



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tutua v Kiptalam & 3 others (Environment & Land Case E35 of 2021)  
[2023] KEELC 21027 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21027 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E35 OF 2021  
FM NJOROGE, J  
OCTOBER 26, 2023**

**BETWEEN**

**LUCY WANJIKU TUTUA ..... PLAINTIFF**

**AND**

**ROBERT MININGWO KIPTALAM ..... 1<sup>ST</sup> DEFENDANT**

**BENJAMIN KIPKECH KIPKULEI ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**FRANCIS K. SANG ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling on an application dated 20/4/2023 filed by the plaintiff under Section 1B (1) and 3A of the *Civil Procedure Act*, Cap 21, Order 50 rule 1 of the Civil Procedure Rules and the inherent power of the Court. It seeks that the Honourable Court be pleased to strike out and expunge purported Agricultural Development Corporation's letter dated 18/7/2022, letter dated 4/11/2022 and purported to have been written by Cheptumo & Company Advocates to the Agricultural Development Corporation and alleged Director of Criminal Investigation's letter dated 9/11/2022 addressed to the Hon. Attorney General as contained at pages 35 to 38 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Further List of Documents dated 9/3/2023 from the court record, the costs of this application be borne by the Plaintiff.
2. The background to the present application is that through an application dated 2/2/2023, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants (the Defendants) applied for the leave of Court to amend their pleading and adduce additional documents. The application to adduce additional evidence was supported by the affidavit of Francis K. Sang sworn on 2/2/2023 who deposed that the documents that were intended to be adduced had been exhibited as exhibit "b". The Plaintiff averred that he was aware that the additional documents which the Defendants indicated they intended to file in Court were twenty (20) in number,



but after the Defendant's application to amend their defence and counterclaim and adduce additional documents came up for hearing on 8/3/2023 on which date the Plaintiff conceded to the application and leave was granted by the Court, the Defendant not only filed the exhibit amended defence and counterclaim and the additional documents that had been exhibited to their application but also purported to file the following foreign documents which were neither exhibited to the application for leave to adduce additional evidence nor subject to the leave that was granted by the Court on 8/3/2023:

- i. A confidential letter dated 18/7/2022 purportedly authored by the Agricultural Development Corporation addressed to the law firm of Cheptumo & Co Advocates.
  - ii. A confidential letter dated 4/11/2022 purportedly addressed to the Agricultural Development Corporation by the law firm of Cheptumo & Company Advocates.
  - iii. 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.
3. It is averred by the plaintiff, inter alia, that the above stated three letters are irregularly on record, having been filed without the leave of the Court and long after the hearing of the Plaintiff's case has commenced whose procurement seems patently illegal and whose origin, source, legitimacy and authenticity has not been disclosed or explained and so they cannot form part of the record of the court. The plaintiff urged that it is fair, just and equitable that the impugned documents that run from pages 35 to 38 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Further List of Documents dated 9/3/2023 be expunged from the Court record.
  4. In a Replying affidavit dated 2/5/2023, the 2<sup>nd</sup> Defendant deposes inter alia that the Plaintiff's Application dated 20/4/2023 has been made in bad faith, with no legal justification and it is effectively intended to shield from the court illegalities, acts of subterfuge and abuse of the court process by the Plaintiff; that the 3<sup>rd</sup> Defendants' Further List of Documents dated 28/09/2022 had only one document dated 23/09/2023 in form of a letter by the Director of Criminal Investigations enclosing controversial documents that violate the right to fair trial.
  5. The Plaintiff filed her submissions dated 30/5/2023 on 5/6/2023 while the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed their submissions dated 9/6/2023 on 13/6/2023.
  6. Submitted for the Plaintiff, the issues for determination are (a) The question of leave and (b) Whether the filing of the impugned evidence is tenable.
  7. On issue (a); the plaintiff submits that on 14/3/2023, the Defendants filed their further list of documents that not only contained the documents that had been exhibited to their application dated 2/2/2023 but also contained three alien documents that were deceitfully sneaked on record. The application for leave to file additional evidence dated 2/2/2023 according to paragraph 3 of the supporting affidavit sworn by the 4<sup>th</sup> Defendant related to the exhibited documents marked "B" which did not include the alien documents. The Plaintiff relies on the cases of Preview Property Agency & another v Terrie Wanjiku Miano [2021] eKLR, P.H Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi t/a Quantalysis [2005] eKLR and Johana Kipkemei Too v Hellen Tum [2014] eKLR. On issue (b), the Plaintiff: that the basis of the subject documents is that these are contrived and stolen documents, which if genuine have been acquired in violation of the law. The Plaintiff relies on the cases of Baseline Architects Limited & 2 others vs National Hospital Insurance Fund Board Management [2008] eKLR, Susan Wariara Kariuki v Diakonie Katastrophenehife [2016] eKLR, Jackline Chepkemai Kimeto vs Shafi Grewal Kaka & 3 others [2019] eKLR, Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR and Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission [2017] eKLR.



8. Submitted for the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Defendants: the issues for determination are (a) whether additional leave is required to file documents in support of an amended pleading; (b) Whether the letter dated 18/7/2022 from Agricultural Development Corporation, letter dated 4/11/2022 from Cheptumo & Company Advocates and a letter dated 9/1/2022 are illegitimate and inadmissible.
9. On (a), the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants submit that that there is no direct provision in the Civil Procedure Rules that expressly addresses the issue of additional document save to add that Order 7 rule 5 makes provision for documents accompanying a defence and counterclaim. It is their submission that the said equally applies to amended pleadings as well as the party seeking amendments is expected to file documents in support of the amendment if need be. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants rely on the cases of Jumbo North (E.A) Limited v Martin Ratemo Nixon [2019] eKLR, Moses Warui Gatimu v Douglas Mwai Machuru & Another [2018] eKLR, Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel [2022] eKLR, Aniket Property & Investments Limited v Hamadi Juma Mwakibibo & 7 others [2018] eKLR. On issue (b), the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants submit that it is premature to raise issues of admissibility. They rely on the cases of Moses Warui Gatimu v Douglas Mwai Machuru & another [2018] eKLR, Attorney General v Torino Enterprises Limited [2020] eKLR, Michael Serгон v Joseph K. Kigen & 5 others, Gabriel Macharia Njoroge v Land Registrar Murang'a Lands Office & another [2018] eKLR, Ngomeni Swimmers Limited v Katana Chara Suleiman [2014] eKLR, Evangeline Nyegera (Suing as the Legal Representative of Felix M'liugu alias M'ikiugu Jeremia M' Raibuni (Deceased) v Godwin Gachagua Gitui [2017] eKLR and Director of Public Prosecutions v Tom Ojienda t/a Tom Ojienda & Associates Advocates & 3 others [2019] eKLR.
10. I have considered the application by the Plaintiff dated 20/4/2023 and the supporting affidavit, the 2<sup>nd</sup> Defendant's Replying Affidavit dated 2/5/2023 and their submissions and the following issue arises for determination:
  - a. Whether the letter dated 18/7/2022, the letter dated 4/11/2022 and a letter dated 9/11/2022 adduced by the Defendants should be struck out and expunged?
11. This Court notes that the orders sought in the Notice of Motion Application by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Application dated 2/2/2023 were as follows:
  1. That this application be certified urgent and heard ex-parte in the first instance;
  2. That the 2<sup>nd</sup> and 4<sup>th</sup> Defendant/ Applicants be granted leave to Amend their Statement of Defence as per the attached draft Amended Statement of Defence.
  3. That the 2<sup>nd</sup> and 4<sup>th</sup> Defendants be granted leave to file additional documents and a witness statement in support of their Defence and Counterclaim.
12. The Plaintiff's application dated 20/4/2023 contends that the three documents were sneaked on record. The Court has examined the record and found that the documents mentioned by the plaintiff and which are listed at paragraph 2 of the present ruling were not part of the bundle exhibited as "Exhibit B" in the supporting affidavit.
13. This court can only consider documents which were disclosed to the plaintiff at the recording of the consent of 8/3/2023 to have been covered by that consent and not otherwise. The consent was not to open floodgates to the defendants to file any documents that had not been the subject of that application.



14. The Court therefore finds that the contested documents produced by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants are not properly on record as they were not covered of the consent of the parties. The plaintiff's application dated 20/4/2023 has merit and I grant it in terms of prayer no. 1 thereof.
15. The following documents are therefore struck out and expunged from the court record:
  - i. Letter dated 18/7/2022 purportedly authored by the Agricultural Development Corporation addressed to the law firm of Cheptumo & Co Advocates.
  - ii. Letter dated 4/11/2022 purportedly addressed to the Agricultural Development Corporation by the law firm of Cheptumo & Company Advocates.
  - iii. Letter dated 9/11/2022 purportedly authored by the Directorate of Criminal Investigations and addressed to the office of the Hon Attorney General.
16. The costs of the present application shall be borne by the 2<sup>nd</sup> and 4<sup>th</sup> defendants only.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

