



Cirtex Kenya Limited & another v Leparakwo & 6 others (Environment and Land Case 152 of 2018 & 691 of 2011 (Consolidated)) [2025] KEELC 5171 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 152 OF 2018 & 691 OF 2011 (CONSOLIDATED)**

OA ANGOTE, J

JULY 9, 2025

BETWEEN

CIRTEX KENYA LIMITED PLAINTIFF

AND

PETER DAVID LEPARAKWO 1ST DEFENDANT

THE CHIEF LANDS REGISTRAR 2ND DEFENDANT

THE DIRECTOR OF SURVEY 3RD DEFENDANT

DIRECTOR, LAND ADMINISTRATION 4TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 691 OF 2011

BETWEEN

**NATIONAL HOSPITAL INSURANCE FUND BOARD OF
MANAGEMENT PLAINTIFF**

AND

CROWNLINER FREIGHTERS 1ST DEFENDANT

KASKAZI TRADERS LIMITED 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT



RULING

1. When this matter came up for hearing on 8th July 2025, Counsel for the 1st Defendant in ELC 152 of 2018, raised an objection to the intended testimony of Detective Corporal Nicolaus Osuri from the Directorate of Criminal Investigations and the bundle of documents filed by the Attorney General (AG) containing the said Investigation Report. This objection was canvassed by way of oral submissions.
2. Mr. Nyachoti, counsel for the 1st Defendant, submitted that the evidence sought to be introduced by Detective Corporal Nicolaus Osuri relates to concluded investigations and ongoing criminal proceedings, being Criminal Case E341/2023-Republic vs Fredrick Kimemia & Anor and that the same bundle of documents which are to be relied on in this matter have also been filed in the criminal case at the Magistrates Court.
3. According to counsel, this court's pronouncements with respect to the impugned documents by Detective Corporal Nicolaus Osuri will be binding on the Magistrates court thus causing confusion and prejudice to his client, who is an accused person in the criminal court.
4. Counsel for the 1st Defendant submitted that Corporal Osuri, being an officer of the Directorate of Criminal Investigations (DCI), is not the proper person to verify land ownership, which falls within the domain of the Ministry of Lands and that the work of the DCI is to investigate and forward his file to the DPP and not to testify in civil matters. Corporal Osuri, it is urged, is not a competent witness and that his investigation report cannot be used in a civil matter.
5. He also urged for the striking out of the witness statement filed on behalf of the 2nd Defendant in ELC 691 of 2011 for having been filed out of time and without leave of court.
6. Counsel Ogembo, appearing for the 2nd Defendant in ELC 69 of 2011, admitted to the late filing of the referenced witness statement but urged the court to admit it, noting that it mirrored the Defence. He stated that he took over the matter after the trial bundle had been filed and later on realized that the witness statement had not been filed and served. He stated that no prejudice will be occasioned to any party if the witness statement is allowed on record. Without it, it was submitted, the 2nd Defendant will be locked out of the proceedings.
7. As regards Mr. Nyachoti's objection to the production of the Investigation Report, he deponed that the same is not well taken and that the 1st Defendant cannot dictate which evidence should be adduced by a party. He opined that Corporal Osuri's evidence is relevant in establishing ownership of the suit property and that the same will be tested. Counsel submitted that none of the two processes will prejudice the other and that in any event, the documents have yet to be admitted in the criminal trial.
8. Counsel Asli, for the Plaintiff in ELC 152 of 2018, stated that they were of the opinion that the objection should have been made when the witness testifies. She nonetheless supported the objection, noting that the Report may potentially infringe on her client's rights to a fair hearing.
9. Counsel submitted that the 2nd Defendant's witness statement was served on her that morning. She however indicated that she would not object to the production of the statement and will seek to file any relevant additional documents.
10. Advocate Munyuri, for the Plaintiff in ELC 691 of 2011, submitted that the objection by the 1st Defendant should have been brought formally. He submitted that they have no problem with the



admission of the statement and that they would be seeking leave to file fresh witness statements on account of new officials. The contents of the statements, he stated, would not change.

11. Counsel Allan Kamau, for the AG, submitted that the court is being asked to expunge documents which have not been produced, and that the application was premature. He opined that the questions of competence and admissibility of witnesses and documents respectively can be addressed when the witness is called and the documents are produced.
12. He stated that not being parties to the criminal proceedings, they cannot authenticate that the documents that will be produced therein are the same documents that Detective Osuri will produce. He emphasized that how the 2nd and 4th Defendants choose to defend their case is up to them and as guided by the exposition in *Dakiaga Distributors Ltd vs Kenya Seed* [2015]eKLR, each party should be allowed to frame its case.
13. According to counsel Kamau, the fact of the ongoing criminal proceedings cannot be a basis for refusal to admit documents; that no prejudice that will be suffered has been shown to the court and that there is no infringement of the right to a fair hearing. According to counsel, the impugned documents are not binding on the court and neither is the decision by Muigai J that was relied on by the 1st Defendant's counsel.
14. In a rejoinder, counsel Nyachoti submitted that the authorities cited by the AG are distinguishable and not applicable to the present circumstances. He emphasized that the witness statement of Corporal Osuri, filed under Order 7 of the Civil Procedure Rules, commences by outlining the alleged criminal offences which fall squarely within the purview of the Directorate of Criminal Investigations (DCI).
15. Mr. Nyachoti contended that the DCI, being a specialized investigative agency, does not possess the mandate to participate in civil proceedings by proving land ownership or related civil claims and that the DCI is not just like any other witness.

Analysis and Determination

16. The court has considered the rival arguments by the parties. The two issues that arise for determination are:
 - i. Whether the witness statement of Corporal Nicolaus Osuri and accompanying documents should be expunged from the record?
 - ii. Whether the witness statement of Trophimus Kiplimo should be expunged from the record?
17. The 1st Defendant in ELC 152 of 2018 seeks to have Corporal Nicolaus Osuri's statement and the accompanying documents expunged from the record. The 1st Defendant has challenged the competence of the witness and admissibility of the documents procured by the DCI during investigations.
18. The record shows that this matter has under-gone pretrial conferencing, during which time the parties disclosed their witnesses and the nature of the evidence to be relied upon. Corporal Osuri was duly identified as an intended witness, and the evidence forming the basis of the objection was part of the materials that were exchanged at that stage.
19. However, that notwithstanding, nothing precludes a party from raising objections on admissibility of documents and competence of a witness during trial.
20. The competence of a witness is primarily governed by the *Evidence Act*, specifically Sections 125 and 127. Generally, all people are considered competent to testify in civil cases unless they are deemed



- incapable of understanding questions or providing rational answers due to age, extreme old age, disease, or similar factors.
21. As regards admissibility of evidence, Section 5 of the [Evidence Act](#), provides as follows:
- “Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.”
22. Discussing this, the Indian Supreme Court in the case of Arjun Panditrao Khotkar v Kailash Kushanrao, (2020) 3 SCC 216 cited by the Court of Appeal in Parkar & another vs NQ [§ 2 others \(Civil Appeal 139 of 2020\)](#) [2023] KECA 908 (KLR) (24 July 2023) (Judgment)observed as follows:
- “Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-i. Admissibility; ii. Relevancy and iii. Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the [Evidence Act](#), relevancy must be established before admissibility can be dealt with.”
23. Halsbury’s Laws of England (4th Ed) Vol 17 at para 5 states that:
- “The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (i) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another.”(emphasis mine)”
24. As to the manner of determining relevance, the court in Concord Insurance Co Ltd vs NIC Bank Ltd[2013] KEHC 3571 (KLR), opined:
- “Relevance must be tested by the pleadings...”
25. To begin with, the competence of Corporal Nicholus Osuri as a witness has not been impugned within the meaning of Section 125 of the [Evidence Act](#). It has not been shown that he is incapable of understanding questions or providing rational answers due to age, extreme old age, disease, or similar factors.
26. As to the admissibility of his evidence, the court is guided by the principles discussed in the authorities earlier cited, including Arjun Panditrao Khotkar(supra) which makes it clear that admissibility is dependent on relevance.
27. In this case, Corporal Osuri’s intended testimony and documents thereto sets out the Attorney General’s position with respect to transactions relating to the suit property and its ownership. Indeed, this evidence relates directly to the central question before this court, namely, the legitimate proprietorship of L.R. No. 24968/2, IR 179264, which is currently contested by the parties.



28. It is also not lost on the court that Corporal Osuri is being called as a witness by the Attorney General, who, like all litigants, is entitled to call witnesses in support of his case. That the witness is a police officer attached to the DCI does not in itself render his evidence inadmissible or incompetent in civil proceedings.
29. The investigative role of the DCI, as defined under Article 247 of *the Constitution* and Part V of the *National Police Service Act*, does not preclude officers from testifying in civil cases as to facts they have lawfully investigated, especially where such facts are directly relevant to the issues in dispute.
30. The court further notes that the existence of parallel criminal proceedings or investigations touching on the same subject matter does not prohibit, or otherwise bar the continuation of civil proceedings. [See Section 193A of the *Criminal Procedure Code*].
31. This principle was affirmed by the Court of Appeal in *Lalchand Fulchand Shah vs I&M Bank Ltd & 5 Others* [2018] eKLR, where it was held that where there are concurrent civil and criminal proceedings, the court may only intervene to halt one set of proceedings where it is shown that the same is oppressive, vexatious, or an abuse of the court process.
32. It is also important to reiterate that that civil and criminal proceedings operate under distinct legal standards and evidentiary burdens. In the instant civil matter, the applicable standard is that of a balance of probabilities, while in the criminal matter alluded to, the burden lies on the prosecution to prove its case beyond reasonable doubt. It cannot be that the decision of this court will be binding on the criminal court.
33. More crucially, the court emphasizes that the evidence of Corporal Osuri, like all other evidence to be adduced before the court must be weighed and tested through cross-examination, and assessed in light of the pleadings and other materials on record. The mere fact that he is an officer of the DCI does not elevate the probative value of his testimony. Whether or not his evidence ultimately proves the Attorney General's case is a matter for determination by this court in the context of the full evidentiary record.
34. Article 50 of *the Constitution* guarantees every party the right to a fair hearing, which includes the opportunity to present evidence, call witnesses of their choice, and challenge the evidence brought against them.
35. This is a foundational principle of the adversarial system. Each party bears the burden of prosecuting or defending its case, and the court must be careful not to fetter this right without lawful justification.
36. In the absence of any lawful basis, the court declines to expunge the witness statement of Corporal Nicolaus Osuri and the attendant documents.
37. Counsel for the 1st Defendant also seeks to have the witness statement sworn on behalf of the 2nd Defendant in ELC 691 of 2011 struck out on account of having been filed late and without the leave of court.
38. Counsel for the 2nd Defendant concedes that the witness statement was indeed filed out of time and without leave of court. He however urges the court to admit the same on the record. Counsel submitted that he was unaware that the witness statement which had already been drawn by the former advocate had not been filed and served.
39. It is settled law that a Defendant who has been served with summons to enter appearance and a plaint, and who elects to defend the suit, is required to file a memorandum of appearance and, thereafter, a statement of Defence.



40. In addition to the Defence, such a Defendant is also obligated to file a list of witnesses, witness statements, and a bundle of documents. These documents are intended to facilitate orderly pre-trial disclosure and promote fair trial.
41. In the present case, the 2nd Defendant did not file the witness statement within the set timelines. The filing of the said witness statement late would have been fatal had the matter proceeded for hearing. However, in view of the objections raised, and the matter having not commenced, I will exercise my discretion to allow the said statement on record.
42. That's is the only option that the court has for purposes of giving the 2nd Defendant in ELC 611 of 2011 an opportunity to be heard.
43. For those reasons, the objection is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nyachoti for 1st Defendant

Mr. Asli for Plaintiff in 152/2018

Mr. Ogembo for 2nd Defendant in 691/2011

Mr. Muyuri for Plaintiff in 691/2011

Mr. Allan Kamau for 2nd – 4th Defendant in 152/2018

Court Assistant: Tracy

