



REPUBLIC OF KENYA



Tutua v Kipkulei & 2 others; Agricultural Development Corporation (Third party) (Environment & Land Case E34 of 2021) [2023] KEELC 19978 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E34 OF 2021
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

GEOFFREY MAINA TUTUA PLAINTIFF

AND

BENJAMIN KIPKECH KIPKULEI 1ST DEFENDANT

ROBERT MININGWO KIPTALAM 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION THIRD PARTY

RULING

1. This ruling is in respect of the 1st and 2nd defendants Notice of Motion application dated 15/03/2023 which is expressed to be brought under order 7 rule 5(d), 18, 20, rule 3 & 5 and order 51 rule 1 of the [Civil Procedure Rules](#), sections 1A, 1B and 3A of the [Civil Procedure Act](#) which sought the following orders:
 - a. That the 1st and 2nd defendant/applicants be granted leave to file additional documents in support of their support of their defence and counterclaim.
 - b. That the 1st defendant be granted leave to file a witness statement.
 - c. That costs of this application be in the cause.
2. The application is supported by the affidavit of Benjamin Kipkech Kipkulei sworn on 15/03/2023. The grounds on the face of the application and the supporting affidavit are that the 1st and 2nd defendants have come across documents relating to the acquisition of LR 20591/16 and LR 20591/79 which are crucial to their defence; that upon perusal of the court record, his advocates realized that



his witness statement dated 21/05/2021 was not on the court record; that they only realized the said error while they were preparing for the hearing on 15/03/2023; that some of the documents that he intends to introduce are for events that have been happening during the pendency of this suit and could therefore not be available when the matter was set down for hearing and that it is in the interest of justice that he be allowed to bring in the new documents.

3. The plaintiff opposed the 1st and 2nd defendants' application vide the grounds of opposition filed on 20/04/2023. The grounds are as follows:
 - a. The Applicant seeks to introduce illegitimate and inadmissible documents whose source, origin, legitimacy and authenticity have neither been explained nor disclosed to wit:
 1. A confidential letter dated 18/07/2022 purportedly authored by the Agricultural Development Corporation addressed to the law firm of Cheptumo & Co. Advocates, whose source, legitimacy and authenticity has not been explained.
 2. A confidential letter dated 4/11/2022 purportedly addressed to the Agricultural Development Corporation by the law firm of Cheptumo & Company Advocates, whose source, origin and legitimacy has not been explained and
 3. A confidential letter dated 9/11/2022 purportedly authored by the Directorate of Criminal Investigations and addressed to the office of the Hon. Attorney General, whose source, origin and legitimacy has not been explained.
 - b. The documents which the 1st and 2nd Defendants intend to adduce, to wit, the letter purportedly authored by the Agricultural Development Corporation dated 18/7/2022, the letter purportedly authored by Cheptumo & Company Advocates dated 4/11/2022 and the Directorate of Criminal Investigations' letter dated 9/11/2022 are illegally obtained documents, whose origin, source, legitimacy and authenticity has not been disclosed or explained, are inadmissible and incapable of forming part of the Court's record.
 - c. The impugned documents which the 1st and 2nd Defendants intend to adduce, to wit, the letter purportedly authored by the Agricultural Development Corporation dated 18/7/2022, the letter purportedly authored by Cheptumo & Company Advocates dated 4/11/2022 and the Directorate of Criminal Investigations' letter dated 9/11/2022 constitute privileged and confidential documents that were obtained in breach of the law and therefore inadmissible at this stage.
 - d. The intended additional documents namely the Agricultural Development Corporation's purported letter dated 18/07/2022, the letter purportedly authored by Cheptumo & Company Advocates dated 4/11/2022 and the Directorate of Criminal Investigations letter dated 9/11/2022 have been obtained contrary to express requirements of Articles 31 and 35 of the Constitution and Section 80 of the Evidence Act.
 - e. The admissibility of the documents in question, and more specifically the Agricultural Development Corporation's purported letter dated 18/07/2022, the letter purportedly authored by Cheptumo & Company Advocates dated 4/11/2022 and the Directorate of Criminal Investigations letter dated 9/11/2022 would render the trial herein unfair and would be detrimental to the administration of justice.
 - f. The documents namely the Agricultural Development Corporation's purported letter dated 18/07/2022, the letter purportedly authored by Cheptumo & Company Advocates dated 4/11/2022 and the Directorate of Criminal Investigations letter dated 9/11/2022 whose



4/11/2022 addressed to Agricultural Development Corporation and stated that they are privileged documents which the 1st and 2nd defendants did not explain how they got into their possession. The plaintiff relied on the cases of *Susan Wariara Kariuki v Diakonie Katastrophenhilfe* [2016]eKLR and *Jackline Chepkemoi Kimeto v Shafi Grewai Kaka & 3 others* [2019] in support of his arguments.

9. The plaintiff submitted that it is challenging the authenticity of the letter dated 9/11/2022 written by the Directorate of Criminal Investigation and addressed to the Hon. Attorney General. The plaintiff also submitted that the said letter was not addressed or copied to the 1st and 2nd defendants and they have not indicated how they acquired it. The plaintiff submitted that the said letters were illegally obtained and relied on the case of *Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management* [2008] eKLR among other cases in support of his arguments.
10. The plaintiff further submitted that the court could not rely on illegally obtained evidence as the 1st and 2nd defendants did not demonstrate how they acquired the said letters. The plaintiff relied on article 35 and 163(7) of the *Constitution* of Kenya and the case of *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission* [2017]eKLR in support of his arguments. The plaintiff concluded his submissions by seeking that the court dismisses the 1st and 2nd defendants application dated 15/03/2023.

Analysis and determination

11. After considering the 1st and 2nd defendant's application, the response thereto and the submissions, the only issue that arises for determination is whether the 1st and 2nd defendants should be granted leave to file additional documents in support of their defence and counterclaim.
12. The 1st and 2nd defendants are seeking for leave to file the 1st defendant's witness statement, copies of the Kenya Gazette dated 20/02/2004, 22/10/2004 and 30/04/2004, letter dated 18/07/2022 written by the Agricultural Development Corporation and addressed to Cheptumo & Co. Advocates, a letter dated 04/11/2022 written by Cheptumo & Co. Advocates addressed to the Agricultural Development Corporation and the letter dated 9/11/2022 written by the Directorate of Criminal Investigations to the office of the Attorney General.
13. The Plaintiff is not opposed to the 1st and 2nd defendants being granted leave to file the 1st defendant's witness statement, copies of the Kenya Gazette dated 20/02/2004, 22/10/2004 and 30/04/2004 but he is opposed to the production of letters written by the Agricultural Development Corporation, Cheptumo & Co. Advocates and the Directorate of Criminal Investigations. The plaintiff argued that the said letters were obtained fraudulently as they are confidential and privileged documents. The 1st and 2nd defendants argue that the issue of whether or not the said letters are confidential and privileged documents can only be determined at trial.
14. Order 2 Rule 13 of the *Civil Procedure Rules* provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”
15. Order 7 Rule 5 of the *Civil Procedure Rules* provides as follows:

“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.”

16. The court in the case of *Alois Oceano D'sumba v Rajnikant Narshi Shab & another* [2017] eKLR held as follows:

“ 10. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of order 11 of the *Civil Procedure Rules*. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case.”

17. As indicated before, the plaintiff is not opposed to the 1st and 2nd defendants being granted leave to file the 1st defendants witness statement and the copies of the Kenya gazette dated 20/02/2004, 22/10/2004 and 30/04/2004 annexed to his application. On the basis of that concession, the court may allow the 1st and 2nd defendants to file the said documents.

18. However, the plaintiff is only opposed to the 1st and 2nd defendants being granted leave to file the letters written by the Agricultural Development Corporation, Cheptumo & Co. Advocates and the Directorate of Criminal Investigations as he alleges they are confidential documents.

19. The court in the case of *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR held as follows:

“ 25. Justice Munyao has held, in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR as follows:

“This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159 (2) (d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document,...”



26. I cannot agree more with my brother judge. There are situations which can call for additional documents and even witness statements to be filed after the Pre-trial Conference. But these only occur in exceptional circumstances. The circumstances should be those ones which are basically beyond the control of the parties, those which with due diligence and action the party could not have in his or her possession the document that is sought to be added.”
20. The circumstances under which a party can be granted leave to file additional documents are limited to those beyond their control and those with due diligence and action the party could not have had in their possession.
21. The 1st and 2nd defendants alleged that they came into possession of the said letters written by the Agricultural Development Corporation, Cheptumo & Co. Advocates and the Directorate of Criminal Investigations after the present suit had been filed. That may be the case but the said letters were written in the year 2022 as the present matter was pending in court.
22. I have already dealt with a similar issue in ELC 43 OF 2021 where I gave the reasons for my rejection of the proposal to file such letters. I stated as follows:
- “The 1st and 2nd defendants alleged that the said documents were not in their possession before the close of pleadings and that is why they were not filed on time. It is my view that the plaintiff will not be prejudiced in any way if the 1st and 2nd defendants are allowed to file the Kenya Gazette Notice mentioned. However, I have not been shown that before or at that date of filing suit, the applicants were not in possession of the judgment in the case cited or any other evidence of the date of demise of Mr. Kilele. The hearing of the present suit has already commenced and it would prejudice the plaintiff to have to go back to the drawing board perchance the applicants are permitted to file the said documents and that course of events may entail considerable delay in the disposal of the present suit.
- Besides the risk of delay aforementioned, it is noteworthy that the letters dated 9/11/2022 and 18/7/2022 were made after the suit had been filed. Thought that may not be the intent of any of the parties in the present instance, this court must be wary of and thwart any attempts by any party to influence the course of litigation by way of production of documents made after the hearing has commenced. In this case, it cannot be that the applicant’s case was so hopeless before the new said letters were made that it could not succeed. It must be the evidence that the defendant had before the pleadings closed, which predated the date of filing of suit, that they relied on for the ultimate success of their defence. Indeed, this is a case whose ultimate determination is purely predicated on events happening prior to the filing of the suit. The likelihood of amendment triggered by those documents may have been a consideration by this court, but the documents sought to be filed and produced are not in any way likely to change the contents of the plaint or defence, including the prayers therein, and no amendment has been sought to accommodate them in any way.
- Having stated as before, I find no justification for allowing the applicants to file any other documents save the Gazette Notice No. Vol. CVI – No. 18 of 20/2/2004 which is a public document.”

23. There is no basis at all for any departure from the position stated in the passage above and I fully apply the reasoning given in ELC 43 OF 2021 to the instant application. Consequently, I only partially allow the Notice of Motion application dated 15/03/2023 in the following terms:



- a. A supplementary list and bundle of documents comprising only of the 1st defendants witness statement and the copies of the Kenya gazette dated 20/02/2004, 22/10/2004 and 30/04/2004 annexed to the application dated 15/03/2023 shall be filed and served within 14 days from today.
- b. Each party shall bear its own costs of the application.
- c. Parties will appear before the court virtually on 18/10/2023 for taking of further directions as to hearing.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

