



REPUBLIC OF KENYA



Kinyanjui & another v Joreth Limited & 5 others (Environment and Land Case Civil Suit 1189 of 2014) [2023] KEELC 418 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1189 OF 2014**

**JO MBOYA, J
FEBRUARY 2, 2023**

BETWEEN

JOHN HARRISON KINYANJUI 1ST PLAINTIFF

JOHN HARRISON KINYANJUI 2ND PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

JORETH LIMITED 2ND DEFENDANT

FERDINAND MUNYIRI KAHARUKA 3RD DEFENDANT

FERDINAND MUNYIRI KAHARUKA 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

RULING

Introduction and Background

1. The Plaintiff herein filed and commenced the instant suit vide Originating Summons dated the September 4, 2014 and in respect of which the Plaintiff sought for various declarations pertaining to and concerning LR No 13330/260 (IR No 148466), Thome Farmers No 5, situated in Garden Estate, Nairobi.
2. For coherence, the Originating Summons under reference is premised essentially on a claim based on adverse possession pertaining to and/or concerning the named property, which the Plaintiff contends to have been in occupation of for a duration of more than 12 years by the time of filing/mounting the instant suit.



3. It is also imperative to note that at the time of filing the originating summons, the Plaintiff filed a list of witnesses and one of the witnesses who was named by the Plaintiff was one, namely, Kimani Kahiro, Advocate.
4. In addition, the Plaintiff herein also proceeded to and extracted a witness statement from the named Kimani Kahiro, Advocate. In this regard, the witness statement was duly filed with the court in anticipation of same being relied upon and used by the named witness in due time.
5. In the premises, it is therefore apparent that indeed the Plaintiff herein had laid down the requisite basis for purposes of calling the named advocate as a witness. However, prior to and before the said advocate could tender his evidence, same passed on, on the October 1, 2022.
6. As a result of the death of the named Advocate, counsel for the Plaintiff herein has now mounted an Oral Application seeking to have the witness statement and the documents attached to the said documents, which were prepared and authored by the said Kimani Kahiro to be admitted in evidence pursuant to the provisions of Section 33(b) and (f) and 35 of the Evidence Act, Chapter 80 Laws of Kenya.
7. On the other hand, counsel for the 1st and 2nd Defendants have opposed the Application by and on behalf of the Plaintiff and same have raised inter-alia, the contention that the admission of the named witness statement and the attendant document would unduly prejudice the 1st and 2nd Defendants' cases.
8. Arising from the foregoing, the court directed the advocates for the respective parties to file and exchange written submissions on (sic) the issue of admissibility of the named statement and by extension, the prejudice, if any, to be suffered by the Defendants in the event that the statement of the deceased is admitted.
9. Pursuant to the direction of the court, counsel for the Plaintiff filed written submissions dated the January 26, 2023, whereas counsel for the 1st Defendant filed written submissions dated the January 31, 2023. For completeness, counsel for the 2nd Defendant also filed his written submissions on even date.

Submissions by the Parties

a. Plaintiff's Submissions

10. Vide written submissions dated the January 26, 2023, learned counsel for the Plaintiff has raised, highlighted and amplified two issues for consideration by the court. Firstly, learned counsel for the Plaintiff has submitted that at the onset when same filed or lodged the instant suit, same provided and supplied the Honourable court and the rest of the parties, the list of witnesses who would be called upon to tender evidence and testify on behalf of the Plaintiff.
11. In addition, learned counsel has contended that other than availing and disclosing the names of the intended witnesses, same also caused the witness statements of the intended witnesses, inter-alia, the witness statement of Mr Kimani Kahiro, to be filed and served.
12. Arising from the foregoing, learned counsel has therefore contended that the Plaintiff's desire and intention to call Mr Kimani Kahiro as a witness, was therefore made known both to the court and the adverse parties.
13. Additionally, learned counsel has submitted that the named advocate, that is Mr Kimani Kahiro, had hitherto been engaged and retained by the 1st Defendant herein to handle conveyance and legal matters pertaining to LR No 13330, which is the mother Title from which the suit property emanates.



14. In this regard, learned counsel for the Plaintiff has submitted that during the course of handling the issue pertaining to the mother Title, the said advocate dealt with the Plaintiff pertaining to and concerning the Plaintiff's right to and ownership of the suit property.
15. In any event, learned counsel has added that the fact that Mr Kimani Kahiro dealt with and handled matters pertaining to the mother Title on behalf of the 1st Defendant has been confirmed by the witness statement of one Njeri Kariuki Advocate, who has generated the witness statement on behalf of the 1st Defendant.
16. Nevertheless, learned counsel has submitted that during the pendency of the subject suit, Mr Kimani Kahiro Advocate passed on and hence same was not able to testify and tender his evidence before the court. In this regard, it has been submitted that the evidence of Mr Kimani Kahiro Advocate (now deceased) is admissible in evidence before the court.
17. To vindicate the submissions that the evidence of the named advocate, now deceased is admissible in evidence, counsel for the Plaintiff has cited, inter-alia, the case of *Samson Maina Kamau versus Panari Hotel (2021)eKLR, Fleur Investments Ltd versus Permanent Secretary Ministry of Roads & Another (2021)eKLR*, respectively.
18. The second issue that has been raised by counsel for the Plaintiff touches on and concerns the fact that the Defendant shall not suffer any undue prejudice, if the witness statement and the attached documents that were authored by Mr Kimani Kahiro, Advocate, (now deceased) are admitted in evidence.
19. In this respect, learned counsel has contended that the Defendants herein and in particular, the 1st and 2nd Defendants had knowledge pertaining to the contents of the witness statement which is sought to be relied upon by the named witness, now deceased.
20. Additionally, counsel has further submitted that after being served with the witness statement and the bundle of documents of the named witness (now deceased), the 1st and 2nd Defendants procured various witnesses who recorded witness statements in response to the witness statement of the deceased. In this regard, counsel for the Plaintiff has invited the court to take cognizance of the witness statement of Njeri Kariuki Advocate.
21. Furthermore, learned counsel has submitted that the said witness, now deceased, was engaged and retained by the 1st Defendant herein and hence there is no prejudice to be suffered if the witness statement and the documents attached thereto are admitted in evidence.
22. In support of the need and necessity to admit all available evidence, in a bid to enable the court to effectually and effectively determine the dispute beforehand, learned counsel has cited and relied on the case of *Mwihaki versus Kigui & 2 Others Environment and Land Court Case Number 572 of 2015 (2022)KE ELC 2771 (KLR)*.
23. In view of the foregoing submissions, learned counsel has impressed upon the Honourable court that the witness statement of Kimani Kahiro Advocate (now deceased) and the documents attached thereto are essential to the determination of the issues in dispute.
24. In any event, counsel has added that the said witness statement and the attached documents are admissible by dint of Section 33 and 35 of the Evidence Act, Chapter 80 Laws of Kenya.



b. 1st and 2nd Defendant's Submissions

25. Vide the written submissions filed by and on behalf of the 1st and 2nd Defendants, same have raised and highlighted two issues for consideration.
26. First and foremost, learned counsel for the 1st and 2nd Defendants have submitted that the witness statement of Mr Kimani Kahiro, advocate, now deceased, is not admissible and in any event, does not fall within the exceptions captured and provided by the provisions of Section 33 of the Evidence Act.
27. In particular, learned counsel for the 1st Defendant have contended that the witness statement and the attached document were never made by the witness, now deceased, in the discharge of his professional duty either to the Plaintiff or the 1st Defendant.
28. Additionally, it has also been submitted that the witness statement also does not relate to or concerns matters/issues touching on family affairs, to warrant its admission by dint of Section 33(f) of the Evidence Act, Chapter 80 Laws of Kenya.
29. Furthermore, learned counsel have submitted that contention on record is that the witness, now deceased, whose evidence is sought to be admitted was advocate for Thome Farmers No 5 and hence any professional duty, if at all, would only be owed to the said client and not otherwise.
30. In short, learned counsel for both Defendants has submitted that the impugned witness statement and documents are therefore not admissible, either by dint of Section 33 or 35 of the Evidence Act, Chapter 80 Laws of Kenya, in the manner advocated by counsel for the Plaintiff.
31. Secondly, learned counsel for the 1st and 2nd Defendant has submitted that in the event that the witness statement of Mr Kimani Kahiro, Advocate, (now deceased) and the attendant documents are produced and admitted evidence, then the 1st and 2nd Defendants would be denied or deprived of a right to cross examine the author (now deceased).
32. Furthermore, learned counsel for the 1st and 2nd Defendants have submitted that the admission of the named witness statement and the attendant document shall cause undue prejudice to the 1st and 2nd Defendants and in this regard, such admission would infringe upon the 1st and 2nd Defendants right to Fair hearing.
33. To this end, learned counsel for the 1st and 2nd Defendants has paid homage to the provisions of Article 50(1) of the Constitution, 2010 and invited the court to uphold and vindicate the right to Fair hearing.
34. In addition, learned counsel for the 1st and 2nd Defendant has also cited and quoted the decision in the case of *Joseph Mwangi Wabome versus Housing Finance Company of Kenya Ltd & Another (2019)eKLR*, to vindicate the importance and significance of the right of cross examination as pertains to each and every witness whose statement is admitted in evidence.
35. In a nutshell, learned counsel for the 1st and 2nd Defendants have therefore impressed upon the court to find and hold that the witness statement of Mr Kimani Kahiro, advocate, (now deceased) and the attendant document attached thereto are not admissible in evidence.

Issues for Determination

36. Having reviewed the Oral Application made pursuant to and in line with the provisions of Section 33 and 35 of the Evidence Act, Chapter 80 Laws of Kenya and upon considering the written submissions filed by and on behalf of the Parties, the following issues are pertinent and thus worthy of determination:



- i. Whether the Witness statement of Kimani Kahiro, Advocate (now deceased) and the attendant documents prepared by same during his lifetime are admissible by dint of Section 33(b) and 35 of the Evidence Act, Chapter 80 Laws of Kenya?
- ii. Whether the Defendants and in particular the 1st and 2nd Defendants, would suffer any prejudice, if the named witness statement is admitted in evidence?

Analysis and Determination

Issue Number 1 Whether the witness statement of Kimani Kahiro, Advocate (now deceased) and the attendant document prepared by same during his lifetime are admissible by dint of Section 33(b) and 35 of the Evidence Act, Chapter 80 Laws of Kenya?

37. It is common ground that when the Plaintiff filed and commenced the instant suit vide Originating Summons dated the September 4, 2014, the Plaintiff filed inter-alia a list containing the names of the witnesses that same intended to call.
38. In addition, there is also no gainsaying that subsequently and upon the directions being given pertaining to and concerning the manner of disposal of the originating summons, the Plaintiff proceeded to and procured Witness Statement from each and every witness that same intended to call.
39. In particular, it is evident and obvious that the Plaintiff herein procured a witness statement from Mr Kimani Kahiro, Advocate, now deceased, which witness statement was duly executed and signed by the named witness.
40. In addition, it is also imperative to note and underscore that the named witness, Mr Kimani Kahiro Advocate, also generated and caused to be attached to his witness statement, assorted documents in support of the averments contained thereon.
41. Suffice it to point out that the contents of the witness statement of Mr Kimani Kahiro Advocate, essentially relate to what same knew arising from his handling of the conveyance and affairs pertaining to LR No 13330, which is the mother Title from which the suit property emanates.
42. In any event, the fact that Mr Kimani Kahiro, Advocate, handled and dealt with the affairs pertaining to and concerning the mother Title out of which the suit property emanates, has been confirmed by Ms Njeri Kariuki, Advocate, who has filed a witness statement on behalf of the 1st Defendant.
43. From the foregoing observations, what becomes evident and apparent is that the witness statement of Mr Kimani Kahiro, now deceased, contains excerpts or pointers as to information and facts which came into his knowledge and possession during his handling of the affairs of the 1st Defendant and hence in the course of discharge of his professional duties.
44. It is not lost on the court that the Plaintiff herein has since testified and indeed tendered evidence to show the interactions that same had with Mr Kimani Kahiro, now deceased as pertains to his (Plaintiff's) ownership and interests over the suit property.
45. Additionally, the Plaintiff herein has also tendered in evidence, to the effect that same took a bankers cheques towards and in respect of payments of inter-alia survey and registration fees to the advocate Mr Kimani Kahiro, only to be informed by the deceased that the 1st Defendant had since taken away instructions from him (Mr Kimani Kahiro).
46. Given the foregoing juxtaposition, what becomes apparent is that the witness statement of Mr Kimani Kahiro would serve kind of, to illuminate and corroborate the deposition and evidence by the Plaintiff.



47. Nevertheless, before Mr Kimani Kahiro, Advocate, was called to testify and tender evidence, same passed on, on the October 1, 2022. In this regard, it is obvious that the said witness cannot now be called upon to appear before court (sic) and tender evidence on the basis of the witness statement and the attendant documents.
48. However, there is no gainsaying that the law of evidence envisaged and anticipated situations and scenarios like the one beforehand, where a witness who had hitherto recorded a witness statement dies before testifying in court.
49. Clearly, the provisions of Section 33 of the Evidence Act, Chapter 80 Laws of Kenya contemplated that where a witness who has hitherto recorded a statement dies before tendering evidence in court, the witness statement and documents, if any, authored and signed by such a witness would be admissible in Evidence, without same being called upon to appear in court.
50. To this end, it is appropriate to reproduce the Section 33 of the Evidence Act, Chapter 80 Laws of Kenya and in particular Section 33(a) and 33(b) of the Evidence Act.
51. For ease of reference same is reproduced as hereunder:
33. Statement by deceased person, etc. When Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
- a. Relating to cause of death, when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;
- b. Made in the course of business.
- When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
52. Additionally, the admission of a witness statement and document, if any, executed by a witness who has since passed on is also sanctioned vide the provision of Section 35 of the Evidence Act, Chapter 80 Laws of Kenya. For coherence, same underscores that where the maker of the statement cannot be procured or be found albeit without unreasonable expense, the Evidence in question is admissible.
53. In this regard, there is no gainsaying that the named Witness is Dead. Consequently, the dead witness cannot be procured, irrespective of the amount of efforts and expense, if at all.
54. To be able to appreciate and acknowledge the import and tenor of Section 35 of the Evidence Act, I propose to reproduce the pertinent aspects thereof. For coherence same is reproduced as hereunder:
35. Admissibility of documentary evidence as to facts in issue.



- (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say;
 - (a) If the maker of the statement either—
 - (i) Had personal knowledge of the matters dealt with by the statement; or
 - (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - (b) If the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

55. In my humble view, the named provisions of Section 35 of the Evidence Act, Chapter 80 Laws of Kenya, provides a window upon which the written statement and document, if any, authored and made by a witness who has since passed on, are rendered admissible in evidence before a court of law.
56. Furthermore, I have come to the conclusion that the nature and kind of witness statement and the documents attached thereto, which are sought to be produced relates to the information that came to the knowledge of Mr. Kimani Kahiro, Advocate (now deceased) in the ordinary course of his business (practice as an Advocate) and by extension in the discharge of his professional duty on inter-alia, to the 1st Defendant herein.
57. Irrespective of the angle which one applies to the witness statement of Mr Kimani Kahiro, Advocate, now deceased, and the document attached thereto, same no doubt fall within the prescribed and stipulated exceptions in terms of Section 33 and 35 of the Evidence Act, Chapter 80 Laws of Kenya.
58. Other than the interpretation of the named Sections of the Evidence Act, I beg to state that I have also drawn inspiration from the holding of the court in the case of Fleur Investment Ltd versus Permanent Secretary Ministry of Roads & Another (2021)eKLR, where the court stated and observed as hereunder:

- ' 7. In the instant case, we are dealing with a statement which was recorded by a person who cannot be called as a witness on the ground that he is dead. The relevant requirements under section 33 (b) of the Evidence Act is that such statement has to be in writing: that the statement must contain admissible facts made by the deceased; that the statement was made in the ordinary course of business or in the discharge of professional duty.
10. Dr Kioko Mang'eli's statement contains what he did himself. He installed the VSAT in the course of his professional duty as an engineer. Such evidence is admissible under section 35 of the Evidence Act. The statement does not contain hearsay evidence as contended by the Respondent. His evidence was recorded and his statement was served upon all the parties to this case prior to



his death. There is no evidence to suggest that he had any interest in the subject matter of this suit.

11. The Respondent argued that Dr Kioko's evidence should have been substituted by another expert witness. Whereas this may be so in certain circumstances, the statement of Dr Kioko Mang'eli has met all the requirements under section 33 (b) that is as regards non availability to testify, admissibility and the manner in which it was recorded i.e in the course of his professional duty. A substitution of Dr Kioko Mang'eli's statement with another expert would simply not work as that witness would not know what had been installed and the extent of the boundaries of the Applicant's land or even the exact location of the equipment installed.'

59. In a nutshell, I find and hold that the impugned witness statement of Mr. Kimani Kahiro, advocate (now deceased) and the attendant documents referenced to thereat, are admissible in evidence in line with the stipulated exception contained vide Sections 33 and 35 of the Evidence Act, Chapter 80 Laws of Kenya.

ISSUE NUMBER 2 Whether the Defendants and in particular the 1st and 2nd Defendants, would suffer any prejudice if the named witness statement is admitted in evidence?

60. The 1st and 2nd Defendants have contended that the admission of the impugned written statement of Mr Kimani Kahiro Advocate, now deceased, would unduly prejudice their rights and interests in respect of the instant matter.

61. In particular, learned counsel for the 1st and 2nd Defendants have extensively submitted that the admission of the impugned witness statement will deny and deprive the 1st and 2nd Defendants of their Constitutional rights of cross examination of the author of the impugned witness statement.

62. Premised on the foregoing, learned counsel for the 1st and 2nd Defendant have therefore added that the admission of the Witness Statement and the attendant Documents in question would therefore be contrary to and in contravention of the Right to Fair Hearing as stipulated and enshrined vide Article 50(1) of the Constitution 2010.

63. Whereas I do agree that the right to cross examination constitutes one of the fundamental tenets of a Fair hearing, it must be understood that the mere admission of the named witness statement and the attached documents, does not per se, confer upon the named documents/witness statements probative value.

64. Additionally, I beg to underscore that admission of a witness statement and document as evidence before the court is one thing and whether or not such a document has probative value is another thing.

65. In any event, it is not lost on the court that despite the admission and production of the named witness statement and the attendant documents, the court would still be called upon to evaluate same, albeit with due caution and circumspection, taking into account that the author thereof was not cross-examined and thereafter to determine the weight or value, if any, to be assigned thereto.

66. Furthermore, it is also important to underscore that even prior to the court retiring to consider the probative value and weight, if any, to be attached to the impugned witness statement and the attendant documents authored by the deceased, the Advocates for the 1st and 2nd Defendants herein (being the adverse parties), shall have an opportunity to make considered submissions pertaining to the probative value thereof.



67. In view of the foregoing considerations, it is my humble opinion that the extent of prejudice, if any, to be suffered by the 1st and 2nd Defendants will be mitigated by the opportunity to render submissions on the credibility or otherwise, of the impugned witness statement and the attendant documents, in due time.
68. Consequently and in the premises, I come to the conclusion that the 1st and 2nd Defendants herein would not suffer any undue prejudice, if the impugned witness statement and documents are admitted in evidence.
69. To the contrary, the Plaintiff herein who had hitherto notified the court and all the adverse parties that same shall be calling the named witness, will be unduly prejudiced if the witness statement of Mr Kimani Kahiro, Advocate (now deceased), and the attendant documents, are excluded by the court.
70. Finally, it is also important to note that it is the duty of the Honourable court to admit and accept all cadres of evidence, available and relevant to the issues in dispute, subject only to the provisions of Article 50(4) of the Constitution 2010.
71. For clarity, the court is enjoined to endeavor to and pursue substantive justice, whose net effect is to arrive at an informed determination, after taking into account all available evidence, tendered and offered by the respective Parties.
72. To this end and for emphasis only, I reiterate the sentiments which I made in the case of Mwihaki versus Kigui & 2 Others (Environment and Land Case 572 of 2015 (2022) KE ELC 2771 (KLR)).
73. For coherence, this court observed and stated as hereunder:
- ' Be that as it may, it is the duty and/or mandate of the court to render justice and therefore the court ought not to shut its eyes and forsake its Constitutional mandate, where it is said that some Evidence, somewhere may be of great assistance to the Court in the discharge of her mandate.'
74. In a nutshell and having delicately balanced the interests of the parties to this particular matter and taking into account the overarching obligation to administer substantive justice, it is my humble view that the wider Interests of Justice would be better served by admitting the witness statement by Mr Kimani Kahiro, Advocate (now deceased) and the attendant documents thereto.

Final Disposition

75. Having duly reviewed and analyzed the thematic perspectives that were highlighted and amplified in the body of the Ruling herein, I come to the conclusion that the Oral Application anchored and predicated upon the provisions of Section 33 and 35 of the Evidence Act, Chapter 80 Laws of Kenya, is well founded.
76. Consequently and in the premises, the named Application be and is hereby allowed. In this regard, the witness statement of Mr Kimani Kahiro, Advocate (now deceased) and the attached documents thereto, are hereby admitted as evidence on behalf of the Plaintiff.
77. As pertains to costs, I direct that same shall abide the outcome of the main suit.
78. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2023.

HON. JUSTICE OGUTTU MBOYA,



JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Maina Makome for the Plaintiff.

Ms. Mabele h/b for the 1st Defendant.

Mr. Gachuhi for the 2nd Defendant.

N/A for the 3rd Defendant

