



**Maina v Cheruiyot & another (Environment and Land Case
177 of 2016) [2025] KEELC 6259 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 177 OF 2016
EM WASHE, J
SEPTEMBER 17, 2025**

BETWEEN

KIPTANUI MAINA PLAINTIFF

AND

YASSIN KIPROP CHERUIYOT 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The Ruling by the Court relates to an Objection raised by the 2nd Defendant's Counsel on a letter dated 03.04.1995 produced by the 1st Defendant's witness.
2. The 2nd Defendant's Counsel objected to the production of the letter dated 03.04.1995 on two substantive grounds.
3. The first ground was that the letter dated 03.04.21995 was from the Director of Land Adjudication & Settlement to the Acting Deputy Chief Litigation Counsel and was not copied to the 1st Defendant herein.
4. In other words, the manner in which the letter was procured by the 1st Defendant was unlawful and illegal hence the same is not admissible in evidence.
5. The second ground in support of the objection is that the letter dated 03.04.1995 was a correspondence between the Director of Land Adjudication & Settlement to the Acting Deputy Chief Litigation Counsel which in the eyes of the 2nd Defendant's Counsel was privileged information between a client and an advocate.
6. Consequently, the 2nd Defendant's Counsel was of the considered view that the contents of the letter dated 03.04.1995 were privileged and confidential in nature and therefore inadmissible by the Court



without the press authority of the Principal Secretary, Ministry of Land & Settlement who is the Chief Accounting Officer allowed in law to waive such a privilege.

7. The Objection by the 2nd Defendant was vehemently opposed by the 1st Defendant's Counsel.
8. The Counsel for the Plaintiff supported the Objection by the 2nd Defendant.

Submissions Made In Support Of The Objection By 2nd Defendant

9. The 2nd Defendant objected to the production of the letter dated 03.04.1995 which was filed through a Supplementary List of Documents on 22.12.2022 arguing that it was neither addressed nor copied to the 1st Defendant whose witness wished to produce it.
10. The 2nd Defendant argued that there was no correspondence requesting for the document from either the Attorney General or the Principal Secretary in the Ministry of Lands & Settlement and no explanation had been offered as to how the 1st Defendant obtained the letter.
11. The 2nd Defendant further argued that the letter contains privileged information between an advocate and client, which privilege is meant to protect the client and can only be waived by the Principal Secretary Ministry of Lands & Settlement upon advice by the Attorney General.
12. Counsel submitted that the implication of the document did not matter, since the privilege must be maintained, and in any event, the witness who sought to produce the document had no power to waive the privilege accorded to the document.

Submission By The Plaintiff

13. On behalf of the Plaintiff, Counsel chose to associate himself fully with the submissions made on behalf of the 2nd Defendant with nothing to add.

Submissions By Counsel For The 1st Respondent.

14. Arguing against the objection, Counsel appearing for the 1st Defendant submitted that the 2nd Defendant had not pointed to any legal provision or regulations requiring the consent of the Principal Secretary in the Ministry of Lands & Settlement to waive any privilege, and though the practice can be adopted by the Government, there is no lawful backing to the same.
15. He also submitted that the witness before the stand seeking to produce the letter dated 03.04.1995 was a representative of the Director of Land Adjudication & Settlement who are the authors of the letter and clients to the 2nd Defendant.
16. Counsel for the 1st Defendant submitted that Counsel for the 2nd Defendant had not demonstrated the nature of the prejudice that the 2nd Defendant would suffer if the document is produced.
17. Finally, Counsel for the 1st Defendant argued that there was already on record a privileged document dated 10.05.2018 by the Plaintiff from County Land Adjudication & Settlement to the Attorney General.
18. He accused the 2nd Defendant of blowing hot and cold on the issue of production and prayed that the objection be overruled.



Rejoinder By Counsel For The 2nd Defendant.

19. Responding to the arguments by 1st Defendant's Counsel, Counsel for the 2nd Defendant submitted that the consent to waive any privilege is vested in the Accounting Officer of every ministry which in this case was the Principal Secretary in the Ministry of Land.
20. Counsel for the 2nd Defendant submitted that the 2nd Defendant in its own capacity was objecting to the production of said document and that the 1st Defendant cannot purport to speak for the 2nd Defendant.
21. Counsel for the 2nd Defendant reiterated that the witness on the dock did not have capacity to produce a privileged document.
22. On the prejudice to be suffered, Counsel for the 2nd Defendant argued that the use of privileged documents by persons other than the persons addressed is more than enough damage.
23. As regards the letter dated 10.05.2018 from the County Land Adjudication and Settlement to the Attorney General, Counsel was of the view that this was wrong and Court cannot continue admitting documents based on wrong principles.
24. The Court having heard and considered the submissions by the Advocates herein, the only issues that crystallize for determination are; -

Issue No.1-Was the 1st defendant's witness capable of producing the letter dated 03.04.1995 on behalf of the director of land adjudication & settlement?

Issue No.2- IS The letter dated 03.04.1995 privileged as provided by law?

Issue No.3- Is the objection by the 2nd defendant successful?

25. The Court having identified the above-mentioned issues for determination, the same will now be discussed herein below; -

Issue No.1-Was the 1st defendant's witness capable of producing the letter dated 03.04.1995 on behalf of the director of land adjudication & settlement?

26. The first issue that requires to be resolved is who is producing the letter dated 03.04.1995 that the 2nd Respondent has objected to.
27. It is clear that at the time the letter dated 03.04.1995 was being produced, it was the 1st Defendant's case.
28. However, the 1st Defendant did not produce this particular document in his evidence.
29. Instead, the 1st Defendant elected to call DW2 who is an officer at the Directorate of Land Adjudication and Settlement offices.
30. The letter dated 03.04.1995 was authored in the office of the Land Adjudication and Settlement office and directed to the Acting Chief Litigation Council in the office of the Attorney General.
31. In other words, the witness DW2 who the 2nd Defendant did not dispute is an officer from the office of the Director of Land Adjudication and Settlement has the capacity to produce the said letter dated 03.04.1995 by virtue of his office.
32. On this note, this Court makes a finding that the letter dated 03.04.1995 can be produced by DW2 to assist in the determination of the issues before the court.



33. The issue that the letter was not addressed or copied to the 1st Defendant cannot make the letter dated 03.04.1995 inadmissible as evidence.

Issue No.2- Is the letter dated 03.04.1995 privileged as provided by law?

34. The second aspect raised in the 2nd Defendant's objection touches on the confidentiality of the letter dated 03.04.1995.

35. According to the 2nd Defendant's submissions, the letter dated 03.04.1995 was a correspondence from the office of the Director Land Adjudication and Settlement (Client) and the acting chief litigation counsel in the office of the Attorney general (advocate).

36. Counsel for the 2nd Respondent argued that the said letter dated 03.04.1995 was one which contained privileged information between an advocate and a client.

37. It was further argued by the 2nd Defendant's Counsel that the letter dated 03.04.1995 should be deemed to be a privileged document between a client and an advocate and therefore should not be admitted as evidence produced by the 1st Defendant unless the client grants a waiver of the said privilege for the document to be admissible in court.

38. Counsel for the 1st Defendant opposed these submissions by stating that the letter dated 03.04.1995 cannot be deemed as a privileged document for the reason that the author was in court and ready to produce the same to enable the court decide on the issues before it.

39. Similarly, the 1st Defendant's Counsel challenged the 2nd Defendant's Counsel's submissions that there ought to be a waiver issued by the Principal Secretary in the Ministry of Lands and settlement to allow DW produce the said letter before the court.

40. Counsel for the 1st Defendant pointed out to the Court that there were no statutory provisions which had been outlined before the Court to support the argument by the 2nd Defendant's Counsel.

41. To resolve this issue, this Court finds it necessary to first identify where the letter dated 03.04.1995 is coming from.

42. The law requires that every registered property must have or contain a correspondence file in which various correspondences are contained for further use.

43. It is no doubt that the letter dated 03.04.1995 should be one of the documents contained in the correspondence file of the suit property.

44. All correspondence files held by the Director of Land Adjudication and Settlement, the Chief Land registrar, the County Land Registrars and any other person allowed in law to keep such records are in the eyes of the law public documents.

45. Looking at the letter in issue dated 03.04.1995, it is not denied that it emanates from the office of Land Adjudication and Settlement to the Acting Chief Litigation Counsel at the Attorney General's Office.

46. Nevertheless, the contents in the letter dated 03.04.1995 were not deemed as private and confidential by the author who was the Director of Land Adjudication and Settlement.

47. If the author who is the Director of Land Adjudication and Settlement was of the view that the contents in the said letter dated 03.04.1995 were private and confidential, then there would have been nothing easier than to simply indicate the words "Private and Confidential".



48. The next question then is whether the letter dated 03.04.1995 can be deemed as a privileged document between an advocate and a client.
49. The privilege between an advocate and a client is founded on Section 134(1) of the Evidence Act which provides as follows; -
- “ 134. Privilege of advocates.
- (1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
50. The 2nd Defendant’s Counsel sought to rely on the provision of Section 134 of the Evidence Act, Cap 80 to advance the argument that the information in the letter dated 03.04.1995 was privileged and could not be admissible in Court unless there is a waiver granted by the Principal Secretary in the Ministry of Lands who is its accounting officer for it to be admissible.
51. Looking at the Constitution, the statutory provisions of the Evidence Act read together with the Advocates Act, this Court is of a different opinion.
52. To begin with, the Advocates Remuneration Order is specifically provided for to deal with Relationships between private citizen or entities and a private licensed advocate.
53. All public institutions are required to be represented by the Attorney General who is the legal advisor and representative of the government.
54. Having said so, all government institutions are bound by Article 35 of the Constitution which guarantees the right of the public to access information.
55. For avoidance of doubt, Article 35 provides as follows:
35. Access to information
- (1) Every citizen has the right of access to—
- (a) information held by the State; and
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
56. Looking at the above provision of the Constitution, every citizen has the right to access the information in the correspondence file held by the Director of Land Adjudication and Settlement, Chief Land Registrar, County Land Registrars or any other person who holds public documents.
57. This access to public information is further safeguarded through the Access to Information Act which outlines exceptions recognised in law if need be to curtail access to information under Article 35.
58. The provisions of Section 6 of the Access to Information Act provides as follows:-
6. Limitation of right of access to information



- (1) Pursuant to Article 24 of *the Constitution*, the right of access to information under Article 35 of *the Constitution* shall be limited in respect of information whose disclosure is likely to—
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
 - (h) damage a public entity's position in any actual or contemplated legal proceedings; or
 - (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.
- (2) For purposes of subsection (1)(a), information relating to national security includes—
 - (a) military strategy, covert operations, doctrine, capability, capacity or deployment;
 - (b) foreign government information with implications on national security;
 - (c) intelligence activities, sources, capabilities, methods or cryptology;
 - (d) foreign relations;
 - (e) scientific, technology or economic matters relating to national security;
 - (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
 - (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
 - (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;
 - (i) cabinet deliberations and records;



- (j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;
- (k) information that is referred to as classified information in the *Kenya Defence Forces Act* (Cap. 199); and
- (l) any other information whose unauthorized disclosure would prejudice national security.

59. The Court takes note that Section 6(1)(h) of the Access to Information states as follows: -

- (h) damage a public entity's position in any actual or contemplated legal proceedings; or

60. It is true that there could be instances where a public document that an individual or entity wishes to produce before the Court can damage a public entity's position in an actual or contemplated legal proceeding.

61. If such a scenario comes into existence, what then should the Attorney General do to render such a document that a party wishes to produce in Court inadmissible.

62. The answer is contained in Section 131 of the *Evidence Act* which provides as follows: -

Wherever it is stated on oath (whether by affidavit or otherwise) by a minister that he has examined the contents of any document forming part of any unpublished official records, the production of which document has been called for in any proceedings, and that he is of the opinion that such production would be prejudicial to the public service, either by reason of the content thereof or of the fact that it belongs to a class which, on grounds of public policy, should be withheld from such a production, the document shall not be admissible.

63. The interpretation of Section 131 of the *evidence Act* is that where the Attorney General is of the considered view that any public document should not be admissible because it would be prejudicial to its case in the contemplated and/or actual proceedings, then the same should be stated on oath either through an affidavit or otherwise by the Minister in charge of that Department.

64. The obligation of preparing that Statement on Oath is placed on the Attorney General and the Cabinet Secretary in charge of that department concerned.

65. In the instant case, there is no Statement on Oath by the Cabinet Secretary in charge of the Office of Land Adjudication and Settlement explaining why the letter dated 03.04.1995 should not be admissible as a public document or unpublished official record.

66. In other words, this Court hereby makes a finding that the letter dated 03.04.1995 is a public document and is admissible in Court unless a Statement on Oath objecting to the same by the Cabinet Secretary in charge of the Department of Land Adjudication and Settlement has been filed in these proceedings.

Issue No.3- Is the objection by the 2nd defendant successful?

67. The last issue is whether the Objection by the 2nd Defendant is sustainable or not.

68. Based on the determination on issue No. 1 and 2 hereinabove, this Court is of the considered opinion and finding that the Objection against the production of the letter dated 03.04.1995 by the 2nd Defendant is not sustainable.



Conclusion

69. In conclusion, this court hereby makes the following orders in relation to the 2nd Defendant's Objection raised on 25th July, 2025: -

- A. The objection raised against the admission of the letter dated 3rd april, 1995 be and is hereby dismissed.
- B. The letter dated 3rd april, 1995 is admissible subject to production by the author.
- C. There will be no costs on this objection.

DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC ON THIS 17TH DAY OF SEPTEMBER 2025.

EMMANUEL.M. WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Brian

Advocate For The Plaintiff: Mr. Tanui H/b For Mr. Ngigi

Advocates For The Defendants: Ms. Salim H/b For Mr. Mwetich For 1st Defendant, Ms. Cheruiyot For 2Nd Defendant(n/a).

