



Kipkemboi & 4 others v Commissioner of Lands & 7 others (Environment and Land Case Civil Suit 924 of 2012) [2022] KEELC 2920 (KLR) (22 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 924 OF 2012**

**LN MBUGUA, J
JUNE 22, 2022**

BETWEEN

**DAVID KIPKEMBOI 1ST PETITIONER
JOSEPHINE MOINDI 2ND PETITIONER
DAVID KAMUNYA RUNO 3RD PETITIONER
SINGUO HOLDINGS LIMITED 4TH PETITIONER
TIMOTHY ONDIEKI 5TH PETITIONER**

AND

**COMMISSIONER OF LANDS 1ST RESPONDENT
REGISTRAR OF TITLES 2ND RESPONDENT
DIRECTOR OF SURVEYS 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
MICROTECH ACCESSORIES LIMITED 5TH RESPONDENT
BANGAL TRADING LIMITED 6TH RESPONDENT
MUMTAZZ TRADING AND INVESTMENT CO LTD 7TH RESPONDENT
MOKOWE TRADERS LIMITED 8TH RESPONDENT**

RULING

Background

1. This suit was filed by way of a petition dated 16.11.2012 in which the petitioners sought orders that;



- a. A declaration that the 1st, 2nd and 3rd respondents arbitrarily deprived the petitioners' proprietary rights to L.R. No. 209/12666/4, 12666/6, 12666/9 and 12666/16 contrary to Article 40 of *the Constitution*.
 - b. A declaration that the respondent's do compensate the petitioners for the market value loss of their sub-plots to a total of Kshs.236,156,700/=.
 - c. Costs of this petition and interest.
2. Until 30.7.2014 directions had been given for the suit to be heard by way of written submissions, but on the said date, the petitioners' counsel informed the court that they desired to adduce viva voce evidence. There being no objection from the other parties, the court directed the petition to be heard in that manner. To this end, parties were directed to file and serve their respective trial bundles containing their witness statements and documents to be relied upon within 60 days and the matter was scheduled for Pre-trial directions on 8.10.2014. From henceforth, a period spanning 6-7 years, the matter marked time in the stage of compliance with pretrial directions!.
 3. I took over this matter on 1.2.2022 when the case was scheduled for hearing for two days, of which the actual hearing took off on 2.2.2022. Just before the trial commenced, the court conducted a mini pretrial exercise in which the advocates for the various parties were directed to identify their pleadings, their witnesses and the documents they were to rely upon. Alas, just as the first witness for the petitioner, (PW1) was in the process of producing their various documents, objections to the production of the said documents came by first and furious from the counsels of the respective respondents triggering this Ruling.
 4. At this juncture, it is crucial to note that the the petitioner has availed a rather voluminous trial bundle containing 257 pages dated 11.9.2018 and the objections raised by the Respondents refer to documents filed thereon. In order to internalize and analyze the said objections, I deem it fit to summarize the content in the petitioner's trial bundle as follows;
 - i. Page 10 is the Supporting Affidavit of David Kipkemboi (PW1) dated 16th November 2012 with numerous annexures running from page 16 to 70 which are; Page 16- approved subdivision plan by Commissioner of lands; Page 17, 18 and 43 is one and the same document which is a letter dated 28th March 2007 from Director of Survey to Commissioner of Lands confirming that subdivision survey documents were submitted by a licensed surveyor, Mr. O.M Wainaina and the survey documents given Computation File No 49398 and F/R 317/57. The letter also states that following authentication of the survey documents new LR Nos issued were 209/12666/2-26 and subsequent deed plan numbers 244535-59 processed. Page 19- 42 are copies of deed plans. Some of the LR Nos on page 20, 23 and 24 are not legible while the document on page 41 is blurred. Page 44-46, 47-49, 50-52, 53-54, are copies of certificates of Title for LR Nos. 209/12666/16, 4, 9 and 6 in the names of the 1st and 2nd Petitioners; 3rd Petitioner; 4th Petitioner and 5th Petitioner respectively, while Pages 55-56 are requests for certified copies of LR Nos 209/12666/16 and 4. Page 63-66 is a copy of certificate of title for LR No. 209/12666 in the name of Microtech Accessories Ltd (herein the 5th Respondent). This is the same document on page 67-70.
 - ii. Page 71-72 is a Notice of Withdrawal of suit dated 9th March 2012 which is the same document on page 106-107.
 - iii. Page 73-74 is a Further Affidavit sworn by the 1st Petitioner dated 3rd April 2013 annexing: copy of what he identifies as the I.R Register which is on page 75 of the bundle of documents; An



affidavit sworn by Silas Komen Mwaita dated 1st April 2013 (on page 76-77), which is the same document as that on pages 78-79 and 90 -92.

- iv. Page 80-81 is a court order dated 8th May 2013 by Hon. Justice Mutungi given in this suit.
 - v. Page 82-84 is a Chamber Summons application dated 21st March 2013 in this case seeking orders for the Registrar of Titles to be compelled to produce the Register and Daybook.
 - vi. Page 85-86 is a Supporting Affidavit by the 1st Petitioner dated 21st March 2013.
 - vii. Page 87- 89 is a Replying Affidavit by the 1st Petitioner dated 6th July 2013 opposing application for joinder of 5th to 8th Respondents in this suit. Therein, he has availed 3 annexures as follows: The I.R. Register on page 90 (similar to the one on page 75); Another affidavit of Silas Komen Mwaita on page 91, while on Page 93-95 there is a handwritten statement by Bibiana Rabuku dated 19th July 2010 denouncing having signed any grants and is recorded at CID offices. The same document is to be found at page 127-129.
 - vii. Page 96-97 is a Replying Affidavit dated 23rd September 2013 by Edwin Munoko Wafula, a Senior Land Registration Officer for the 2nd Respondent with its constituent annexures on page 98-99 which is another copy of the I.R Register. This time round, the document has two pages unlike those on pages 75 and 90.
 - vii. Page 100-105 is a further replying Affidavit by the 1st Petitioner dated 12th May 2014 on the issue of fraud in issuance of grants to the 5th Respondent. The annexures run from page 106 – 150 and include: page 108, a decree in ELC Case No. 215 of 2010, at Page 110-112, 113-115, 119-121 are valuation reports dated 16th April 2014 for LR Nos. 209/12666/4, 209/12666/6, 209/12666/9 and 209/12666/16 respectively. Page 122 -123 is a subdivision plan for LR Nos. 209/12666/4, 209/12666/6, 209/12666/9 and 209/12666/16, but the said document is partially not legible. Page 126 is a deed plan. Page 130-131 is a letter dated 2nd October 2013 by Bibiana Rabuku to advocates for the Petitioner indicating her lack of knowledge on how Deed Plan 274629 was issued. Page 132 is not legible save that it is from Bibiana Rabuku. Page 133-136 is an Affidavit sworn by Edwin Munoko attaching the IR Register same as the documents on page 96-99. Page 137-138 is an affidavit sworn by Silas Komen Mwaita dated 1st April 2013 similar to those on pages 76-77, 78-79 and 90-92. Page 139 is a receipt, page 140 is an illegible map, 141-142 is a letter from commissioner of lands to Attorney General, page 143 is a document from Bibiana Rabuku, pages 144-145 are not legible, page 146 is a letter from Kenya Anti Corruption Commission to the ministry of lands, while on page 148 is the response from the ministry. Page 150 is another copy of the I.R register.
 - vii. Page 151 is an Affidavit sworn by Timothy Ondieki the 5th Petitioner dated 11th September 2018 which constitutes annexures on pages 152a – 152 j. Some documents therein are not legible-see page 152h.
 - vii. Page 153- 157 is a Replying Affidavit dated 18th January 2008 by Antony Kahiga which constitutes annexures on pages 158-253 of the Petitioners’ bundle.
 - vii. Page 254- 256 is a witness statement by David Kamunya Runo, the 3rd Petitioner dated 11th September 2018.
5. What is discernible from the above analysis is that most of the documents of the petitioners are annexures to various affidavits, and such annexures include sworn affidavits by other deponents.



Objections by 1st -4th Respondents

6. The objections raised by the aforementioned respondents relate to the following documents;
 - i. Document on page 16, 17 and 18 on grounds that the witness was neither the maker of the documents nor were the documents addressed to him.
 - ii. Documents on page 19-42 on grounds that the Petitioner's claim is for IR 209/12666/16 but the documents adduced were in relation to many other properties and no basis had been laid as to why the other deed plans were being produced.
 - iii. Documents on pages 76-77 and 91-92 which are affidavits sworn by one Silas Komen Mwaita on grounds that these are documents made by a 3rd party and the witness could not be cross examined on averments made by another person.
 - iv. Document on page 93-95 which is a statement made by Bibiana Achieng Rabuku on grounds that the maker was the competent person to produce it.
 - v. Document on page 96-99 which is a replying affidavit sworn by one Edwin Munoko on grounds that the deponent would be the competent witness.
 - vi. Documents on pages 110-121 which are valuation reports which ought to be produced by the maker.
 - vii. Documents on page 127-132 which are documents in reference to correspondence of Bibiana and have no reference to the 1st Petitioner. Thus the competent person to produce them would be Bibiana.
 - viii. Documents on page 141 – 142 and 143-150 which is a letter from the Commissioner of Lands to the Attorney General and should be produced by the maker adding that the 1st Petitioner had not laid basis for their production.

Objections by the 5th, 6th and 8th Respondents

7. The Counsel for these respondents aligned himself with the objections raised by the counsel for 1st - 4th respondents. He added that all the documents mentioned were photocopies which was against rules of evidence stating that where secondary evidence was used, a basis for that ought to be laid and that the other parties ought to have been informed that reliance on such secondary evidence would be made. To this end, reference was made to the provisions of Section 68 of the Evidence Act and the case of; In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR.
8. It was further argued that the production of secondary evidence was not a procedural technicality but an issue of substantive fairness. Thus the documents referred to by the witness should not be admitted in evidence until the original documents are produced in court.
9. It was further argued that PW1 could not produce documents which were not authored by him because this was not only a miscarriage of justice but he could also not be cross examined on the same.
10. The specific documents objected to by these respondents are;
 - i. Document on page 17 marked A4 referred in the Affidavit of Anthony Kahiga was from the Director of Survey who should be the person to confirm that the document emanated from their office. Same case applies to documents on page 18 and 19.



- ii. The survey maps on page 19-42 relate to subdivisions for LR 209/12666/2 and all the documents were annexures in the Affidavit sworn by Anthony Kahiga who was not a witness herein. The deed plans emanate from the Director of Survey and should be adduced by a competent person including their original copies.
- iii. On page 43 was correspondence between the Commissioner of Lands to the Director of Survey making reference to digital equipment which PW1 had not laid a basis for its production.
- iv. Page 44-46, 57-59 are titles in the name of the 1st Petitioner which the counsel had not seen and that originals should be availed.
- v. The title documents on page 47-54, 60-62 are in the names of 3rd Petitioner, 4th Petitioner and 5th Petitioner who should have their day in court to produce the said documents.
- vi. The documents on page 55-56 are in the name of David K and should be produced by the maker.
- vii. On page 71 which is a notice of withdrawal of suit, counsel stated that they would call someone from the law firm of Ngunyo Munyua over that document.
- viii. The affidavit on page 73-74 by Pw1 relates to the Chamber Summons application of 21st March 2013 which was a request to the Registrar of Titles to be furnished with certain documents.
- ix. Document on page 75 has no author and it appears as a handwritten document whose authenticity is unknown and cannot be verified.
- x. On page 76-79, 91-92, the Affidavit sworn by Silas Mwaita, as well as those on page 133-134 by Munoko could not be verified.
- xi. For the documents on page 90, 98 and 99, their origin is unknown. If the same originated from the Ministry of Lands, then the said Ministry should produce them.
- xii. For the documents on page 141-150, including statements made at DCI or any other public office, their purpose can only be ascertained by the respective public officer. On this point, reference was made to the provisions of Section 67, 68 and 69 of the *Evidence Act*.

Objections by the 7th respondent

11. The 7th respondent also took the stand taken by the other respondents adding their voice in the following broad areas namely:
 - i. That documents emanating from the Ministry of Lands on page 17-19 were copies of annexures from affidavits of Anthony Kahiga meaning that they had been produced in other proceedings. They are therefore secondary evidence of another secondary evidence which was inadmissible in court. Further, PW1 had not indicated in his affidavit where the documents emanated from. This issue cut across all documents produced from other people's affidavits.
 - ii. Originals of documents produced as official searches should be availed as basis of why the originals had not been availed. Counsel also pointed out that some of the searches did not relate to the Petitioner.
 - iii. The third set of documents are the Affidavits by 3rd parties: Silas Komen Mwaita on page 76-77, 78-79, 91 and the annexures therein and affidavit sworn by Edwin Munoko Wafula on page 96. Counsel contested admissibility of these documents on grounds that an affidavit being a sworn



disposition cannot be adduced by a third party as this would amount to hearsay evidence. Therefore the makers of the affidavits ought to be called for cross examination.

- iv. The hand written documents annexed to the 1st Petitioner's affidavit on page 75, 98-99, the handwritten statements of Bibiana and the extract from official records apparently obtained by PW1 from the Registrar of Lands were inadmissible. This is because there was no evidence of communication between PW1 and the Registrar of Titles leading to issuance of the extract and therefore their authenticity was questionable. Counsel stated that PW1 ought to have applied for summons for the Registrar to produce the said documents.
- v. Counsel also objected to the production of the valuation report by PW1 arguing that it was an expert opinion on the value of the land which ought to be produced by the valuer.

Petitioners' Rejoinder to the objections

12. Counsel for the Petitioners stated that they have originals for the documents on page 44-46, title on page 47-49, as well as the original survey plan on page 122, and that they had the original certified court order issued by Justice Mutungi for the document on page 75 and page 80. The petitioners are ready to call the Registrar to testify.
13. In view of the objections raised, the petitioners contend that one Kamunya has recorded a witness statement on page 254 of their bundle and he can testify. Similarly, the Petitioners will call Silas Komen Mwaita in relation to his affidavits. They will also call Bibiana Rabuku as a witness in relation to the documents on page 93-95 and 127-132 even though this person has not recorded a statement. They will also call the valuer to produce the valuation report on page 110-125.
14. On the issue of the Affidavit of Edwin Munoko Wafula on page 133-136, counsel stated that the said affidavit formed part of the pleadings of this suit since it was a supplementary affidavit by the Attorney General on behalf of the Registrar of Titles.
15. As for the other documents on page 16-45, counsel requested to be allowed to produce the said documents as they were obtained from another case HCCC number 692 of 2007 (Judicial Review) between Microtech Accessories Ltd (the 5th Respondent herein) and Ministry of Lands and Commissioner of Lands.
16. Counsel also prayed that PW1 be allowed to rely on the Supplementary Affidavit sworn by himself dated 10th April 2013 which had laid basis for the documents on page 16-45 which were obtained in that case. Counsel argued that the parties at the time of swearing the said affidavit were the current Petitioners and the Respondents were the 1st to the 4th Respondents. It was argued that since it was the Attorney General who made an application for joinder of the 5th to 8th Respondents, the Attorney General ought to have served them adding that they also ought to have confirmed the documents that had been filed. Therefore the mistake was caused by the Attorney General and they should not be punished for it. Counsel stated that should their prayer be disallowed, then they could call an officer from EACC, Survey of Kenya, Ministry of Lands and any other necessary persons to adduce the said documents.
17. Finally, Counsel for the petitioners prayed that the documents filed by the 7th respondent the previous day be expunged from the records.
18. All the respondents' counsels had no issue with the title document on page 44 save that page 2 was missing. For the title of one Runo, the counsel for the 1st- 4th respondents had no issue with the same, however, the rest of the respondents requested that the person known as Runo be the one to produce



the said documents. For the survey map, again counsel for the 1st respondent had no issue with the same, counsel for the 7th respondent prayed that the same be availed during cross examination and thereafter, it can be returned to petitioners. However, counsel for the 5th, 6th and 8th respondents stated that they had reservations on the said document.

19. Further, counsel for 5th, 6th and 8th respondents stated that they had never seen the supplementary affidavit which had apparently been expunged, so the same should not be relied upon.

Analysis and determination

20. At this juncture, I find it crucial to extract the information given by the advocates regarding the witnesses who would testify and the documents to be relied upon during the mini pretrial exercise conducted by the court on 1.2.2022. In respect of the petitioners, the court was informed that they would call two witnesses (1st & 5th petitioners); their statements of witness are the Affidavits of David Kipkemboi on Pages 10 and 73; Affidavit of Timothy Ondieki on page 151, and statement of David Kamunya at page 254. That the statement of surveyor filed on 26.11.2014 by surveyor was not filled in the trial bundle but had been served. It was pointed out that they have a valuation report.
21. For the 1-4th defendants, the court was informed that they have no trial bundle. They will rely on two replying affidavits, but they may call defendants!
22. For the 7th respondents, the court was informed that they did file an affidavit dated 24.4.2014 and they had a witness statement and 21 documents dated that very day of 1.2.2022.
23. For the 5th, 6th, and 8th respondents, they will rely on a replying affidavit dated 28.3.2014 sworn by Melijedich Nyamind containing 12 annexures.
24. When the petitioners called their first witness David Kipkemboi (PW1), to testify, he went ahead to identify the following affidavits with their annexures as his evidence.
 - i. His supporting affidavit dated 16.11.2012 on page 10 of the bundle.
 - ii. His further affidavit dated 3.4.2013 on page 73 of their bundle.
 - iii. His Replying Affidavit dated 6.7.2013 on page 87 of the bundle.
 - iv. His Further Replying Affidavit dated 12.5.2018 on page 100 of their bundle.
25. It is clear beyond peradventure that the only parties who were prepared for the trial are the 5th, 6th and 8th defendants. The 7th defendant was filing documents on the date of trial which means that the said documents had not even been served, while the 1st-4th respondents are not sure whether they will call any witness. However, the gaudy presentation made by the petitioners in their trial bundle can only be described in one word; Ignominious!. Otherwise why would the counsel for the petitioners mention the two affidavits on page 10 and 73 as the ones to be relied upon by pw1 only for the said witness to unleash other affidavits with voluminous annexures running from page 87 all the way upto page 150 not to mention another affidavit on page 85! The court is at a loss as to whether this is a case of the petitioners flaunting their bundle with unbridled abandon, whether it is a case of disregard of court's directions on pretrial procedures or its a case of sheer ineptitude! Whatever the scenario, it is astounding.



26. The provisions of Section 1 A of the *Civil Procedure Act* stipulates that:

- “(1) (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) 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 processes of the Court and to comply with the directions and orders of the Court.”

27. For the court to carry out its mandate as set out in the above provisions of law, then a proper transparent pretrial exercise has to be undertaken. This cannot be achieved if advocates don't play their role in terms of the provisions of subsection (3) above. In the case of *Elias Borana Laichena & another v. Michael Kirimi Kobia (suing as the legal representative and administrator of the state of Gabriel Gikubu Kobia), Deceased* (2019) eKLR, I applauded a trial court for conducting the trial process in a transparent manner in the following words:

“I find that the magistrate has picked up a style of ensuring that there is no obscurity at every step of the trial process”.

28. I find that this is a case whereby the petitioners have all along been desiring to proceed by way of reliance on various affidavit (see the proceedings of 8. 10. 2014). The question is why then were they so ill prepared?. How did they expect to unleash such a disorganized bundle as evidence without anyone raising a query?

29. Fast forward, there are objections to be determined since the court cannot wring its hands in despair. In determining the issue at hand, this court will give directions geared towards the transparent progression of the case in line with Active Case Management Principles.

30. An argument has been advanced by the respondents particularly counsel for the 5th, 6th and 8th respondents that photocopies of documents cannot be produced in court as evidence as they are not primary documents and that only makers of documents can produce such documents. I beg to differ. With the advent of the *Civil Procedure Rules* of 2010 (as revised in 2020), Order 3(2) and order 7 (5) thereof stipulate that the copies of documents to be relied on at the trial have to accompany the pleadings. The said documents are served alongside the pleadings.

31. The pretrial procedures are then required to be undertaken in tandem with Order 11 of the aforementioned rules of procedure. What is envisaged to happen at this stage includes; Disclosure of documentary evidence and witness statements and considering in advance the determination of any arguments inter-alia relating to the admissibility of any documentary, technical, expert, or electronic evidence; Early identification of the undisputed and disputed issues and gauging the gravity of the case (i.e complexity, novel etc). In essence, the pretrial procedures are geared towards quality preparation, quantification of the workload associated with each particular case and generally ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way possible.



32. The overarching principles in Active Case Management in which Pretrial Procedures are anchored upon are; the doctrine of predictability (Where there is certainty of the processes and outcome at every stage of the trial); Transparency; Accountability; Efficiency; Fairness; Just; and Expeditious trial.
33. The constitutional underpinnings of the above principles can be found in Article 159 (2) (b) of *the Constitution* on expeditious trials, Article 50 (1) on legitimate expectation of fairness, Article 20 3(a) and (b) on obligation to develop the law , Article 21 on observing, respecting, protecting, promoting and fulfilling rights and fundamental freedoms in the bill of rights, Article 22 (3)(d) and Article 159 2 (d) which entreats the courts not to be restricted by procedural technicalities when observing the rules of natural justice.
34. Article 50(4) of *the Constitution* provides that the courts have discretion to determine whether the admission of documents would be detrimental to the administration of justice in the following words:
- “Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice”
35. In the Court of Appeal case of *Evangeline Nyegera (Suing as the Legal Representative of Felix M’ikiugu alias M’ikiugu Jeremia M’Raibuni (Deceased) v Godwin Gachagua Githui* [2017] eKLR, the court had this to say with regard to secondary evidence;
- “The *Evidence Act* allows secondary evidence by way of copies of documents made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies. We think the appellant ought to have specified the nature of the documents and their relevance. As the suit is still pending, and as there is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence, we hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents (Emphasis added). It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross-examine on veracity and legitimacy if it be necessary (Emphasis added).
36. All that I am saying is that the era of having a retinue of witnesses trooping in court to produce a plethora of documents, disputed, undisputed et al is long gone. Through the pretrial procedures where documents are exchanged, parties get to know in advance the nature of the evidence that the protagonists intend to adduce. Thus there is a paradigm shift in the whole process of adducing evidence via documentary and oral evidence. However, at all times, the court retains inherent jurisdiction in meeting the interests of justice by applying pragmatic balance rather than a robotic approach.
37. By and large, the petitioner has made concessions in affirming that they are determined to avail most of the original documents and they will also call some of the deponents of the affidavits as witnesses. A perusal of the record reveals that this is a rather complex dispute where different entities and persons hold various titles to the same parcel of land. Litigation in relation to the said land appears to be in abundance going by the number of cases which have been mentioned here and there by the parties. I.e HCCC 215 of 2010, and HCC 692 of 2007. In the circumstances, and noting that the petitioner gave a rather disjointed show in identification of the documents they are to rely on at the beginning of the trial, then it behoves this court to be extra vigilant and at the same time be pragmatic in the issuance of appropriate directions.



38. I will give directions on seven (7) broad categories as to how the various documents shall be produced in court.

Affidavits and Statements

39. It is noted that pw1 had embarked on a process of producing affidavits of other persons as well as their statements as evidence on the basis that they form part of his annexures. I find that counsel for the 7th Respondent has rightly pointed out that affidavits are sworn dispositions hence only the deponents can be adequately cross examined on the same. On the same breadth, the statements for instance those made by Bibiana Rabuku cannot certainly be produced by pw1 or any other person other than the author of such a document, unless the provisions of Section 33 - 35 of the Evidence Act are invoked.
40. To this end, counsel for petitioners has under taken to avail the authors of the aforementioned affidavits and statements, to wit; Silas Komen and Bibiana Rabuku. That puts to rest the objections raised in respect of documents on pages 76-77, 91-95, 127 & 132. Counsel for the petitioners however, avers that they can't avail Edwin Munoko Wafula regarding his affidavits and annexures because the said affidavits are pleadings (see pages 96 and 133 of the bundle). However, and as again pointed out by the 7th Respondent, a party cannot rely on the pleadings of the opponents as their evidence!. Such documents ought to be utilized in the platform of cross examination.
41. I do note that Edwin Munoko was swearing the affidavits in his capacity as a Senior Land Registration Officer at the Ministry of Lands, and was allegedly authorized to do so by the Land Registrar. In the circumstance, the petitioners need to avail the deponent to testify, but they are at liberty to request for summons to the relevant officers in the office of The Chief Land Registrar to produce the documents referred to by Mr. Munoko. In any event, the petitioners have also expressed a wish to call the Land Registrar on the issue of the aforementioned documents (particularly the I.R. Register) in the event that the affidavits of Mr. Munoka are not admitted as evidence.

Public Documents

42. Documents with a flavour of a public office including private documents emanating from public offices i.e the proposed subdivision plans, deed plans, R.I.M's, titles, and application for official searches shall be produced without calling the makers. The only rider is that the original documents shall be availed at the trial and for the titles, it is the respective owners of these titles who shall produce the same. The respondents will have a chance to cross examine the witnesses on the authenticity of the said documents. This takes care of documents at page 16, 19-42, 44- 70, 122 and 126 noting that the document on page 140 is not legible hence the court will not mention the same in this category.

Private Documents

43. Private documents including valuation reports on pages 110 – 121, and documents on pages 143 and 144 shall be produced by the makers of such documents.

Correspondence

44. Considering that the subdivision and alienation of the suit land is at the heart of the dispute herein, and seeing that there are a plethora of letters from various government and private offices, I direct that the authors of the said letters be the ones to produce the said documents. However, in case of the correspondences from public offices like Director of Survey, Ministry of Lands, Kenya Anti corruption Authority and the Commissioner of Lands, the petitioners are at liberty to request for summons to authorized officers of the respective departments to produce the documents. And in



case such entities have become defunct (as in the case of the Commissioner of lands and Kenya Anti Corruption Authority) the summons can be directed to the succeeding office. This then takes care of such documents as those on pages 17, 43, 141,146 – 149.

Unknown Documents

45. These are the documents which cannot be understood on their own particularly the one on page 75 which is repeatedly availed in the bundle (I.e on pages 90,98,99 & 150). A person from the offices where the documents emanates from should be called to produce the same.

Admissible Documents

46. The documents on pages 71, 80 and 108; the notice of withdrawal of the suit, the court order and a decree shall be produced by the witness (pw1) just as they are.

Illegible/ repeated documents

47. It is noted that some of the documents in the bundle are not legible i.e those on pages 41, 58, 122,132, 140, 144, 145 and 152 (h). Other documents have repeatedly been reproduced (see document on page 17,18 & 43; 71 & 106; 76-77, 78-79, 91-92; 93-95 & 127-129; 75, 90, 98, 135 & 150. In that regard the petitioners should go through their bundle with a tooth comb and replace all the illegible documents with clear copies, while at the same time they should desist from a repeat exercise.

48. I have already pronounced that no proper pretrial has been done despite the hiatus of 6-7 years. Ordinarily, the court should not be writing lengthy rulings at the stage of the actual hearing on matters “pre trial.” But again, I find that it would be a futile exercise if this court was to allow the case to continue for hearing in the current state. In the circumstances, I give final orders as follows:

- 1) That this suit shall be subjected to a pretrial exercise hence the scheduled trial is suspended unless the said exercise is accomplished before the date of the trial.
- 2) That the petitioner and any other party herein is granted leave to file and serve a trial bundle containing their pleadings, Affidavits, witness statements and documentary evidence that they desire to rely upon. To this end, any orders that the court may have given expunging any document(s) of the parties are hereby varied such that parties are now granted leave to file and serve any old or fresh documents and witness statements and affidavits to facilitate the production of their various documents.
- 3) That the respective paginated Trial Bundles shall be filed and served within 60 days, failure to which 1) the suit shall stand as dismissed on the part of none compliance on the part of the petitioners, 2) the case shall proceed as an undefended claim in respect of the defaulting respondent.
- 4) Documents filed outside the given timelines, not served or are not in the respective paginated bundles shall stand as expunged.
- 5) For purposes of harmonious proper and efficient case and court management, and in order to maintain sanctity of the record, and noting that the file is voluminous, the file shall be arranged in three volumes as follows;
 - (1) Volume one shall contain only the hand written records,
 - (2) Volume two shall contain the rest of the documents filed as at the time of delivery of this ruling,



- (3) Volume three shall contain the fresh Trial Bundles of the parties and subsequent documents.
- 6) The parties (through their advocates) are directed to focus on the shortest but fairest route of finalizing the matter by identifying the disputed and undisputed issues and documents during the date of Pretrial.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Munyua for the Petitioner,

Allan Kamau for the 4th Respondents,

Wangui holding brief for Cohen for 5th, 6th and 8th Respondents,

Mrs Ahomo holding brief for Mr. Issa for 7th Respondent.

Court Assistant: Eddel / Joan

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