



**Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Limited (Interested Party) (Environment & Land Case 4 of 2021) [2025] KEELC 1307 (KLR) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1307 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 4 OF 2021  
JO MBOYA, J  
MARCH 17, 2025  
FORMERLY THIKA ELC CASE NO. 115 OF 2019**

**BETWEEN**

**MARRIOT AFRICA INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

**MARGARET NYAKINYUA MURIGU ..... 1<sup>ST</sup> DEFENDANT**

**MARY WANJIKU KANYOTU ..... 2<sup>ND</sup> DEFENDANT**

**WILLY KIHARA ..... 3<sup>RD</sup> DEFENDANT**

**KANGAITA COFFEE ESTATES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**UKOMBOZI HOLDINGS LIMITED ..... INTERESTED PARTY**

**RULING**

1. The instant matter came up for further defense hearing whereupon the 3<sup>rd</sup> Defendant took to the witness stand, testified in chief and was thereafter subjected to cross examination. However, before learned counsel for the 1<sup>st</sup> Defendant to the counterclaim could commence cross examination of the 3<sup>rd</sup> Defendant [DW4], the learned counsel for the 1<sup>st</sup> Defendant to the counterclaim sought leave of the court to be allowed to use and deploy a document, namely an affidavit that had been filed vide Milimani HCC Succession Cause No. 1239 of 2008 for purposes of cross examination of DW4.
2. The learned counsel contended that though the document under reference was neither filed nor discovered on behalf of the 1<sup>st</sup> Defendant to the counterclaim, the document in question was relevant



- and critical to the subject proceedings. Furthermore, it was contended that the said document would enable the court to discern the truthfulness or otherwise of the witness, namely DW4.
3. Moreover, learned counsel for the 1<sup>st</sup> Defendant to the counterclaim also submitted that the document under reference namely the affidavit in question having been filed in a suit/proceeding pending before the court is therefore a public document and hence same [document] can be produced and relied upon before the court even if same was not discovered at the time of pretrial.
  4. Moreover, learned counsel for the 1<sup>st</sup> Defendant to the counterclaim also posited that the Honorable court was at liberty to take judicial notice of the document and thereafter to allow same [document] to be used and deploy for purposes of cross examination of DW4.
  5. Arising from the foregoing, learned counsel implored the court to grant the leave sought and to allow the document which the counsel had fished out from the other proceedings to be used in the course of the current proceedings. In any event, learned counsel contended that it was in the greater interests of justice that the document under reference be allowed to be used for purposes of cross examination.
  6. The application and request by learned counsel for the 1<sup>st</sup> Defendant to the counterclaim was supported by learned for the Plaintiff and the interested party, respectively. For coherence the advocates for the Plaintiff and the interested party contended that the affidavit in question, which was filed in the succession proceedings, namely Milimani HCC Succession No. 1239 of 2008, is a public document and thus same can be deployed for purposes of cross examination of the witness.
  7. Additionally, it was contended that by virtue of being a public document in terms of Section 79 [1] [a] of the *Evidence Act*, Chapter 80 Laws of Kenya, the court is also at liberty to take judicial notice of the same. Simply put, it was posited that even though the document had neither been filed nor discovered during pretrial, the court had the discretion to allow same to be used for cross examination.
  8. On the other hand, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants; and learned counsel for the honourable attorney general [3<sup>rd</sup> and 4<sup>th</sup> Defendants to the counterclaim] opposed the application. It was contended that all parties are obliged to file and discover the document that same desire to use and rely upon in the course of the proceedings. For good measure, it was submitted that such documents must be discovered and exchange prior to and during the pretrial.
  9. Moreover, it was submitted that the discovery and exchange of document plays a critical role in ensuring that litigation is conducted on equal footing, without any surprises and ambush. Furthermore, it was submitted that the filing and discovery of documents constitutes a critical tenet of the right to fair hearing; fair trial and the due process of the court.
  10. Arising from the foregoing, it was submitted that the document in question having not been filed and discovered by the 1<sup>st</sup> Defendant to the counterclaim during the pretrial conference, same cannot therefore be deployed for purposes of cross examination, either in the manner contended by the 1<sup>st</sup> Defendant to the counterclaim or at all.
  11. In addition, it was also submitted that the document under reference does not fall within the purview of what constitute public documents. To this end, the attention of the court was drawn to the provisions of Section 79 of the *Evidence Act*, Chapter Laws of Kenya which defines what constitutes a public document and what constitutes a private document.
  12. Finally, the advocates for the opposing parties, including the honorable attorney general submitted that the document in question does not fall with the purview of documents which the court is mandated to take judicial notice of. In this regard, the attention of the court was invited to the provisions of Section 59 and 60 of the *Evidence Act*, Chapter 80 Laws of Kenya.



13. Having reviewed the informal application and upon taking into consideration the oral submissions made on behalf of the respective parties, I come to the conclusion that the determination of the application beforehand turns on three critical issues, namely; whether the document sought to be deployed for cross examination and which was neither discovered is a public document or otherwise; whether a document which was neither filed nor discovered during pretrial can be used for purposes of cross examination; and whether the court can take judicial notice of the impugned documents or otherwise.
14. Regarding the first issue, namely; whether the affidavit which was filed vide Milimani HCC no. 1239 of 2008 constitute a public document or otherwise, it is imperative to take cognizance of the provisions of Section 79 of the Evidence Act, Chapter 80 Laws of Kenya. For good measure, the named provisions defines what documents are public documents and otherwise.
15. Furthermore, what constitutes a public document was also elaborated upon by the supreme court of kenya in the case of Kenya Railways Corporation & 2 others v Okioti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment), where the court held as hereunder;
  80. The Evidence Act cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that: Application.
    1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.
    2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
  81. The Evidence Act provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states: Certified copies of public documents.
    1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
    2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.
  82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allows the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.
  83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby outrightly rendered inadmissible.



16. Though the affidavit is said to have been filed vide Nairobi HCC Succession No. 1239 of 2008, there is no gainsaying that pleadings, letters and documents filed in the course of proceedings in a court of law do not constitute public documents. On the contrary, the proceedings of the court; the ruling, the judgment, the decree and orders issued by the court constitute public document by dint of Section 79 [1] [a] [iii] of the *Evidence Act*.
17. Regarding the second issue, namely, whether a document which was neither discovered nor filed by a party can be used for purposes of cross examination. It is important to underscore that the filing and discovery of documents is a critical segment of the hearing and trial of matters. For coherence, the discovery of documents enables the adverse party to comprehend the nature of the case that the adversary is going to canvass and thereafter prepares the opponent to assemble suitable response including evidence to counter the case for the adverse party.
18. To my mind, discovery of documents constitute a critical tenet and/or aspect of the right to fair hearing; fair trial and the rule of natural justice. In this regard, the 1<sup>st</sup> Defendant to the counterclaim cannot seek to spring a document during intended cross examination and thereafter be heard to contend that the usage of such a document served the greater interests of justice.
19. Surely, the greater interest of justice cannot be served by circumventing and/or short socketing known provision of the law, whose purpose is to ensure that litigants engage at arms-length and/or equal footing. In any event, the right to fair hearing, fair trial and the due process of the law which are critical component of the rule of law cannot be sacrificed at the alter of [sic] greater injustice.
20. Additionally, I beg to underscore that the need to file and discover documents in good time cannot be contended to be a procedural technicality, which can be whitewashed by the invocation of Article 159 [2] [d] of *the Constitution*. For good measure, a violation of the right to fair hearing and fair trial goes to the root of the jurisdiction of the court and vitiate any decision that is arrived at in contravention thereof. [See the Decision of the supreme court in the case of Gladys Bosh Sholley v Judicial Service Commission [2022]KESC; Standard Chartered Financial Services Ltd v Manchester Outfitters [formerly Kings Wollen] Ltd [2016] KESA and The Speaker County Assembly of Kisumu v The Clear County Assembly of Kisumu & Others [2015]eKLR, respectively].
21. In a nutshell, it is my holding that the usage and deployment of a document which had neither been filed nor discovered during the pretrial conference shall be offensive to the right to fair hearing and shall in any event be tantamount to promoting litigation by ambush and surprise.
22. As concerns the last issue, that is whether this court can take judicial notice of an affidavit that was filed in another case, namely Milimani HCC Succession No. 1239 of 2008, it suffices to state that the jurisdiction of the court to take judicial notice of documents is circumscribed to public documents. [See Sections 59 and 60 of the *Evidence Act*].
23. Additionally, where a party, in this case, the 1<sup>st</sup> Defendant to the counterclaim seeks to invite the court to take judicial notice of a particular document and/or issue, it behooves the party to discharge the burden of proving that the document, issue and/or matter which the court is being invited to take judicial notice of, has indeed accrued the requisite notoriety to warrant judicial notice being taken of same.
24. Nevertheless, in respect of the instant matter, I am afraid that learned counsel for the 1<sup>st</sup> Defendant to the counterclaim did not discharge the requisite burden of proof. Furthermore, learned counsel for the 1<sup>st</sup> Defendant to the counterclaim also fail to bring the impugned document within the purview of Section 59 and 60 of the *Evidence Act*.



25. Finally, I d wish to underscore that the right to fair hearing [fair trial; due process of the law and rules of natural justice] goes to the root of the trial and/or proceedings and hence it does not fall in the lips of learned counsel for the 1<sup>st</sup> Defendant to the counterclaim to posit that the usage of the impugned document shall not impact on the rights of the adverse parties.
26. In a nutshell, I hold the firm view that the introduction, usage and deployment of the impugned document shall violate the fair hearing. Consequently and for the reasons stated herein before, the oral application to use the document which was neither filed nor discovered for purposes of cross examination be and is hereby declined.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF March 2025.**

**OGUTTU MBOYA,**

**JUDGE.**

In the Presence of;

Benson - Court Assistant

Mrs. Wangui Koech for the Plaintiffs

Mrs. Wangui Koech for the Defendants

Ms. Kiunga h/b for Mr. Eric Theuri for the 1<sup>st</sup> Defendant

Mr. Ruiru Njoroge for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

Mrs. Akedi for the 4<sup>th</sup> Defendant

Mr. Guandaru Thita for the Interested Party/3<sup>rd</sup> Defendant to the counterclaim [Applicant]

Mr. O.M.T Adala for the 1<sup>st</sup> Defendant to the Counterclaim

Mr. Allan Kamau [Principal Litigation Counsel] for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the counterclaim.

N/A for the 2<sup>nd</sup> Defendant

