



**Mwenda (Suing by His Next Friend Jerusha Kanario Mwenda) v Maingi & 4 others  
(Sued as the Legal Representative of the Late Ezekiel Muthiane Maingi - (Deceased))  
(Environment & Land Case 325 of 2017) [2024] KEELC 6601 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6601 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 325 OF 2017  
CK NZILI, J  
OCTOBER 2, 2024**

**BETWEEN**

**SAMUEL M'IMAINGI M'LAARU ..... PLAINTIFF**

**SUING BY HIS NEXT FRIEND JERUSHA KANARIO MWENDA**

**AND**

**MARTIN MURIITHI MAINGI ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, MAUA LAND REGISTRY ..... 2<sup>ND</sup> DEFENDANT**

**TABITHA KANAINI MAINGI ..... 3<sup>RD</sup> DEFENDANT**

**EZEKIEL MUTURA MANYARA ..... 4<sup>TH</sup> DEFENDANT**

**CICILIA MWOTIANIA MUTHIAINE ..... 5<sup>TH</sup> DEFENDANT**

**SUED AS THE LEGAL REPRESENTATIVE OF THE LATE EZEKIEL  
MUTHIANE MAINGI - (DECEASED)**

**RULING**

1. By an application dated 22.7.2024, the court is asked to admit the 1<sup>st</sup> defendant's documents for hearing out of time. The documents include; land control board meeting minutes and resolutions for 5.2.2015 and confirmed on 5.3.2015.
2. The second prayer is to issue a notice to show cause why the District County Commissioner (DCC) Igembe South and Central and the Chairperson the Land Control Board Kangeta, as to why they should not be compelled to produce land control board minutes for 29.10.2014.
3. In an affidavit to support the application, Martin Mureithi the 1<sup>st</sup> defendant averred that on 29.10.2014 and 5.2.2015, he alongside all his brothers and mother attended the land control board meeting at



- Maua and Kangeta where his father consented to the transfer of L.R No. Njia/Kiegoi/176, Justus Mwindi Miangi getting L.R Njia/Kiegoi/514, his brother Eliud Murungi Maingi getting L.R No. Akachiu/Auki/317 and L.R No. Akachiu/Auki/2716 going to Ezekiah Muthine Miangi.
4. The 1<sup>st</sup> defendant averred that on numerous times he followed up the said officers refused to release the document unless written reasons being offered. Again, the 1<sup>st</sup> defendant averred that previously the officers had said that they were unable to trace the documents but later changed their position and said that for the minutes of 29.10.2014, they could not release them yet he has a right to access information affecting him held by the state or a state organ.
  5. The 1<sup>st</sup> defendant averred that the said documents will not prejudice any party nor were they introducing a new cause of action but would go a long way to assist the court in the fair determination of the matter and reinforce the respondent's defence.
  6. The 1<sup>st</sup> defendant averred that the land registrar in his evidence intentionally left out crucial documents which relate to the material facts of this suit and that he might not have another opportunity to avail them. Further, the 1<sup>st</sup> defendant averred that the leaving out of the documents by the land registrar was a well-orchestrated scheme to suppress material and crucial evidence which unfortunately could not have been produced or filed earlier, as they had not been traced.
  7. When the application came up for hearing on 25.7.2024, the respondents were directed to file any response to the same. The plaintiff opposes the application by a replying affidavit sworn on 24.9.2024 by Jerusha Kanario Mwenda. It is averred that after the plaintiff's case was closed on 24.1.2023, the 1<sup>st</sup> defendant started giving his defence.
  8. The plaintiff averred that to grant leave to introduce the documents at that this juncture would be an analogy to an application for leave to amend a pleading. She termed the application incurably defective, dishonestly made, as brought in bad faith for no proper purpose and injurious to the plaintiffs case, pleadings were closed and her case is equally closed. Reliance was placed on *P.H Ogola Onyanggo t/a Pitts Consult Consulting Engineers v Daniel Githegi t/a Quantalysis* (2002) eKLR, *J.C Patel v B.A Joshi* 1959 19 E.A 42.
  9. Interim orders were issued against the 1<sup>st</sup> defendant on 16.1.2018. By a ruling dated 22.5.2018 interim orders were extended to ensure that the land was not alienated. By consent dated 26.11.2018, parties were directed to file and exchange amended pleadings and compliance documents within 60 days and come for a pre-trial conference on 6.2.2019. Interim orders were extended until the determination of the suit. By consent of parties, the evidence for the 3<sup>rd</sup> defendant was to be taken de bene esse.
  10. Further on 29.7.2019, before the evidence could be taken, the claim in respect to land registration No's Njia/Kiegoi/3217, Njia/Ciamwendwa/2644 was abandoned.
  11. DW 1 namely Tabitha Kanini now deceased, testified on 29.7.2019. By a ruling dated 19.2.2020 another further amendment was allowed to include L.R No. Njia Cia Mwendwa/2317, Njia/Burieruri/2510 and Njia Ciamwendwa 3090. The defendants were equally granted leave to amend their defences.
  12. By directions given on 12.10.2021 this court took over the suit from where it had reached. Professor Erastus Amayo testified as PW 2 while Jerusha Kanario Mwenda testified as PW 3 and was cross-examined by Mr. Njindo for the 1<sup>st</sup> defendant.
  13. PW 4 took the witness stand on 14.7.2022 when an application was sought and allowed for the plaintiff to avail additional documents to be produced by PW 4 the Land Registrar Meru North.



14. Shadrack Munyika testified as PW 5 before PW 4 could be recalled and told the court that he had brought a record as per the witness statements served upon him.
15. Learned counsel for the 1<sup>st</sup> defendant extensively cross-examined the witness. He did not raise any issue touching on the minutes for 2014 and 2015, regarding the stated parcels of land. There were no questions put to the witness that he was withholding vital and crucial documents from the court. Thereafter the court took the evidence of PW 6 leading to closure of the plaintiffs case.
16. DW 1 was the 1<sup>st</sup> defendant and the applicant herein who testified relying on his witness statement and a list of documents dated 17.5.2019. He produced D. Exh No's. 1-6. He never referred to any documents or facts relating to L.R No's. Njia/Kiegoi/176, 514, L.R No's. Akachiu/Auki 317 and 216. His evidence was with regard to L.R No's. 3460, 2317, and 3090.
17. Again, DW 1 was stood down on 24.2.2023. When the court resumed on 30.10.2023 the 5<sup>th</sup> defendant brought an application dated 30.8.2023 applied to file additional documents touching on L.R No's. Njia Cia Mwendwa/3088 and 3089. The same was dismissed by the court on 7.2.2024.
18. Come 15.2.2024 the claim against the 3<sup>rd</sup> defendant was abandoned after he passed on. Mr. Njindo for the 1<sup>st</sup> defendant sought for witness summons against the chair of land control board Maua and Kangeta to attend court.
19. DW 1 resumed his re-examination on 5.7.2024 and closed his defence, paving the way for Rwanda Robert as DW 2 a clerk with the Land Registrar Maua.
20. An objection was raised that he had not served any documents that he was to rely upon given that PW 4 of the same office had testified.
21. Mr. Njindo opposed the objection based on Article 27 of the Constitution. He told the court that when the land registrar testified, there were difficulties in procuring the land control board minutes, but fortunately, out of the industry of the 1<sup>st</sup> defendant, they were now available and should not be locked out of the court in the interest of justice. Further counsel submitted that the land registrar gave no reason why he omitted to produce the documents otherwise, he was suppressing the truth.
22. Learned counsel said that the documents were public in nature, though currently not in his possession. He said the counsel for the plaintiffs had equally sought for time to adduce documents under Article 35 of the Constitution.
23. Mr. Thangicia advocate, supported the application given that the land registrar had said that the documents were not available and had sought leave to produce them later hence the documents were not strange to the plaintiff or prejudicial.
24. Senior counsel Dr. Kuria rejoined that the documents had not been supplied to him. It was trial by ambush the plaintiff would be prejudiced and had not been served before the witness was called.
25. The court upheld the objection since the documents did not form part of the court record and the 1<sup>st</sup> defendant had not laid a basis for their production after the closure of the plaintiff's case.
26. Further, the court said that in the absence of leave to file and serve new documents, the plaintiff would be prejudiced. The 1<sup>st</sup> defendant prayed for DW 2 to be stood down to enable the 1<sup>st</sup> defendant to file a formal application now before the court.
27. Mr. Thangicia and Mr. Kinyua told the court they were not opposed to the application for adjournment the documents were crucial to the case. Senior counsel Dr. Kamau Kuria opposed the application for adjudication. The court ordered for a formal application to be filed.



28. The basis of the 1<sup>st</sup> defendant's application is that the land registrar omitted the documents.
29. PW 4 came to testify out of witness summons dated 20.1.2022 and to produce documents for L.R Njia Cia Mwendwa 3090, 3460, 2317, Njia/Kiegoi/176 & 348, Njia/Burieruri 2510 and as requested by the plaintiff P. Exh No. 12 had already been produced by PW 2.
30. L.R No's. Akachiu/Auki/317 and 216 have not been part of the plaintiff's suit save for L.R No's Njia/Kiegoi/514 and 176. The former was not in the witness statement of PW 4.
31. By the time DW 1 testified, he had not sought for witness statements to the land registrar to produce any documents or for that matter, any other witness as per his list of witnesses dated 17.5.2019.
32. In the witness statement dated 17.5.2019, the 1<sup>st</sup> defendant did not refer to any existing land control board meeting minutes for 2014 and 2015 relating to L.R Akachiu/Auki/317 and 216 and L.R No's Njia/Kiegoi/514 and 176.
33. The list of documents, dated 17.5.2019 did not refer to any such land control board minutes for 2014 and 2011 regarding the said suit parcels.
34. Other than L.R No's. Njia/Kiegoi/514 and 176, the rest do not feature in the 1<sup>st</sup> defendant's defence and counterclaim dated 26.1.2019. The owners of those parcels of land were also not listed as witnesses by the 1<sup>st</sup> defendant.
35. Equally, the 4<sup>th</sup> & 5<sup>th</sup> defendants did not list the said land control board minutes as exhibits to be relied upon since filing their defence counterclaim and list of documents dated 21.1.2019 and 28.3.2019 respectively.
36. Order 7 Rule 5 of the *Civil Procedure Rules* provides that the defence shall be accompanied by a list of witnesses, witness statements and a list of copies of documents to be relied upon at the hearing.
37. A party may file with leave of court documents before the pre-trial conference and before the hearing commences. New and fresh evidence to be admitted must meet the threshold of due diligence, its importance, influence or credibility and prejudice to oppose it.
38. In this application, the proposed additional documents have not been shared with the court or the opposite parties in order to establish if they meet the threshold.
39. It has been close to 7 years since the suit was filed and five years since the 1<sup>st</sup> defendant filed a statement of defence and counterclaim the list of witness statements and documents, he wished to rely upon at defence hearing.
40. The record shows that no witness summons were sought at the instance of the defence and the land registrar who is also a party to this suit. He may be a competent but not a compellable witness. The 1<sup>st</sup> defendant had the option of filing a notice to produce documents against the co-defendant. He opted not to do so. The specific documents, questions and issues were not put to PW 4 when he was testifying.
41. The prejudice to the plaintiff who has closed the prosecution of her case will be profound. The 1<sup>st</sup> defendant had all the opportunity to prepare for his defence and squandered it. Once a party is given a right to a fair hearing and fails to utilize it, he cannot be heard to complain of breach of his constitutional right to a fair hearing.
42. The upshot is I find no basis to re-open the 1<sup>st</sup> defendant's defence. The application is disallowed.



43. Similarly, I find no basis to issue or compel the chairman of the land control board and the D.C.C to come and testify before this court at the instance of the 1<sup>st</sup> defendant on documents which are not part of the court record. The said witness summons are hereby vacated.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024**

In presence of

C.A Kananu

Munyori for S.C Dr. Kuria for the plaintiff

Njindo for the 1<sup>st</sup> defendant

Kirera for Kinyua for 4<sup>th</sup> defendant

**HON. C K NZILI**

**JUDGE**

