



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 102 OF 2012**

**THE CHAIRMAN BOARD OF**

**TRUSTEES NDALU MOSQUE ..... 1<sup>ST</sup> PLAINTIFF**

**THE SECRETARY BOARD OF**

**TRUSTEES NDALU MOSQUE ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARTIN MABELE.....1<sup>ST</sup> DEFENDANT**

**MOSES WAFULA .....2<sup>ND</sup> DEFENDANT**

**COUNTY COUNCIL OF BUNGOMA.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. Among the list of documents filed by the plaintiffs in this case is one dated 3<sup>rd</sup> July 2019 and filed herein on 5<sup>th</sup> August 2019. It contains a letter dated 30<sup>th</sup> August 2018 from one **WINSTON SAKWA** the Acting Assistant County Director to the Department of Lands, Housing, Urban and Physical Planning County Government of Bungoma and addressed to the County Secretary National Land Commission Bungoma County.
2. When this case came up for further hearing of the plaintiffs' case on 15<sup>th</sup> July 2021, **RAMADHAN WASHIALI (PW 2)** attempted to produce as part of the plaintiffs' evidence the above letter as filed vide the above list of documents dated 3<sup>rd</sup> July 2019. However, both **MR OKILE** Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and **MR MURUNGA** Counsel for the 3<sup>rd</sup> defendant objected to it's production on the ground that they had not been served with the said list of documents and letter. As the letter was already part of the record, I allowed Counsel to address the Court as to why it should not be produced as evidence in this case.
4. **MR MURUNGA** submitted that the letter was neither addressed to the plaintiffs nor copied to them. Therefore, the plaintiffs cannot respond to any question regarding its contents and the best that the plaintiffs can do is to have the letter marked for identification and summon the maker. **MR OKILE** associated himself with the objections raised by **MR MURUNGA**.
5. In response, **MR KRAIDO** Counsel for the plaintiffs submitted that there was nothing to suggest that the said letter had been obtained unlawfully. He added that the letter was handed over to the plaintiffs and relates to the subject matter in this case and that it was infact authored by the 3<sup>rd</sup> defendant and is not a forgery.
6. **MR MURUNGA** however pointed out that the said letter had not been filed earlier.
7. I have considered the oral submissions by Counsel on the production of the said letter. It is of course correct, as **MR MURUNGA** has rightly pointed out, that the letter dated 30<sup>th</sup> August 2018 and which I have referred to above was not in the list of documents filed together with the plaint on 16<sup>th</sup> July 2012. That was of course in violation of the strict requirements of the provisions of **Order 3 Rule 2(d)** of the **Civil Procedure Rules** which states that all suits shall be accompanied by –

***“Copies of documents to be relied on at the trial including a demand letter before action.”***

However, I have previously allowed late filing of documents more so in the early stages of the trial and where the other party will have an opportunity to call evidence in rebuttal – see **MARCLUS KIRANGA NIMROD & ANOTHER .V. NESSY KUTHII JUSTUS &**

**8.** The plaintiffs ought to have sought leave before filing the list of documents dated 3<sup>rd</sup> July 2019. That is the proper practice. I notice however that even the witness statement of **RAMADHAN WASHIALI (PW 2)** dated 16<sup>th</sup> July 2012 and which he had already adopted as his evidence in this case without objection, was also filed late without leave. I will therefore invoke the provisions of **Article 159(2)(d)** of the **Constitution** and treat this oral application both as one for leave to file a witness statement and documents late and also for the admission or otherwise of the letter dated 30<sup>th</sup> August 2018.

**9.** As stated above, the letter dated 30<sup>th</sup> August 2018 is addressed to the 3<sup>rd</sup> defendant in this case. There is nothing to suggest that it is a forgery. It is relevant in these proceedings because it relates to the subject matter in this case which is Plot No 2 **NDALU TOWNSHIP**. It was authored by the 3<sup>rd</sup> defendant's representative and there is nothing to suggest that it was obtained un – lawfully. On the issue that the plaintiff cannot respond to any questions relating to it, that is rather presumptive. In any event, the 3<sup>rd</sup> defendant under whose authority the said letter was authored is a party in these proceedings and should be in a position to shed more light on its contents. It is essentially a public document held by the County Government and which, pursuant to the provisions of **Article 35** of the **Constitution**, the plaintiffs had the right of access to. They are therefore entitled to produce it in prosecuting their case. The defendants are yet to prosecute their cases and they will have an opportunity to rebut contents therefore.

**10.** In view of all the above, I overrule the objection by the defendants on the production of the letter dated 30<sup>th</sup> August 2018 as filed through the plaintiff's supplementary list of documents dated 3<sup>rd</sup> July 2019. I accordingly make the following orders: -

- 1: The supplementary list of documents filed by the plaintiffs on 5<sup>th</sup> August 2019 and dated 3<sup>rd</sup> July 2019 be deemed as properly filed.**
- 2: The plaintiffs may produce the letter dated 30<sup>th</sup> August 2018.**
- 3: The defendants, if they so wish, may, within 14 days from today, file and serve any further list of documents and statements of witnesses if they so wish.**
- 4: Further hearing shall be on 27<sup>th</sup> June 2022 subject to the concurrence by Counsel or a fresh date be taken in the registry.**

**BOAZ N. OLAO.**

**J U D G E**

**1<sup>st</sup> March 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 1ST DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL WILL NOTICE TO THE PARTIES.**

**BOAZ N. OLAO.**

**J U D G E**

**1<sup>st</sup> March 2022.**