



**Chebril (Suing as the administrator of the Estate of Asha Jabril  
Mohammed - Deceased) v Mburugu & 6 others (Environment & Land  
Case 001 of 2021) [2023] KEELC 19294 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 001 OF 2021**

**PM NJOROGE, J**

**JULY 26, 2023**

**BETWEEN**

**MARYANN MOHAMMED CHEBRIL (SUING AS THE ADMINISTRATOR OF  
THE ESTATE OF ASHA JABRIL MOHAMMED - DECEASED) ..... PLAINTIFF**

**AND**

**MICHAEL KOOME MBURUGU ..... 1<sup>ST</sup> DEFENDANT**  
**ISIOLO COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**  
**JEDIEL KIRIMI RUTERE ..... 3<sup>RD</sup> DEFENDANT**  
**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**  
**THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT**  
**THE DIRECTOR OF SURVEY ..... 6<sup>TH</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. An oral application was made by Counsel Benjamin Kimathi seeking that he be allowed to file documents which had recently come to his attention. He explained that he only started participating in this case after Pretrial procedures had been concluded. He proffered that the documents he intended to produce were only supplied on July 5, 2023. Another oral application was made by advocate Haji for National Land Commission seeking to have an expert's report be admitted and for the expert to produce it in court.



2. In his oral application Mr. Kimathi sought leave to have the said documents admitted so that an officer from the land's office could come to court to give evidence. He also orally applied that the hearing of the suit be adjourned so that he could proffer the intended evidence.
3. Advocate Lakicha, the plaintiffs advocate supported Mr Kimathi's oral application for production of documents and for adjournment.
4. Advocate Mwirigi Kaburu, the 1<sup>st</sup> defendants advocate told the court that he strenuously opposed Mr Kimathi's oral application. He told the court that the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants filed their defence on September 18, 2019 and that they participated in the pretrial conference where documents to be relied upon were agreed upon after which the court certified the matter as ready for hearing. He said that the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had been cross examined, including by the Counsel representing the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants. The advocate opined that introduction of new evidence at this stage would be akin to reopening the proceedings as this would involve new witnesses and fresh evidence. He argued that this was beyond the anticipation of the 1<sup>st</sup> defendant when he was preparing for his defence. The advocate also opined that *Civil Procedure Rules*, and specifically Order 11 thereof, should never be ignored. He also referred the court to the Case of *Raila Odinga Versus IEBC & 3 Others [2013] eKLR* where the Supreme Court of Kenya held as follows;

“The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertencies which were foreseeable or could have been avoided”

5. Advocate Ken Muriuki who represented the 2<sup>nd</sup> defendant told the court that he strenuously opposed the application for introduction of new evidence and for adjournment of the case. In his view the purpose of any application to introduce evidence by the 5<sup>th</sup> defendant and the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants was meant to further procrastinate the finalization of this matter almost 7 years after this suit was filed. He proffered that Order 7 Rule 5 provided mandatory guidelines regarding documents which should accompany the defence or counter claim.
6. Advocate Muriuki opined that Mr. Kimathi's attempt to introduce new evidence and to have the case adjourned was typical of “a Johnny come lately” more so since this was coming after the plaintiff and some of the defendants had closed their cases. He felt that this would gravely prejudice the other parties. He told the court that he wished to rely on the case of *George Kimani Versus the National Land Commission [2022] eKLR* where the Attorney General attempted to introduce new evidence after the parties had closed their case and the court declined to allow that attempt.
7. Advocate Murango Mwenda who represented the 3<sup>rd</sup> defendant told the court that he fully associated himself with the submissions made by the counsels for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He told the court that it did not matter when the Counsels for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants started participating in the proceedings or when they obtained new evidence as always, the parties had legal representatives from the time the hearing of the suit commenced. He said that the rules require parties to fully disclose their cases by filing witness statements, names of witnesses and the documents to be relied upon during trial. He concluded that it was prejudicial to his client to have new documents produced after the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants had closed their cases. He told the court that he was relying on the case of *Trust Bank Limited Versus Ajay Shah & 8 Others* where Justice Mabeya, J, declined introduction of new documents after the defence had closed its case.



8. Mr Haji who represented the National Land Commission told the court that he supported Mr Kimathi's oral application. He told the court that it would be in the public interest to allow the application and to consider the role of the Attorney General in suits and to also consider attendant government bureaucracies. Outrightly I reject the assertion that allowing inordinately late introduction of new evidence against all rules is in the public interest. I also reject the notion that courts of law should condone government bureaucracies' inefficiencies and infractions.
9. Regarding his application that an expert report be admitted and that the expert be allowed to produce it, Mr Haji told the court that the said report touched on procedure for allocation of land. He said that it was in the interest of justice that the said report be admitted.
10. I have carefully considered the oral applications made by Mr. Benjamin Kimathi for the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants and by Mr Haji for the 5<sup>th</sup> defendant. I do note that proceedings in this case have continued for close to seven years since this case was filed on March 9, 2017.
11. Regarding filing of documents Order 7 Rule 5 provides a mandatory guideline, It reads 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 rule 1 and 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 upon.
12. I wish to point out that although Order 7 Rule 5 exempts experts witnesses from signing witness statements, it does not exempt the litigants from listing them as witnesses in accordance with Order 7 Rule 5 (b).
13. There is a preponderance of authorities to the effect that rules and timelines must be observed by the litigants.
14. Indeed, even the top court in Kenya, the Supreme Court of Kenya, has waded into this area and given a ruling that binds all courts, except itself, in the Republic of Kenya. This is the case of Raila Odinga & Others, Supreme Court of Kenya, Presidential Petition Numbers 3,4,5/2013 [2013] eKLR.

Courts of Law have also authoritatively held that new evidence cannot be introduced after plaintiff's and defendants have closed their cases. In this case the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants have closed their cases.
15. In the circumstances, the following orders are hereby issued;
  - a. The application by the Attorney General to introduce new evidence after the plaintiff, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendants have closed their cases is hereby denied and, therefore, dismissed.
  - b. Similarly, the application by the 4<sup>th</sup> defendant to introduce new evidence after the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants have closed their cases is hereby denied and therefore dismissed.
  - c. Costs shall be in the cause.



**Delivered in open court at Isiolo this 26<sup>th</sup> day of July, 2023 in the presence of;**

**Court assistant: Balozi/Rahma**

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

