



**Wanderi v Nganga (Environment and Land Appeal E043 of 2024)  
[2025] KEELC 5005 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5005 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E043 OF 2024**

**MAO ODENY, J**

**JULY 4, 2025**

**BETWEEN**

**FLORENCE NGENDO WANDERI ..... APPELLANT**

**AND**

**JAMES NJENGA NGANGA ..... RESPONDENT**

*(Being an appeal against the Ruling of the Honorable Lina Akoth (SRM)  
delivered on 29th July, 2024 in NAKURU CM ELC NO E119 OF 2023)*

**JUDGMENT**

1. This appeal arises from the ruling delivered by Hon. Lina Akoth (SRM) on 29<sup>th</sup> July, 2024 in Nakuru CMELC No. E119 of 2023. The Appellant herein being aggrieved by ruling lodged a Memorandum of Appeal dated 23<sup>rd</sup> August, 2024 and listed the following grounds of Appeal:
  1. That the Learned Trial Magistrate erred in law and in fact when she denied the Appellant's witness PW3 known as Simon Mucheke Njuguna from producing the minutes from the chief's meeting even though she had on the 10<sup>th</sup> of June, 2024 granted the Appellant's counsel an adjournment so that they can call the maker of the document to produce it during the next hearing date.
  2. That the Learned Trial Magistrate erred in law and in fact by denying the Appellant's witness an opportunity to produce the minutes thus denying the Appellant the right to access justice.
  3. That the Learned Trial Magistrate erred in law by denying the production of the minutes of the chief's meeting despite them already forming part of the Appellant's bundle of documents as per the List of Documents dated 21<sup>st</sup> August, 2023.



4. That the Learned Trial Magistrate erred in law and in fact by having the Appellant close her case despite not having called PW3 who is the Area Chief Kihingo Location to produce the minutes of the chief's meeting which is a critical document in her case and of very high probative value.
5. That the Learned Trial Magistrate erred in law and in fact by showing open bias against the Appellant.
2. The Appellant prayed that:
  - a. That the Appeal herein be allowed.
  - b. That this honorable court be pleased to overturn the ruling of the Trial Magistrate denying the Appellant's witness (PW3) from an opportunity to produce the minutes from chief's meeting.
  - c. Costs of the Appeal.
3. The Appellant had sued the Respondent in the lower court vide a plaint dated 12<sup>th</sup> June, 2023. The Appellant sought the following orders:
  - a. An order of eviction against the Defendant from the parcel of land.
  - b. A permanent injunction to restrain the Defendant by himself, his agents, servants or any person claiming under him from trespassing, entering, remaining and/or dealing in whatever manner with the Plaintiff's parcel of land Rare/teret Block 1/4937 (mutukanio)
  - c. General damages for trespass.
  - d. Costs and interest of the suit.
  - e. Such other and further relief the Honourable court may deem fit and just to grant.

### **Appellant's Submissions**

4. Counsel for the Appellant filed submissions dated 13<sup>th</sup> May, 2025 and identified the following issues for determination:
  - a. Whether failure to file witness statements and other documents in a suit is so fatal to deny the party to testify orally?
  - b. Whether the anomaly under (a) above may be cured in the interest of serving substantive justice?
5. On the first issue, counsel submitted that faced with the task of making a choice between two opposing stories on the subject minutes in question, the trial court ought to have given the Appellant an opportunity to be heard on the contents thereof especially since the Respondent denied knowledge of the meeting being held and chaired by the Kihingo Area Chief.
6. It was counsel's submission that the error of counsel not to file the Appellant's witness statement adopting the contents of the minutes being the maker should not be visited upon the Appellant being an innocent litigant. Counsel relied on Article 50 (1) & 159 (2) of *the Constitution* of Kenya and the case of Central Organization of Trade Unions vs Benjamin K Nzioka & Others Civil Appeal No 166 of 1993.
7. On the second issue, counsel submitted that while dealing with such emotive matters as land, the Court ought to be guided by the interest of justice. Counsel urged the court to invoke the principles of overriding objectives and relied on Sections 1A, & 1B of the *Civil Procedure Act*, Sections 3 & 13



of the Environment & Land Court [Act No 19 of 2011](#), Sections 101 of [Land Registration Act](#) No 3 of 2012, Sections 150 of the [Land Act](#) No 6 of 2012 and the case of Ngilu & 3 others vs Kombo & 18 others [2024] KEELC 1010 (KLR).

### Respondent's SubmissionS

8. Counsel for the Respondent filed submissions dated 2<sup>nd</sup> May, 2025 and identified the issue for determination as: whether the trial court correctly applied the rules of procedure and evidence in barring the chief's testimony. Counsel submitted that the trial court acted judiciously within its discretion and upheld the principles of fair trial and procedural justice by disallowing PW3 to testify without a witness statement as mandatorily required by law.
9. Counsel relied on Order 3 Rule 2 (c) of the Civil Procedure Rules and Article 50 (1) of [the Constitution](#) of Kenya and the cases of Koilel & 47 others vs Ntiyia & 2 others [2022] eKLR, Omanwa vs Kanyuku & 2 others [2023] eKLR and South Nyanza Sugar Co. Ltd vs Hezron Ndarera Mogwasi (2010) eKLR.

### Analysis And Determination

10. I have considered the grounds of appeal and submissions by counsel on record. This is an appeal on a preliminary issue where the case has not been heard and determined. The Appellant was dissatisfied with the ruling of the Trial Magistrate denying a witness an opportunity to testify having not filed a witness statement.
11. In the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

12. The issue for determination is whether a witness should be denied an opportunity to testify for failure to file witness statements and other documents. Order 3 Rule 2 of the Civil Procedure Rules provides as follows:

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by:

- a. the affidavit referred to under Order 4 rule1(2);
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses excluding expert witnesses; and
- d. copies of documents to be relied on at the trial including a demand letter before action:

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.



13. In the case of *Naki Investments Company Limited & another v Vekaria & another; Vekaria & another* (Plaintiffs to the Counterclaim); *Naki Investments Company Limited & 8 others* (Defendant to the Counterclaim) [2025] KEELC 4528 (KLR), the court pronounced as follows at paragraphs 11 and 12:

Where the period provided by the rules passes, leave to file witness statements out of time, can be granted provided it is furnished fifteen (15) days prior to the pretrial conference. This is as per Order 3 Rule (2) (d) above. Where the pre-trial conference has passed, then extension of time can be sought.

On extension of time, Order 50 rule 6 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

14. From the record, PW3 the Chief Kihingo was listed as a witness and the minutes to be produced were also in the Appellant’s bundle of documents but unfortunately he had not recorded a witness statement which was acknowledged by both parties. When the plaintiff gave evidence the minutes were marked for identification as the defendant’s counsel objected to their production. Counsel stated that the maker should produce them, which is procedural.
15. Counsel for the Appellant therefore requested for adjournment to call the maker but counsel for the Respondent objected on the grounds that there was no witness statement but agreed to their production without giving evidence. The court rejected this position and ordered the Appellant to either proceed or close her case, which gave rise to this Appeal.
16. Rules of Procedure are to guide the court and organize proceedings in an orderly manner. They establish a framework for the just, speedy, and efficient resolution of civil disputes. Therefore, they are important as they guide the process of filing cases before the court, presentation of evidence and ensuring fairness and consistency in the process. The Rules also ensure that there is no trial by ambush and that is why Order 11 comes into play where a pre-trial conference is done where parties exchange documents and agree on the ones that they will object to and require the makers to produce.
17. The court is cognizant of the fact that litigants are obliged to comply with the Provisions of the law, including the provisions of the Civil Procedure Rules 2010. It is also not lost to the court that the same Rules allow the court to grant leave for a party to comply with the procedure upon application if the same is reasonable and deserving.
18. In this case, the witness was listed in the list of witnesses and the document to be produced was in the list of Documents and counsel for the Defendant agreed to the production without tendering evidence. These were documents that had been served on the Defendant hence it was not an ambush.
19. In the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR the court held as follows:

“Under Order 11 of the Civil Procedure Rules, even after the pretrial conference and the matter is set down for hearing, nothing prevents the court from exercising discretion and



allowing parties to call further witnesses or filing further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act*, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in Article 50(1) of *the Constitution* and an opportunity to present or defend their cases fairly. See *Raila Odinga & others v IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR, where the Supreme Court considered whether to allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as-materially:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

20. Upon production of documents, the Defence counsel will have an opportunity to cross-examine the Appellant on the same. The documents may or may not add any probative value to the case as the court has to evaluate and come up with a Judgment arising from the facts, issues and the relevant laws.
21. I have considered the grounds of the Appeal, the submissions by counsel and find that the Appeal has merit. Appellant to file and serve a witness statement within 14 days for hearing of the case. Each party to bear their own cost.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF JULY 2025.**

**M. A. ODENY**

**JUDGE**

NAKURU- ELCLA/E043/2024-JUDGMENT

