



**Sakwa & 2 others v National Housing Corporation & 4 others (Environment & Land Case 18 of 2021) [2022] KEELC 14930 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14930 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 18 OF 2021  
FO NYAGAKA, J  
NOVEMBER 23, 2022**

**BETWEEN**

**ZURAH NIGHT SAKWA ..... 1<sup>ST</sup> PLAINTIFF  
ALICE MAINA MARUGUT ..... 2<sup>ND</sup> PLAINTIFF  
FRANCIS LILECH ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATIONAL HOUSING CORPORATION ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT  
COUNTY DORECTOR NATIONAL HOUSING TRANS NZOIA .... 3<sup>RD</sup>  
DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT  
ETHICS AND ANTI-CORRUPTION COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

*(On Party to call Witness)*

**RULING**

1. Before me is an issue that while it is a legal one calls for Solomonic wisdom to decide on. I trust that I will do it as I analyze the law and facts on it. The brief facts on it are that the Plaintiff brought the instant suit against the Defendants, claiming many reliefs, amongst which were, that the Defendants do not have a legitimate claim over land parcel number Block 11/18 Kitale Municipality (sic) and the suit land belongs to the Plaintiff; and an order for a permanent injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> Defendants by themselves, servants and/or agents from ever laying claim on the suit land, disrupting operations (thereon), interfering, subdividing, alienating, transferring, leasing, encumbering, intermeddling, or



- selling and/or in any other manner dealing with land parcel Block 11/18 Kitale Municipality, and costs of the suit.
2. At the time of instituting the suit they accompanied the Plaintiff with a list of witnesses christened the "Plaintiff's List of Witnesses". It was dated 5/03/2021. From the list they took only witness, the First Plaintiff, and recorded and filed witness statement. They then filed the set of documents. Among the witnesses listed, though, was one whom they referred to in a general way as "2. Land Registrar Trans Nzoia County.". In the Plaintiffs' oral submissions by learned counsel in support of their contention towards this ruling, counsel described the witness an "expert witness". He submitted that it was by reason of the expert evidence that the witness could have given in court that the Plaintiff did not record a statement from 'him' and file it.
  3. The Defendants entered appearance, and 23/03/2022 filed "The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Defence and Counterclaim" dated March 21, 2022. Accompanying the Defence and Counterclaim was a list of witnesses which were titled "The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' List of Documents" (emphasis mine by way of underline). It was dated March 21, 2022. To it was attached only a witness statement from one of the two witnesses listed. Among the list of witnesses was one who was named as "The County Land Registrar – Trans Nzoia County. His witness statement was not given. The office, or to say the officer in charge of the office, was only named as one of the witnesses.
  4. The 5<sup>th</sup> Defendant, the Ethics and Ant-Corruption Commission, filed their pleadings in response to the Plaintiff's Claim. They filed a Defence and Counterclaim on September 9, 2021. Then they filed their List of Documents on January 27, 2022 and the List of Witnesses on the same date. The List of Witnesses which was dated January 26, 2022 contained eleven (11) witnesses. Each of the witnesses' written statements were attached to the List. Of the witnesses was one Mr Nelson O. Odhiambo who was the 7<sup>th</sup> on the List. His statement was dated August 17, 2021 and signed by him on all pages. By then he was a Land Registrar stationed in Kitale of Trans Nzoia County.
  5. From the record - being the Trial Bundle of the Plaintiffs - it's clear that there was a handwritten statement which the said Land Registrar, one Mr Nelson Odhiambo, had recorded with the Police at the Lands Office, Kitale as indicated on the margins of the pages of the statemen. The statement was barely legible in all the pages, being photocopied in deep dark colour. The statement was done earlier than, and actually prior to, the filing of the Plaintiffs' Trial Bundle on February 10, 2022 pursuant to the directions of the Court on December 6, 2021. The Court's directions were given in order for parties to comply with Order 11 of the Civil Procedure Rules and the Practice Directions of this Court Gazetted as No 5178 of 2014. The Bundle was then filed on February 10, 2022. I have singled and repeated out the act and date of the Plaintiffs filing the Trial Bundle because the act presents an interesting but unpleasant practice of law as I highlight hereunder.
  6. The Plaintiff filed the instant case, under Certificate of Urgency, on March 8, 2021. Accompanying the Plaintiff was the "Plaintiff's List of Witnessess (sic)" which was dated March 5, 2021, which I have alluded to at paragraph 2 above. The List had four names of witnesses and indicated that others may be called "with the leave of the Court." To the List was attached only one witness statement which was that of the Plaintiff. It was dated the same date. To be clear, there was no other witness statement filed save that of the Plaintiff.
  7. When this Court directed, on 6/12/2021, that parties file and exchange their Trial Bundles, it also ordered that each party file their detailed witnesses' statements of the ones already filed and as clearly stated in the order then, "if there is need to amend statements." Those were the directions of the Court. It was clear to all parties that they were to file only amended witnesses' statements with the Trial Bundles if the witnesses had recorded the statements and the same already filed.



8. Interesting and contrary to, and without leave of, the Court orders, the Plaintiffs, using their skills or other means 'ingenuity' that this Court may not be aware of, obtained a copy of a handwritten statement of the then Land Registrar of Kitale County, one Nelson Odhiambo, self-recorded on March 16, 2021. They then attached it to the Trial Bundle filed on February 10, 2022. The Statement purported to be a statement filed by the Plaintiff on or by March 5, 2021 when the List of Witnesses was filed. But by any stretch of imagination, it could not have been filed as at that date.
9. As it appears, the latter statement was in relation to investigations which the Police office was carrying out then over the same subject matter herein. It would seem also that to the Plaintiff, the said statement by the witness was favourable to their case, and whereas the learned counsel for the Plaintiff submitted that the said witness was to be called by the Plaintiff to produce only the extract of title to the parcel of land in question, there is more than meets the eye: they wanted to call the witness to testify on the self-recorded statement they sneaked into the Court record. I wonder how the witness ceased to be an expert witness as submitted by the Plaintiff's and now recorded a witness statement to be filed in advance of the trial. But before I analyze this issue further, I give a deeper exegesis of the proceedings leading to the instant application.
10. The suit proceeded with the hearing of the Plaintiff's case. After the First Plaintiff testified in that behalf, his learned counsel informed the Court that he had two witnesses remaining to be called one of whom was a Mr Nelson Odhiambo, the Land Registrar in charge of Trans Nzoia County. He applied for adjournment and witness summons to him. Learned counsel submitted that the witness' role was to produce in evidence the extract of title to the suit land. At this point both learned counsel representing the Attorney-General who appeared for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the one representing the 5<sup>th</sup> Defendant objected vehemently to the prayer.
11. Their contention was that the said witness was the 5<sup>th</sup> Defendant's witness and actually a party to the case hence could not be called for the adverse party. Learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants argued further that the alleged witness was a party by virtue of having been sued over allegations of fraud allegedly committed in his office and could not therefore be called by the same Plaintiff who had made such allegations against him. He also argued that the said witness or party was already lined up for testimony as the 5<sup>th</sup> Defendant's witness hence it would be prejudicial to them for the Plaintiff to call him as their witness.
12. Learned counsel for the 5<sup>th</sup> Defendant's also objected vehemently to the Application. She stated that the 5<sup>th</sup> Defendant had not only listed the witness as its own but had actually gone ahead to record a witness statement from him and file it, as summarized above. She stated that it would be prejudicial for the Plaintiff to call the witness as his, yet he had made a detailed statement which he was coming to Court, on behalf of the 5<sup>th</sup> Defendant, to give. She stated that it was the 5<sup>th</sup> Defendant who stood to lose if the witness was not called by it hence the fact that he would not be called by the Plaintiff should not worry him as he would have chance to have the evidence produced through the 5<sup>th</sup> Defendant's step. She stated again that the 5<sup>th</sup> Defendant's List of Witnesses was filed on January 25, 2022, a date earlier than the date the Plaintiffs' Trial Bundle that had the List with the alleged statement was filed. She argued, moreover, that the Plaintiff had not recorded a witness statement from the said witness and that the one recorded from him by the police was only done in the course of police collecting information on the demolition of the property. She stated that the act of the Plaintiff including the said specific Land Registrar as a witness was an afterthought.
13. As noted clearly, the Plaintiff's Trial Bundle was filed on February 10, 2022. It was the one that contained or had an attachment to it of a handwritten self-recorded statement of the witness on March



16, 2021 at 10.30 am in the Kitale Lands Office, as given to Police (if it ever was). It is the statement that the 5<sup>th</sup> Defendant's counsel terms its filing as an afterthought.

### **Issue, Analysis And Determination**

14. This Court has considered the issue raised before it orally by the Plaintiff's counsel. It has also analyzed the law - both statutory and case law - and the submissions by the parties. The following issues commend to me for determination in this matter: -
  - a. Whether the 'common' witness, Nelson Odhiambo, is an expert witness;
  - b. Whether the Statement recorded on March 16, 2021 is properly on record;
  - c. Whether the witness should be called to testify behalf of the Plaintiffs or Defendants
  - d. Who to bear the costs of this Application?
15. I now determine the issues sequentially as listed above. The introductory comparative non-legal spiritually situate decision that I give here next depicts the dilemma courts face when non-definitive non-legislated issues and scenarios are presented before them, and the judge has to decide on them using the law and facts.
16. The instant Application presents a dispute similar in many ways to one narrated in the Holy Bible in 1 Kings 3:16 - 28. I give its summary here. It involved two mothers (harlots) who lived in the same house and had given birth, in a span of three days, and during the times of rest at night one of them lay on her infant and it died. Then upon realizing the tragedy she exchanged the dead one with the living one and staged a claim over the baby who was alive. The mother of the living baby resisted. The dispute was presented to King Solomon for determination. In it, each woman desired of the King to hand over the baby to her and they adduced evidence in support of their cases. But when the King could not discern the facts well he had to use wisdom to decide the case. He called for a knife to use to split the baby into two and hand over the halves to each mother. One of the claimants happily wanted the baby to be split into two while the other opted the baby to be spared and handed over to the happy claimant, for the sake of its life.

#### **(a) Whether the 'common' witness, Nelson Odhiambo is an expert witness**

17. The witness claimed by the three sets of parties, namely, the Plaintiffs, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the 5<sup>th</sup> Defendant was the Land Registrar of Trans Nzoia at the time of the alleged actions in relation to suit land. The Plaintiff alleged some fraudulent activities in the Lands Office of Trans Nzoia, which necessitated the set of Defendants to plan to call the said individual who was an officer thereat as a witness common to them, and it led to the 5<sup>th</sup> Defendant recording and filing a witness statement from him. I start with restating the law on witnesses and their recorded statements.
18. The law on filing of lists of witnesses and witness statements in civil matters, in the High Court and Courts of Equal Status and the subordinate courts is the Order 3 Rule 2 of the [\*Civil Procedure Rules, 2010\*](#) and Order 7 Rule 5 of the said Rules. The former deals with the written statements to accompany the Plaintiff while the latter is about those to accompany the Defence and Counterclaim (if any). Both Rules exclude expert witnesses from the requirement to write and file statements at the time of filing the pleadings or in advance of the trial of a matter, where leave is granted for late filing.



19. The adduction of the evidence of expert witnesses is provided for in Section 48 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya. It provides in Sub-section 1 as follows: -

“When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.”

20. Sub-section 2 thereof then provides that such people are called experts. Thus, in my view, the starting point of the definition of an expert is the [Act](#). By it, an expert is a person who, by virtue of being specially skilled in a foreign law, science or art or in questions as to identity or genuineness of handwriting, fingerprint or other impression. But going further, the term has been clarified by many a treatise, scholar and case law. According to Brian A. Garner, in [Black’s Law Dictionary](#) (Eleventh Edition) Thompson Reuters, St Paul MN, 2019, p 1920 an “expert witness” is

“A witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or fact in issue.”

21. The earlier edition (the 9<sup>th</sup>) of the same learned author defined an “expert” as:

“A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.”

22. In the words of the learned authors, [Sarkar on Evidence](#), 10<sup>th</sup> Edition:

“An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he made a special study of the subject, or acquired a special experience therein.”

23. In [Mutonyi v Republic](#) [1982] eKLR, the Court of Appeal held that:

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like...Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.”

24. And Garner, 11<sup>th</sup> Edition, (*supra*), at pp 699-700 defines expert evidence as

“Evidence about a scientific, technical, professional, or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field.”

25. Thus, experts play a crucial role in the process of administration of justice. But their evidence just like that of other witnesses does not necessary carry the day because they have appeared in Court and given it. Experts, being human, can err. Too, when ‘corrupted’ in mind, they can deliberately try to mislead the Court. Not everything that passes as expert opinion should be held in the high pedestal of honour and truth. The judge would do well to caution himself that these are the last days of earth’s history and almost all men and women (evil minded) are bent of extracting anything and everything from their



brother or sister and can do anything and everything to achieve that, including the use of hired expert opinion evidence. As Lord Woolf MR, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1995, p 183 would put it:

“Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.”

26. It therefore behooves every judge or judicial officer to ensure appropriate weight is placed on expert witness's testimony, and the evidence must be tested against known knowledge in their area of expertise, the relevance of thereof and the law taken into account. Therefore, in *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR, Mativo, J stated as follows, and I agree with him:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less...the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess... expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.”

27. One may ask why the testimony of an expert is important in a trial. It is important for reason of the fact that the judge in the case before him is faced with the obligation to determine an issue that requires special knowledge or skill, and an area that in the ordinary training of the judge he/she is not specialized in so much so that in applying the law and facts before him he/she may not fully discern the proper outcome of the interplay between the law and facts hence may not correctly understand the nitty gritty of the facts before and during their application with the law. He/she being an expert in the law is expected to understand in simplicity the complex area or aspect before him so that he properly allies the law to it. Thus, the expert's opinion is to simplify the facts on the issue before the judge: not to confuse or mislead him/her. Therefore, Lord President Cooper in *Davis v Edinburgh Magistrates* [1953] SC 34 at 40 gave the purpose of an expert witness as follows:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence...”

28. That is what I would expect of the said witness who was referred to as an expert witness. But what is left of me to determine at this point is whether the Land Registrar was an expert witness as argued by the Plaintiff's counsel. To answer this, I have to look at the functions of the Land Registrar as stipulated in the law. Sections 14 and 15 of the *Land Registration Act*, 2012 provide for the powers of the Chief Land Registrar, County Land Registrars and any other Land Registrars. I need not enumerate them



here. Section 13A of the Act gives the qualifications for appointment to such office. In the relevant sub-sections, it provides that the appointee should be a

“...an Advocate of the High Court of Kenya (years’ experience required depending on the level), a land surveyor, a land economist or an expert in any other relevant field.”

It therefore goes without saying that a Land Registrar should be an expert in matters relating to land.

29. In conclusion, and to that extent, the witness sought to be called qualifies as one. But to the extent that he will testify on matters that are not related to his area of expertise even though relevant to the instant suit he is not an expert witness and in such a case he ought to have written a witness statement on them. To testify on such matters without a prior written and filed statement would be outside the realm of procedural law and an ambush on the other parties.

**(b) Whether the Statement recorded on March 16, 2021 is properly on record**

30. In paragraphs 8 and 14 above I have given the summary of the facts as borne by the record about the copy of the statement dated March 16, 2021. To summarize, it was not filed with the List of Witnesses that it purported to evidence in the Plaintiff’s Trial Bundle filed on February 10, 2022. Facts relating to it show, on the face of it and this Court takes it to be so, that it was recorded on the date it bears and is signed and that was eleven (11) days after the filing of the instant suit. It cannot, therefore, purport by any means to be a witness statement in reference to the List of Witnesses dated March 5, 2021 and filed on March 8, 2021.

31. In any event it was not self-recorded and given to the police. Again, it was neither filed in Court nor served on the parties as required by law. Furthermore, it was ‘filed’ after the pleadings had closed, and the Pre-trial Conference held. I indicate quotation marks to the term filed because it was only attached to a document filed earlier in Court, which was attached to the Trial Bundle which was filed long after the List of Witnesses was filed.

32. Furthermore, the copy of the statement was filed without leave of the Court being sought as required under the proviso to Order 3 Rule 2 of the Civil Procedure Rules which states that,

“Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

Sub-rule (c) deals with the filing of witnesses’ statements with the Plaintiff. For the reasons above, I find that the copy of the statement dated March 16, 2021 attached to the copy of the document titled “Plaintiff’s List of Witnesses” dated March 5, 2021 filed on March 8, 2021 is a document that is improperly and illegally on record and of no evidentiary effect. In any event it has not been adopted as evidence in-chief of the witness. I agree with the submission by learned counsel for the 5<sup>th</sup> Defendant that it was a document ‘filed’ as an afterthought. It must and is hereby expunged or struck out from the record.

**(c) Whether the witness should testify on behalf of the Plaintiffs or Defendants**

33. While none of the contenders herein have prayed that this Court bars the witness from testifying (and that would be figurative of ‘splitting the baby’ as was prayed in to King Solomon), they have left me with the ‘baby’ in my hands. The best I can do is to use wisdom to ‘hand over’ the ‘baby’ to the rightful party to have him live his life, that is to say, to adduce his evidence. I have done my best to delve into the law of evidence on witnesses and I am yet to come across judicial decisions of this nature or the provisions of law about such an issue.



34. Starting with the law of evidence on witness competence and compellability, Section 125 (1) of the Law of [Evidence Act](#), Chapter 80 of the Laws of Kenya provides that,

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.”

In the instant case, the issue of incompetence has not been raised by any of the parties, if anything each party longs to have him testify. It therefore means that to the extent that the witness has not been presented before the Court so that it makes a finding as to the competence or otherwise of the witness, he is competent witness.

35. Regarding the compellability of the witness, the said witness does not fall among those that the [Evidence Act](#) classifies as non-compellable.

36. Before I finalize my finding on this issue, I look at which of the two ‘witness statements’ by the said Nelson Odhiambo this Court considers as being properly on record, although not formally as part of the evidence of the parties. It is clear what as at the time of the Plaintiff filing witness statements in compliance with Order 3 Rule 2 of the [Civil Procedure Rules, 2010](#), the said proposed witness did not record a witness statement. As at January 27, 2022, a witness statement recorded by the 5<sup>th</sup> Defendant from the said Nelson Odhiambo on August 17, 2021, was filed pursuant to the directions of this Court in terms of complying with Order 7 Rule 5.

37. No rocket science is required to tell that the said attached ‘witness statement’ was not filed in Court on March 5, 2021 since it was self-recorded eleven (11) days after the filing of the suit. In any event it was neither filed electronically into the Court filing system nor was it ever received in Court by being stamped as required by law in relation to filing of documents. In any event it was not an amendment of any other earlier recorded statement of the purported witness. It therefore means that the witness statement filed by the 5<sup>th</sup> Defendant on January 27, 2022 together with the List of Witnesses dated January 26, 2022 was the one properly on record.

38. Having found as above, regarding the validity of the written ‘witness statements’, the remaining issue is who should call the witness and why? On the one hand, to note is that the Plaintiff submitted that his reason for calling the said Nelson Odhiambo as a witness is to produce the extract of title to the suit land. On the other hand, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the 5<sup>th</sup> Defendant submit that they should be given chance to call the said person as a witness because he was a defendant by virtue of allegations of fraud having been levelled against him and that the 5<sup>th</sup> Defendant had recorded a witness statement from him which they would be happy if he attended Court and testified on. That being the case, it appears to me that the role of the said witness if called by the Plaintiff would be a limited one. However, if called by the 5<sup>th</sup> Defendant, his role would be wider in terms of testifying on the issues before the Court. Thus, in my view, if the Plaintiff called him as a witness, it would require that the Defendants also call him in later to testify and that would be a duplication of both effort and resources yet he will testify in both instances on the same extract of title. Therefore, even without going deeper into the law, the facts favour the defence calling him more than the Plaintiff’s side. Moreover, the 5<sup>th</sup> Defendant is the one who ‘identified’ or specified the said witness earlier on the record as their witness than the Plaintiff and it would prejudice them if they were not given the chance to call the said witness as their own. The Plaintiff would have a chance to cross-examine him and put to him specific questions on the extract of title that they wish him to answer. Needless to say, that if the 5<sup>th</sup> Defendant shall not call the witness to testify, this Court has power under Section 25A of the [Evidence Act](#), to summon the said



witness or indeed any other witness from the Trans Nzoia County Land Registry to give evidence and the Plaintiffs shall thereby have occasion to cross-examine him on the extract of title they wish to be produced by him.

39. The conclusion of the matter is that the objection by the Defendants is upheld. The prayer by the Plaintiffs to have the Court summon the said Mr Nelson Odhaimbo as a witness in their behalf is declined. This suit shall proceed on the date it is fixed for further hearing, unless otherwise specifically order.

**(d) Who to bear the costs of this Application**

40. Each party to bear their own costs in relation to this application.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022.**



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**HON. DR. *JUR* FRED NYAGAKA**

**JUDGE, ELC, KITALE**

