



Mwachandi v Safaricom Limited; Kathuri (Third party) (The Administrator of the Estate of Keith Kathuri - Deceased) (Environment & Land Case E010 of 2023) [2025] KEELC 3343 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E010 OF 2023**

CG MBOGO, J

APRIL 24, 2025

BETWEEN

UDI MURIITHI MWACHANDI PLAINTIFF

AND

SAFARICOM LIMITED DEFENDANT

AND

MONICA WANJIRU KATHURI THIRD PARTY

THE ADMINISTRATOR OF THE ESTATE OF KEITH KATHURI - DECEASED

RULING

1. Before this court for determination is the notice of motion dated 7th February, 2025, filed by the plaintiff/ applicant. It is expressed to be brought under Sections 1A, 1B, 3, 3A and 95 of the [Civil Procedure Act](#), and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 - a. That this honourable court be pleased to grant the plaintiff/applicant leave to re-open his case so as to produce a letter from the county government of Nairobi dated 29/01/2025 certifying him as the sole and bona fide owner of the suit property.
 - b. That further this honourable court be pleased to grant the plaintiff/applicant leave to file the letter dated 29/01/2025 as an additional supplementary document.
 - c. That costs be provided for.
2. The application is premised on the grounds inter alia that the plaintiff/applicant is the registered proprietor, and beneficial owner entitled to exclusive possession and occupation of all that parcel of land known as Plot No. CS30-Umoja Residential/Corner Shop. The application is further supported



by the affidavit of Stephen Mwanza Gachie, the learned counsel having conduct of this matter which is sworn on even date.

3. The learned counsel deposed that the plaintiff/applicant and the Nairobi City County entered into a lease agreement through the Chief Land Registrar on 26th May, 1989 for a term of 99 years. Further, that the plaintiff/ applicant was allocated the suit property by the then County Council via an allotment letter dated 30th April, 2001. The learned counsel deposed that the third party encroached on the suit property and leased it to the defendant/respondent necessitating the filing of this suit upon discovery of trespass. Further, that the introduction of the third party brought different dimensions in the suit, which prompted him to seek more information from the County Government of Nairobi.
4. The learned counsel deposed that unless this court allows this application in the quest of a fair hearing, the plaintiff/applicant will not only be prejudiced but he will also suffer irreparably.
5. The defendant/ respondent opposed the application vide the replying affidavit of Cerere Kihoro sworn on 18th February, 2025. The defendant/respondent deposed that the plaintiff/applicant seeks to re-open his case to cure the issues that had been brought up during cross-examination, and further, he has not presented any special circumstances that prevented him from availing the documents. The defendant/ respondent further deposed that the learned counsel for the plaintiff/applicant filed an application dated 13th May, 2024 seeking leave to file additional documents as well as summons to the Assistant Director of Survey, Nairobi County and the same was allowed. However, the plaintiff/ applicant proceeded with the hearing of the case without producing the said documents or availing an officer from the said office pursuant to the summons. Further, that the plaintiff/ applicant has filed this case 5 months after the close of his case, and on the eve of the hearing of the defendant's/respondent's case which is suspect.
6. The defendant/respondent further deposed that the plaintiff/applicant has not shown any attempts, efforts or follow-up to get the documents, and the averments made by counsel are secondary, and ought to be struck out. That in any event, the documents sought to be produced can only be produced by the maker of the document, who are neither parties to this suit nor listed as witnesses. Further, it was deposed that the application is highly frivolous, and highly prejudicial to the defendant/respondent.
7. The application was canvassed by way of written submissions. The plaintiff/ applicant filed his written submissions dated 27th February, 2025, and he raised one issue for determination which is whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-open a case and received additional evidence.
8. On this issue, the plaintiff/applicant submitted that the ambit of the judicial discretion to re-open a case and introduce additional evidence is recognized under the fair trial rights which are protected by *the Constitution* under Article 50. While relying on the case of *State v Hepple*, 279265, 271 [1977], and *Oakley v Royal Bank of Canada* {2013} ONSC 145 {2013} OJ No. 109 SC, the plaintiff/applicant submitted that since the inception of the suit, there has been change in administration in the County Government, with records being misplaced as well as back and forth. On whether the affirmation letter would have been obtained sooner, the plaintiff/applicant submitted that getting the document was an onerous journey, and that it was a matter that was beyond his control. He submitted that to deny him audience to re-open his case will result to injustice, and in any case, the defendant/respondent and the third party will have a chance to defend the letter as the defence hearing is yet to commence.
9. The defendant/respondent filed its written submissions dated 10th March, 2025, where she raised two issues for determination as listed below: -
 - a. Whether the plaintiff has certified the conditions for reopening a case.



- b. Whether the plaintiff has met the criteria for introducing new evidence after their case is closed.
10. On the first issue, the defendant/respondent submitted that the letter dated 19th February, 2025, fails on all the requirements as stated in the case of *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] KEELC 8 (KLR), and that the plaintiff/applicant is trying to cure the insufficiencies that were brought up in their evidence, displaying a direct prejudice to the defendant/respondent. To further buttress on this submission, the defendant/respondent relied on the cases of *John Karuga Wahinya v Attorney General & 4 others* [2020] eKLR, *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR, *Michael Kiplangat Cheruiyot v Joseph Kipkoech Korir* [2019] eKLR and *Samoei v National Housing Corporation & another* [2023] eKLR.
 11. On the second issue, the defendant/respondent submitted that the plaintiff/ applicant had ample opportunity to procure the letter during the pendency of the case, and he has not shown any evidence of difficulties to have the same letter availed earlier. That despite being granted summons for the Assistant Director, he chose not to call this witness, which reveals a lack of diligence. The defendant/respondent opined that the new evidence is of no relevance to the matter in court, and neither is it in the interest of justice. Reliance was placed in the case of *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR. Further, it was submitted that the letter is inadmissible under Section 35 of the *Evidence Act*, as it is a public document requiring production by its maker.
 12. I have considered the application, the reply and the written submissions filed by the respective parties. The issue for determination is whether the plaintiff/applicant ought to be allowed to re-open the case and present evidence.
 13. The instant application has been brought five months after the close of the plaintiff's case. The reasons advanced is that the document sought to be produced by the plaintiff/applicant was not available during trial, and that owing to his advanced age and the changes in the administration of the County Government, it was not possible for him to have obtained the document earlier.
 14. On the other hand, the defendant/respondent questions the timing of the application, and the fact that the document can only be produced by the maker and not the plaintiff/applicant as alleged.
 15. In consideration of the above contentions and bearing in mind the need to ensure a just disposal of the case at hand, this court is persuaded to exercise the provisions bestowed upon it under Section 3A of the *Civil Procedure Act* which provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
 16. I do note that whereas the plaintiff/applicant had already closed his case, the reasons adduced in failing to obtain the document are in my view excusable. On the other hand, the defendant/respondent is yet to defend its case, and additionally there is still room to cross-examine on the contents of the said document. This court restrains itself on commenting on the production of the document as it is yet to be produced. I do also believe that whereas, a date for defence hearing had been set down, the inconveniences caused can be mitigated through a reasonable cost.
 17. From the above, I do find merit in the notice of motion dated 7th February, 2025, and it is hereby allowed in the following terms:-
 - i. The plaintiff/applicant is hereby granted leave to re-open his case to file and produce the letter dated 29/01/2025.



- ii. The plaintiff/applicant to pay costs of Kshs. 30,000 to the defendant/respondent within 30 days from the date hereof.
- iii. Further mention on 17th June, 2025 for further directions.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2025.

HON. MBOGO C.G.

JUDGE

24/04/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Omondi for the Plaintiff/Applicant – present

Ms. Kirimi for the Defendant /Respondent – present

