



**Mombo v Nyoike (Environment & Land Case 53 of 2020)  
[2022] KEELC 2382 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2382 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 53 OF 2020  
MN GICHERU, J  
JUNE 30, 2022**

**BETWEEN**

**DENNIS MWANGEKA MOMBO ..... PLAINTIFF**

**AND**

**JOSEPH MAINA NYOIKE ..... DEFENDANT**

**RULING**

1. This ruling is on the Notice of Motion dated March 9, 2022, which seeks to declare the electronic evidence dated 27/8/2020 inadmissible on the ground that the requisite certificate required under sections 106A and 106B of the *Evidence Act* has not been filed.

The application is supported by an affidavit sworn by the defendant which has quoted several decisions which have declared such evidence as inadmissible.

The defendant has also filed a further affidavit dated 6/6/2022 but filed on 23/5/2022 in which he refers to practice directions dated 2014 which provide that a party may only object to the production of specific documents during the pretrial conference. The applicant also wishes to have the phone that was used to record the electronic evidence produced for cyber forensic examination by him and a report filed with the court.

2. The application by the defendant is opposed by the plaintiff who has sworn a replying affidavit in which he deposes that the application is frivolous, vexatious and an abuse of the court process because the court has already directed that all preliminary applications be abandoned.
3. I have carefully considered the application in its entirety including the affidavits, the grounds, the written submissions and the case law contained.
4. I find that it is a draconian move to strike out evidence that could assist the court in arriving at a fair judgement in this case. Failure to include the said certificate is not fatal to the production of the said



evidence because that failure is curable by a late filing. Amendment of pleadings can be at any time before judgment. It is therefore premature to declare any evidence admissible.

5 The *Constitution of Kenya* at article 50 (1) provides that every person who has a dispute before a court or a Tribunal has a right to a fair hearing. A fair hearing envisages the right to amend and file documents that may have been left out by mistake.

6 The question which should bother the parties and the court in this case is very simple. It is whether the defendant has trespassed onto L.R. Kajiado/Kaputiei/North/23713.

7 The defendant has stated at paragraph 4 of his witness statement that his land is not adjacent to the suit land. Yet a look at the record does not show any maps showing the Plaintiffs and the defendants respective parcels. It is almost two (2) years since this suit was filed yet the material that would assist the court in concluding the matter expeditiously has not yet been filed.

8 Under section 1A (3) of the *Civil Procedure Act*, it is provided as follows;

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with directions and orders of the Court.”

9 The overriding objective of the Act is itself captured in section 1A (1) as follows;

The overriding objective of this Act and the rules made here under is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”

10 The court gave directions on 1/11/2021 that all preliminary objections be abandoned so that we focus on the issues of trespass. The current application goes against those directions. I find that it has no merit and I dismiss it.

11 Secondly, in order that the suit may be concluded expeditiously, I direct that each party files a copy of the official map from the land registry showing the two parcels in dispute so that we may determine whether they abut each other.

12 Such evidence to be filed and served within 60 days.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M.N. GICHERU**

**JUDGE**

