



REPUBLIC OF KENYA



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Mutevesi (Suing as Legal Representative of Mutevesi Lubwa alias Mutevesi Lubwa - Deceased) v Imboko & 2 others; Lubwa & 5 others (Interested Parties) (Environment and Land Case 140 of 2016 & 304 of 2014 (Consolidated)) [2025] KEELC 6508 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6508 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 140 OF 2016 & 304 OF 2014 (CONSOLIDATED)

A NYUKURI, J

SEPTEMBER 24, 2025

BETWEEN

SULUMENA LUBALE MUTEVESI PLAINTIFF

**SUING AS LEGAL REPRESENTATIVE OF MUTEVESI LUBWA ALIAS
MUTEVESI LUBWA - DECEASED**

AND

CHIVEU SHAMALA IMBOKO 1ST DEFENDANT

THE COUNTY LAND REGISTRAR 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

AND

CHRISTOPHER LUBWA INTERESTED PARTY

DAVID SHIJENJE MUKOSHI INTERESTED PARTY

TIMOTHY TELLA INTERESTED PARTY

RODAH WERANGA SIKOLIA INTERESTED PARTY

ADVENTIST CHURCH EA LIMITED INTERESTED PARTY

CLEMENT MUYABILE ISIYE INTERESTED PARTY



RULING

Introduction

1. This ruling is in regard to objections raised by the defendants in regard to production of documents by the plaintiff and 1st, 2nd, 4th, 5th and 6th interested parties and 2nd and 3rd Defendants (Land Registrar and Attorney General).
2. This matter came up for pre-trial conference on 7th July, 2025. Mr. Osango Advocate appeared for the plaintiff and the 1st, 2nd, 4th and 5th interested parties. Mr. Wachilonga Advocate appeared for the 1st defendant, Mr. Nyikuli Advocate appeared for the 1st defendant, in ELC Case No. 304 of 2014, while Mr. Getanda advocate appeared for the 3rd interested party. Mr. Isiyee Clement the 6th interested party appeared in person. There was no appearance for the 2nd and 3rd defendants.
3. Regarding production of documents, Mr. Osango stated that he had filed and served his trial bundle and had no objection for the listed witnesses for the other parties to produce the documents filed. He confirmed that he will be calling two more witnesses and sought witness summons to issue to the Chief of Township location Malava and the County Surveyor. He confirmed that he did not need interpreters or translators during trial and stated that there were no preliminary matters pending.
4. Mr. Nyikuli on his part stated that he objected to production of documents filed by the 2nd and 3rd defendants. That the 6th defendant who is the land registrar should not produce the application for consent and proforma in respect of the list of documents dated 22nd September 2021. He sought that the makers of the document do produce them. In addition, Mr. Nyikuli objected to the production of documents filed by Mr. Clement Isiyee, the 6th interested party and sought that the same be produced by the authors thereof because they are contested.
5. He maintained that the 1st - 5th interested parties will be relying on similar documents as the plaintiffs and that he objects to the production of those documents and that the Chief and the surveyor do produce the documents. He stated that he will be presenting one witness and did not need witness summons, interpreter or translator.
6. On his part, Mr. Getanda supported Mr. Nyikuli's position and stated that he will be calling two witnesses and that he did not need translators, interpreters or summons for witnesses. He also stated that there were no pending preliminary matters.
7. Mr. Isiyee Clement, the 6th interested party referred to this court's ruling dated 17th December 2024 and submitted that the same was in respect of production of documents. He submitted that as the filed documents are the property of the court, the court should admit them. He stated that he was not opposed to the other parties' listed witnesses producing their filed documents. He averred that he will be presenting two witnesses and sought witness summons to issue in respect of one Emily Isiyee. That he did not need a translator or interpreter.
8. Mr. Wachilonga stated that he will call two witnesses and needed witness summons to issue to the Land Registrar Kakamega. He stated that the ruling referred to by Mr. Isiyee was not in regard to production of documents. He sought that original documents be produced.
9. In a rejoinder, Mr. Getanda stated that he had not been served with a statement in regard to the alleged evidence of Emily Isiyee.



10. Mr. Isiye stated that original documents remained with the seller and that he only had one original document. He stated that counsel will have opportunity to cross examine his witnesses on the documents. He conceded that he had not filed any witness statement from Emily Isiye and stated that he will not be calling her as a witness.
11. In a rejoinder, Mr. Osango argued that Mr. Nyikuli was opposing the production of documents which are government documents, while Mr. Nyikuli and Mr. Wachilonga appear for the same party and are aware that the District Surveyor and Land Registrar are retired and that Mr. Fundia, who is retired may not come to court. He sought that Government officers in office should be allowed to produce the documents and maintained that Mr. Nyikuli and Mr. Wachilonga had filed the same documents like those filed by Mr. Osango.
12. Having heard parties, the court ordered that witness summons to issue as prayed and scheduled this matter for ruling on the question of objection on production of documents on 24th September 2025.

Analysis and determination.

13. This court has carefully considered the documents filed and objections raised by the parties as well as the court record.
14. Section 35 of the *Evidence Act* provides on production of documents as follows:
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.
- (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—
 - (a) notwithstanding that the maker of the statement is available but is not called as a witness;



- (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.
- 3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.
- (4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.
- (5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.
16. Therefore, a document may be admitted in evidence on condition that the maker produces the document, and where such maker is dead, cannot be found or is not capable of giving evidence or his attendance will lead to unreasonable delay and costs, then the court can allow a document to be produced by a person who did not make the document. Original documents ought to be produced, or in the alternative a certified copy thereof.
17. In the instant matter, the plaintiff and the 6th interested party have not objected to production of documents by the other parties' listed witnesses. Mr. Nyikuli and Mr. Getanda objected to documents filed by the plaintiff, the 2nd and 3rd defendants and the 1st, 2nd, 4th, 5th and 6th interested parties. They sought that original documents be produced by the makers. Mr. Wachilonga sought that original documents be produced but the 6th Interested Party stated that the original documents in regard to his list of documents were held by the seller. Mr. Osango stated that the documents objected to are Government documents and the authors thereof are retired and may not be willing to come to court, hence current office holders should be allowed to produce them. He further stated that they are the same documents relied upon by Mr. Nyikuli and Mr. Getanda.
18. The documents listed by the plaintiff in his list of documents dated 13th September 2018 are copies of amended grant of letters of administration intestate; certified true copy of the register for parcel No. Kakamega/Chemuche/897; letter dated 1st December 2014 by the area chief; letter dated 3rd December 2014 from District Surveyor Kakamega; Title deed for No. S. Kabras/Chemuche/1723; Title deed for parcel No. S. Kabras/Chemuche/1893 and title deed for parcel No. S. Kabras/Chemuche/1894.
19. The record shows that this matter proceeded to hearing on 9th March 2022 when Sulumena Lubale Mutevesi testified as PW1. When she sought to produce her seven documents listed, the court only allowed her to produce documents Nos. 1, 2, 5, 6 and 7 which are copies of grant of letters of administration; true copy of the register for parcel No. Kakamega/Chemuche/897; title deed for parcel No. S/Kabras/Chemuche 1723; copy of title for parcel No. Kakamega/Chemuche/ 1893 and copy of title for parcel No. Kakamega/Chemuche/ 1894. As for documents 3 and 4 which are letters from the area Chief and District Surveyor dated 1st December 2014 and 3rd December 2014 respectively, the court held that those documents were from Government offices and the plaintiff should call officers from the Government offices where the letters were written. Those orders have not been set aside,



reviewed or even appealed against, hence that remains the position. On 24th March 2025, when this matter came up for directions, parties agreed that the matter proceeds from where it had reached, which position was endorsed by court and made an order of the court. Therefore, in so far as admissibility of the plaintiff's and 1st, 2nd, 4th and 5th interested parties' documents is concerned, this court will not revisit that question as the same was resolved with finality and on merit by this court on 9th March 2022. By dint of Section 7 of the Civil Procedure Act, this court is barred from revisiting that question which is now *res judicata*.

20. As Mr. Osango had sought and been granted witness summons to issue to the Chief Township location and District Surveyor Kakamega, to enable them produce documents 3 and 4 respectively, I find and hold that the objection herein against the plaintiff's and 1st, 2nd, 4th and 5th Interested parties' documents lacks merit and is hereby dismissed.
21. That then leaves us with the question of whether the 6th interested party is a competent witness to produce his documents filed and attached to his list of documents, which are copies of the agreements dated 12th December 1999 and 13th April 2000; acknowledgement letters dated 22nd December 1999, 18th April 2002 and 29th April 2000, document for final settlement of purchase price dated 28th February 2000 and letters dated 13th April 2000 and 31st May 2000 allegedly written by the defendant. Since the 6th interested party is one of the parties to the agreements being document numbers 1-4, he is a competent witness to produce the same.
22. As for the letters allegedly written by the defendant and dated 13th April 2000 and 31st May 2000, the defendant who is a party to this suit cannot be compelled to produce the same, hence the 6th interested party is competent to produce them.
23. On the argument that the 6th interested party should produce the original documents, the latter argued that the original of those agreements are in the custody of the defendant. No evidence was presented to the contrary and no denial of that assertion was made by the defendant. The 6th interested party referred to the ruling of 17th December 2024. Having considered the same, which is in relation to the 1st defendant's application dated 17th June 2024 seeking for an order that the 6th interested party submits original copies of the agreements filed herein, to the DCI for forensic investigation, that application was dismissed by this court which also found that no evidence was presented to prove that the originals of those documents were in the custody of the 6th interested party. The ruling has not been set aside or reviewed.
24. This court having already found that there is no proof that the 6th interested party is in possession of the original documents and the latter having maintained that the originals are held by the 1st defendant, and the court noting that those documents are hand written, meaning that there can only be one original of the same and two disputants cannot both be having the original documents, I do not see any basis to doubt the 6th interested party's assertion. I therefore find that the 6th interested party is competent to produce copies of the documents he filed as the 1st defendant cannot be expected to certify a document against himself. In the premises, the objection raised against the production of documents filed by the 6th interested party by the defendants lacks merit and the same is hereby dismissed.
25. Regarding the Land Registrar, he is competent to produce documents held by him by virtue of his office, and which his office has received or issued in the course of discharging the mandate of that office.
26. As the production of documents filed by the defendants and 3rd interested party have not been challenged, I find that save for the plaintiff, 1st, 2nd, 4th and 5th interested parties' document Numbers 3 and 4 which are letters from the Chief and the Surveyor Kakamega, all documents filed herein are admitted and shall be produced at the trial by the listed witnesses respectively. The two documents



filed by the Plaintiff and 1st, 2nd, 4th and 5th interested parties, having been authored by Government officers in their official capacity, will be produced by the authors thereof and where the authors are no longer in office, by the current respective office holders.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Osango for the plaintiff and the 1st, 2nd, 4th and 5th Interested parties

Mr. Getanda for the 3rd Interested party

Mr. Wachilonga for the 1st defendant

Mr. Nyikuli for the 1st defendant in ELC 140 of 2016

Mr. Isiye Clement the 6th interested party in person.

Court Assistant- Delphine

