



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ongwenya & 2 others v Kenya National Highways Authority (Environment & Land Case 272 of 2016) [2025] KEELC 4120 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 272 OF 2016**

**M SILA, J**

**MAY 27, 2025**

**BETWEEN**

**JOHN KABINGA ONGWENYA ..... 1<sup>ST</sup> PLAINTIFF**

**FRANCIS AMENYA NDUBI ..... 2<sup>ND</sup> PLAINTIFF**

**LILIAN MORAA MONGARE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT**

*(Application by defendant to adduce additional evidence during defence hearing; application opposed; issue in the case being the boundaries of the Kisii-Nyamira Road vis-à-vis some private owned land; public element in the case tilting the scales in favour of the applicant; application allowed)*

**RULING**

(Application by defendant to adduce additional evidence during defence hearing; application opposed; issue in the case being the boundaries of the Kisii-Nyamira Road vis-à-vis some private owned land; public element in the case tilting the scales in favour of the applicant; application allowed)

1. The application before me is that dated 10 February 2025 filed by the defendant. It seeks orders for the defendant to be given leave to file a further witness statement and additional documents. The application is opposed by the plaintiffs who have filed a replying affidavit sworn by John Kabinga Ongwenya, the 1<sup>st</sup> plaintiff. He has more or less deposed that the plaintiffs stand to be prejudiced as they have already closed their case.
2. I have considered the application.



3. The plaintiffs filed suit asserting ownership of various parcels of land and pleaded that the defendant/applicant had issued a notice alleging that developments on their parcels of land had encroached into the Kisii-Ngoina Road. They averred that their developments do not encroach on the road and in the plaint they seek orders to have the applicant restrained from interfering with their properties. The plaintiffs testified and closed their case. Thereafter the applicant presented her witness, one Myra Kigani Musavakwa, on 1 February 2023. She did testify in Chief and when I assessed her evidence I thought that the issue may be resolved if all parties went to the ground and were shown the extent of the road and road reserve. There was a site visit but it appears that it did not settle the matter and I gave directions for the case to proceed. This application was subsequently filed and as I have mentioned it seeks leave to introduce a new witness statement and new documents not earlier discovered.
4. It is true that the evidence of witnesses and the documents to be produced at a hearing need to be availed prior to the hearing date. For the defendant Order 7 Rule 5 provides that the list of witnesses, witness statements, and copies of documents to be relied on during trial be filed together with the defence. The court of course retains discretion to give leave to file additional documents and/or statements depending on the circumstances of each case. Generally at a defence hearing the court would be reluctant to allow additional evidence for the plaintiff would have closed his/her case.
5. In our case, I am prepared to exercise my discretion to allow the production of the additional documents/statements. The issue at hand is actually the extent of the Kisii-Nyamira road and whether or not the properties or developments of the plaintiffs encroach into the road. In my view the case has a public element to it and it is important that all evidence that is capable of determining the dispute be presented. It is this public element that tilts the scales in favour of the defendant. You would not wish for a situation where a party takes advantage of a technicality in law to block evidence from the other party which seeks to outline the boundaries of a public road.
6. I have looked at what is sought to be introduced and it consists of maps, road designs, land records, and other related documents which to me appear to be public documents. In essence the documents attempt to demonstrate the extent of the road. I do not see any prejudice to the plaintiffs and I would even think that it is to their benefit if the extent of the road is made clear to them and to the public at large. If indeed they feel that these public records have an issue, I am prepared to open their case for them to avail any additional evidence. As I have stated, at the end of the day, what needs to be determined is the extent of the road and whether or not the developments of the plaintiffs are on the road and this may not be determined without the evidence now being presented.
7. I am thus persuaded to allow the application. The defendant is at liberty to rely on the additional witness statement and additional documents at the hearing.
8. There will be no orders as to costs.
9. It is so ordered.

**DATED AND DELIVERED THIS 27 DAY OF MAY 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Ms. Lorna for the defendant/applicant

Mr. G.J.M Masese for the plaintiffs/respondents



