitted that even though the Applicant has not included the names of the witnesses against whom summons is sought in his List of witnesses, the Honourable court is still seized of the requisite Jurisdiction to order and direct that such witnesses be summoned to appear and testify before the court. In this regard, Learned counsel has invoked and relied on the provisions on Article 159(2) (d) of *The Constitution* 2010.
13. On the other hand, Learned counsel has also submitted that the current application accords with and is in line with the provisions of Section 127 and 128 of the *evidence Act*, as read together with Order 16 Rule 19 of The Civil Procedure Rules, 2010.
14. Finally, Learned counsel has invited the Honourable court to take cognizance in the holding in the case of Christopher Kipkorir Lembo & 331 Others versus Kenya Power & Lighting Company Ltd (2005)eKLR and Republic versus Martine Kibor (2018)eKLR, respectively.

b. Respondent's Submissions

15. Learned counsel for the Respondent adopted and relied on the contents of the Replying affidavit sworn on the 28th February 2023; and thereafter raised and highlighted three salient issues for the consideration of the Honourable court.
16. First and foremost, Learned counsel for the Respondent has submitted that if the Applicant herein was keen to procure and obtain witness summonses, if any, then it behooved the Applicant to comply with the provisions of Order 16 Rule 1 of The Civil Procedure Rules, which articulates the timeline within which such application ought to be made. In particular, Learned counsel has contended that the application for witness summons ought to be made not later than during the Pre-trial conference.
17. Secondly, Learned counsel has submitted that before an order for issuance of witness summons can issue against specific/designated witnesses, it behooves the Party seeking the witness summons to clearly identify and particularize the documents, if any, that the intended witness shall rely on.
18. Furthermore, Learned counsel has added that the particulars of the documents, which shall inform the witness summons, ought to be contained in the List and Bundle of Documents by the concerned Party.
19. However, in respect of the subject matter, Learned counsel has submitted that the Applicant herein is seeking to procure witness summons against the named witnesses, albeit to produce documents whose details have neither been particularized nor disclosed. In this respect, counsel has contended that the current application by the Applicant is intended to prejudice the Plaintiff's case.
20. Lastly, Learned counsel has submitted that the Plaintiff and the Defendants herein have all filed their final list of documents and list of witnesses, together with witness statement. Nevertheless, counsel has



pointed out that in the named documents filed, the Applicant herein did not allude to his desire to summon and/or call any additional witness or otherwise.

21. In view of the foregoing, Learned counsel has therefore submitted that the grant of the instant application shall constitute an infringement of the Plaintiff/Respondent's Rights and Fundamental Freedoms as entrenched in Article 50(1) of *the Constitution*, 2010. In this regard, learned counsel has implored the court to dismiss the application beforehand.

Issues for Determination:

22. Having reviewed the Application filed by the Applicant and the response thereto and having taken into account the oral submissions that were ventilated on behalf of the respective Parties, the following issues do arise and are worthy of determination;
 - i. Whether the instant Application is Legitimate and made in Good faith or otherwise.
 - ii. Whether the grant of the orders sought at the foot of the Application shall infringe upon and or violate the Right to Fair Hearing and Fair Trial as entrenched in Article 50(1) and (2) of *The Constitution* 2010.
 - iii. Whether the Witnesses from a Co-Defendant can be compelled to testify in favor of yet another Defendant in the same matter irrespective of the provision of Article 50(2) (1) of *The Constitution*, 2010.

Analysis and Determination

Issue Number 1

Whether the instant Application is Legitimate and made in Good faith or otherwise.

23. It is common ground that upon being served with the summons to enter appearance and plead in respect of the instant matter, the 1st and 2nd Defendants duly entered appearance and thereafter filed their statement of defense and counterclaim.
24. Additionally, the 1st and 2nd Defendants herein also filed their List and bundle of documents as well as list of witnesses; and the witness statements of the witnesses intended to be called on behalf of the 1st and 2nd Defendants.
25. For good measure, it is imperative to observe and state that the filing of the list and bundle of documents and list of witnesses; and witness statements, was done in compliance with the statutory requirements articulated by the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010.
26. Instructively, the provisions of Order 7 Rules 5, are couched and expressed in mandatory and peremptory terms. For good measure, it behooves every Defendant who is desirous to oppose a suit to file, inter-alia, the Statement of Defence and the various documents/ items which have been enumerated and elaborated upon under the named provisions.
27. Furthermore, where a Defendant seeks to rely on any documents, in proof of his/her Defense, then such a Defendant is also called upon to file and serve not only the List of documents, but also the Bundle of documents in question.
28. Moreover, there is also no gainsaying that where such a Defendant shall also be keen to call any witness, then such a witness must generate a witness statement and which must no doubt be filed alongside



the Statement of defense. Invariably, the only witness statement that is not mandatorily required to be filed with the Pleadings, is the witness statement of an Expert witness.

29. Nevertheless, where any document alluded to under Order 7 Rule 5 of the Civil Procedure Rules, 2010, is not filed alongside the Statement of defense, then it behooves such a Defendant to ensure that such documents, whether List and Bundle of documents or witness statement, are filed prior to the trial conference.
30. Instructively, the filing and exchange of the List and Bundle of documents and the witness statement, if any, is critical insofar as it enables the adverse party to appreciate the issues being raised and therefore to prepare him/herself to answer the case of the adverse party adequately.
31. In my humble view, the provisions of the law relating to the filing of the various documents, which have been alluded to in Order 3 Rule 2; and Order 7 Rule 5 of the Civil Procedure Rules, 2010 were not proclaimed for the sake of it. Clearly, the said provisions have a serious meaning and implications on the right to Fair hearing.
32. Be that as it may, it is also important to appreciate that the law has provided a window for anyone, the Applicant not excepted, who was unable to comply with the provisions of Order 7 Rule 5 of the Civil Procedure Rules to file whatever documents, albeit, in accordance with the provisions of Order 11 Rule 5 of the Civil Procedure Rules 2010.
33. Given the importance of Order 11 Rule 5 of the Civil Procedure Rules, it is appropriate and imperative that same be reproduced.
34. For ease of reference, the said provisions stipulates thus;
 5. With a view to providing an opportunity for settlement in every suit to which
 - (1). this Order applies the court shall within sixty days of the case conference in the case of a fast track case, and ninety days in the case of multi-track case, convene a settlement conference for the purpose of—
 - (a) settling the case or issues in the case; and
 - (b) providing the parties and their advocates an opportunity to appear before the court to settle the suit or narrow down the issues.
 - (2) Each party shall at least seven days before the date appointed for the settlement conference prepare and exchange a Settlement Conference Brief which should include the following—
 - (a) a concise summary of the facts including the agreed facts and admissions;
 - (b) a concise summary of the issues and the law to be relied upon by each party including their rights and interests;
 - (c) a final list of witnesses and a summary of each witness's statements; and
 - (d) expert reports and the relevant portions of documents relied upon.



35. From the provision of Order 11 Rule 5 (supra), it is evident that the parties before the court are under obligation to file their final list of witnesses and witness statement and the bundle of document that same intend to rely on; at the very latest during the case Conference and not otherwise.
36. Having provided the foregoing background, it is now appropriate to return to the issues raised by the Applicant and to consider whether the court is seized of the requisite Jurisdiction to order the concerned witnesses to attend court and to produce documents, whose details have neither been disclosed nor particularized.
37. Furthermore, there is also the incidental question as to whether any document, which was not alluded to nor particularized in the Final List of documents can be produced by any witness, whether appearing out of volition or pursuant to witness summons. To my mind, the requirement that all document be disclosed and particularized prior to the commencement of the hearing was not made for cosmetic purposes.
38. In addition, I hasten to state that where documents have not been identified and particularized in the final list of documents, like in the instant case, the honorable court cannot grant liberty for any witness, to produce such documents before the court. Instructively, if such a course was to be allowed, then the adverse party would stand prejudiced and the purpose of case conference and Pre-Trial, shall be negated and vitiated.
39. Notwithstanding the foregoing, it is also no lost on the court that the Application for the issuance of the witness summons has also been made contrary to and in contravention of the provisions of Order 16 Rule 1 of The Civil Procedure Rules, 2010 which stipulates and underscores the timeline for an application for issuance of witness summons.
40. For coherence, the provisions of Order 16 Rule 1 stipulates as hereunder;
[Order 16, rule 1.]
Summons to attend to give evidence or produce documents.
 1. At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.
41. Clearly, if the Applicant herein was keen and desirous to pursue the issue of issuance of witness summons, then same was obliged and obligated to abide by and comply with the express provisions of Order 16 Rule 1 of the Civil Procedure Rules, 2010; and in the event of default, it behooved the Applicant to seek for extension of time with a view to making such application for such summonses. See Order 50 Rules 6 of The Civil Procedure Rules, 2010.
42. In my humble view, the current application which is seeking that the Honourable court be pleased to summon the witnesses, whose details are alluded to in the application, but whose names do not form part of the Final list of witnesses, is not legally tenable.
43. At any rate, it is worthy to recall that the named witnesses, are also intended to produce and avail to the court omnibus documents, whose details have not been alluded to or supplied at the foot of the List of documents of Documents, which was filed by the Applicant.
44. Lastly, it is also imperative to state that the witnesses, whom the Applicant seeks to be summoned, have neither been named in the Applicant's list of witnesses nor have same availed any witness statement, as mandatorily provided for under Order 11 Rule 5 of the Civil Procedure Rules, 2010.



45. Certainly, the issuance of witness summons to the said witnesses shall be contrary to the overriding objectives of the court in terms of Section 1A and 1B of the *Civil Procedure Act*, Cap 21, Laws of Kenya; and better still, shall defeat the purpose for which the elaborate provisions of Order 11 of The Civil Procedure Rules was made.

Issue Number 2

Whether the grant of the orders sought at the foot of the Application shall infringe upon and or violate the Right to Fair Hearing and Fair Trial as entrenched in Article 50(1) and (2) of *The Constitution* 2010.

46. Pursuant to the provisions of Article 50(1) of *the constitution* 2010, it behooved the court to ensure that every issue in dispute is entertained and disposed of in a manner that accords with the principle of fair hearing and the Doctrine of Natural Justice.
47. To my mind, the tenets of fair hearing, entails, inter-alia, that the adverse party should be availed all copies of documents and witness statements, if any, that one side is keen to adopt and rely on in the prosecution or Defense of his/her case.
48. Furthermore, it is also important to underscore that the principle of fair hearing, also embodies the doctrine of Natural justice, where the adverse party must be afforded a reasonable opportunity and facility, including due notice, to be able to respond and or react to any adverse information that may be forthcoming.
49. Notwithstanding the importance of the principle of Fair hearing and the Doctrine of Natural Justice, the Applicant herein now implores the Honourable court to order that witnesses whose names are not contained in his Final list of witnesses, be summoned to appear before the court and to testify in the matter.
50. In my humble view, such an application shall only cause and/or occasion undue prejudice to the adverse party, in this case the Plaintiff/Respondent. For clarity, the Plaintiff/Respondent would not be afforded advance notice of the nature of the evidence to be tendered by such witnesses, so as to enable same to respond thereto fairly and appropriately.
51. On the other hand, the Applicant is also keen that the said intended witnesses also to produce documents, which have not been disclosed or better still particularized. Instructively and undeniably, the net effect of such a request is clearly to catch the Plaintiff/Respondent by surprise and therefore, tilt the scale of justice unfairly in favor over the Applicant.
52. Based on the foregoing discourse, I am driven to the conclusion that the current Application, if allowed, shall constitute breach of the principle of fair hearing, as espoused and entrenched in Article 50(1) of *The Constitution* 2010.
53. In the circumstances, I am afraid, that the Application herein is not only misconceived, but same is also not legally untenable. Consequently and in this regard, I am disinclined to allow the application.

Issue Number 3

Whether the witnesses from a Co-Defendant can be compelled to testify in favor of yet another Defendant in the same matter irrespective of the provision of Article 50(2) (l) of *The Constitution*, 2010.

54. Other than the procedural aspects, which have been discussed and highlighted in the preceding paragraphs, there is yet another perplexing aspect, which merits serious examination and interrogation.



- For coherence, the issue herein relates to whether the Applicant herein can use the Honorable court to compel an officer of a Co-Defendant, in this case the 3rd Defendant in the suit, to testify on his behalf.
55. To start with, it is important to recall that the witnesses which the Applicant is keen to summon to appear before the Honourable court and testify, are actually officials of the 3rd Defendant who has been sued by the Applicant in his counter-claim.
56. In addition, it is also not lost on this court that even though the 3rd Defendant has been impleaded and sued, both by the Plaintiff and the Defendants/Counter-claimers, same has not deemed it appropriate to enter appearance or file a statement of defense, for reasons only known to same.
57. Despite the failure by the 3rd Defendant to enter appearance and file statement of defense, to both the Plaintiff and the Counterclaim, the Applicant herein now wants the Honourable Court to order the officials of the 3rd Defendant to come and testify in the matter, albeit on his behalf.
58. To my mind, if the officials of the 3rd Defendant, who has declined to participate in the instant suit, were to be compelled to attend court on the basis of witness summons, then such an order shall be tantamount to compelling the witnesses in question to give incriminating evidence against themselves and the 3rd Defendant, who is their employer.
59. Notably, such kind of an order, if one were to issue, would run contrary to and in violation of Article 50(2) of *The Constitution* 2010, which, inter-alia, prohibits adduction of self- incriminating evidence.
60. For good measure the provisions of Article 50(2) of *the Constitution*, 2010 provides as hereunder;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (i) to remain silent, and not to testify during the proceedings;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
 - (k) to adduce and challenge evidence;
 - (l) to refuse to give self-incriminating evidence;
 - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;



- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

61. One may argue that the provision of Article 50(2) of *The Constitution*, relates to fair trial and thus espouse a position that Fair trial connotes criminal prosecution as opposed to civil proceedings.
62. However, it is imperative to state and underscore that Fair trial is intrinsic and implicit in Fair hearing and hence the tenets that forms the ingredients of Fair trial are also relevant and applicable to the Principle of Fair Fearing. See the Decision of the Court of Appeal in the case of the Speaker, County Assembly of Kisumu and Another versus Clerk, County Assembly Service Board of Kisumu and Others (2015) eKLR, paragraphs 71,72 and 73 thereof.
63. In my humble view therefore, where *the Constitution* provides that a person cannot be subjected to giving self-incriminating evidence, that provision cuts across and applies to both criminal prosecution and civil proceedings, in a like manner and with equal force.
64. To amplify the discourse espoused in the preceding paragraphs and especially the position that Fair trial is implicit in Fair hearing and thus does apply to civil proceedings, it is appropriate to take cognizance of the decision of the Supreme Court in the case of Gladys Boss Shollei versus Judicial Service Commission & another [2018] eKLR, where the court stated and observed as hereunder;
- (36) In my concurring opinion in *Evans Kidero & 4 others v Ferdinand Waititu & 4 others*, Sup. Ct. Petition No. 18 & 20 of 2014, [2015] eKLR, I examined the scope of fair hearing and concluded that it is trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature.
- (37) Accordingly, this settled the question as to whether the right to fair hearing set out in Article 50(1) and the right to a fair trial set out in Article 50(2) of *the Constitution* are different. The two rights are the same and they are both non-derogable by the provisions of Article 25 of *the Constitution*.
65. Based on the foregoing, I come to the conclusion that the issuance of the witness summons against the officers/officials of the 3rd Defendant herein, to come and testify on behalf of a Co-Defendant, who has sued the said 3rd Defendant, shall be tantamount to forcing the said official to give self-incriminating evidence, albeit, contrary to the clear provisions of Article 50(2) of *The Constitution*, 2010.
66. There is no gainsaying that *the Constitution* is the supreme law and thus binds the state, all state organs and all persons. See Article 2(1), 3(1) and 10(1) of *The Constitution* 2010. Inevitably, this court is called upon to protect *the Constitution*.



Final Disposition

67. Premised on the foregoing and in my humble view, the current application which has been placed before the Honourable court is tantamount to inviting the court to violate, breach and infringe upon *the Constitution*, with a view to (sic) facilitating the Applicant to gain mileage over the adverse party.
68. Instructively, such an order cannot issue. Consequently, I come to the conclusion that the Application dated the 9th February 2023, is devoid and bereft of merits.
69. In a nutshell, same is therefore Dismissed with costs to the Plaintiff/Respondent only.
70. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Macharia Nderitu for the 1st and 2nd Defendants/Applicants

Mr. Moindi for the Plaintiff/Respondent

N/A for the 3rd Defendant/Respondent

