

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC LC CASE NO. 776 OF 2017

**ANGELA NKATETO LEEYIO (*Suing as the Administratrix and
Legal Representative of the Estate of TUTAYO ENE LEEYIO
LENKOLO* (Deceased)**

.....**PL**

PLAINTIFF

VERSUS

STEPHEN NAKUO & 13

OTHERS.....DEFENDANTS

AND

**MORRIS RUTHIBU MBUGU & 28 OTHERS.....THIRD
PARTIES**

RULING

1. This **Ruling** is in respect to the **Notice of Motion** application dated **18th July 2025** brought pursuant to **Order 50 Rule 1; Order 18 Rule 10 of the Civil Procedure Rules; Section 146(4) of the Evidence Act; Section 3 and 3A of the Civil Procedure Act** and all other enabling provisions of the law.
2. It seeks orders that;
 - i. **This Honourable Court be pleased to issue an order to recall the Plaintiff (PW1) Angela Nkateto Leeiyo for further cross examination and re-examination.**
 - ii. **The Honourable Court be pleased to allow the Applicants to file further list of documents.**
 - iii. **The costs of this application be in the cause.**
3. The grounds are on the face of the application and are set out in paragraphs a to e. It is supported by the sworn Affidavit of **Alexander Muema Muthengi**.

4. He averred that by the time counsel for the 9th and 10th Defendants came on record, the matter had already substantially progressed before Justice C.O. Ochieng', who had determined several interlocutory applications. He stated that on 14th July 2025, their advocate perused the Court file and discovered a **Notice of Motion dated 19th June 2017**, together with a **Supporting Affidavit** sworn by **Tutayo Ene Leeiyo Lenkolo** on the same date. In that application and affidavit, reference was made to parcel LR No. Kajiado/Kaputiei North/23550, whose title was issued on 17th May 2006. This parcel was also mentioned in the Ruling delivered on 26th June 2018. Additionally, there was an annexure containing a Mutation Form for parcel No. Kajiado/Kaputiei North/4322 and a sketch development plan showing that LR No. Kajiado/Kaputiei North/4155 had been subdivided.

5. The Applicant contended that this information was not within the knowledge of the 9th, 10th Defendants or the Interested Party at the time the Plaintiff testified on, 3rd July 2025. Upon making this discovery, their advocate

proceeded to the Ministry of Lands on 14th July 2025, where he obtained survey plans, maps, and Mutation Forms which are crucial for the proper determination of the issues in dispute. He reiterated that none of this information was available during the pre-trial stage and, therefore, it had become necessary to recall the Plaintiff (PW1) for further cross-examination.

6. He further relied on **Section 146(4) of the Evidence Act** and **Order 18 Rule 10 of the Civil Procedure Rules**, which confer upon the Court the discretion to recall a witness at any stage of the proceedings if such recall is necessary for the fair disposal of the matter. The Applicant contended that the present application was brought without undue delay upon discovery of the new evidence and that if allowed, it would not occasion any prejudice to the Plaintiff, but would instead facilitate the just and expeditious resolution of the dispute.

7. The **1st, 2nd, 3rd and 4th Defendant's** supported the application to recall PW1 on grounds that they were not aware of the new found evidence and that recalling the

witness would not be prejudicial to the Plaintiff but would aid in fair determination of the case.

8. In her **Replying Affidavit** sworn on **21st July 2025**, the Plaintiff, **Angela Nkateeto Leeyio**, opposed the application, contending that it was frivolous, vexatious, and amounted to an abuse of the Court process intended to unjustifiably delay the expeditious conclusion of the dispute. She averred that land parcels Kajiado/Kaputiei North/4322 and Kajiado/Kaputiei North/23550 were unknown to her and that, if indeed such parcels existed, they must have been fraudulently excised from her family's land without her knowledge or consent. She stated that it was upon learning of this information that the Plaintiffs sought to amend their Plaint to reflect the said facts. In her view, recalling her for cross-examination regarding parcels of land which she had expressly stated were unknown to her was both prejudicial and an abuse of the Court process. She further deposed that titles Kajiado/Kaputiei North/4154 and 4155 had never been

subdivided and that the Plaintiffs remained in possession of the original title deeds for the said parcels.

9. The Plaintiff further contended that counsel for the 9th and 10th Defendants had been on record for a considerable period of time and ought, through the exercise of reasonable diligence, to have obtained the information he now claims was previously unavailable to him. She maintained that the present application was therefore an afterthought, brought in bad faith, and solely intended to derail the hearing of the matter. She urged the Court to dismiss the application and in the alternative, she prayed that should the Court to allow the application, the scope of any further cross-examination be strictly limited to issues arising from the Amended Plaint dated 12th September 2024.

10. The application was canvassed by way of written submissions.

Submissions in favour of the Application

11. **Counsel for the 9th, 10th Defendants and Interested Party (Applicants)** submitted that when this suit was filed, the Notice of Motion Application dated 19th June 2017 sought a temporary injunction in favour of LR No. Kajiado/ Kaputiei- North/ 23550. In support of this application, the Plaintiff annexed Mutation forms for Kajiado/ Kaputiei-North/23550. The Applicants claim that by the time the 2017 application was filed, they were not parties to the suit and only became parties through the Amended Plaint dated 20th September 2023. They were therefore not aware of the documents used to get the injunctive reliefs and only learnt about them later. It was therefore necessary to recall the Plaintiff for further cross-examination. It was also submitted that the Applicants intended to produce maps from Survey of Kenya which showed that parcel Kajiado/Kaputiei-North/23550 (bearing the name of the late Plaintiff) were subdivisions of parcel Kajiado/Kaputiei - North/ 4153 and 4154.

12. It was their submission that they had satisfied the requirements for recalling a witness as espoused under

Section 146 (4) of the Evidence Act and Order 18 Rule 10 of the Civil Procedure Rules.

13. **Counsel for the 8th Defendant** supported the application for recalling the Plaintiff pointing out that there were discrepancies in the Plaintiff's evidence such as the Replying Affidavit indicating that titles for parcels Kajiado/Kaputiei North/4154 and 4155 were intact while there was evidence that parcel 23550 had been excised from one of the titles. It was therefore necessary to recall the Plaintiff to ascertain the truth as was held in **Rardrops vs County Government of Kilifi (2020) eKLR.**

14. **Counsel for the 1st, 3rd and 4th Defendants** also supported this application.

Submissions of the Plaintiff

15. Counsel for the Plaintiff opposed the application by submitting that parties are bound by their pleadings. It was argued that once pleadings are amended, the amended version supersedes the original pleadings, and

the matter proceeds on the basis of the latest amendment. Consequently, the live issues before the Court are those arising from the Further Amended Plaintiff, and not the original Plaintiff or any earlier versions.

16. Counsel submitted that the issues on which the Applicants seek to cross-examine the Plaintiff do not fall within the scope of the Further Amended Plaintiff and are, therefore, not live issues before the Court. It was contended that the application amounts to an abuse of the Court process, lacks merit, and is intended to inordinately delay the expeditious determination of this matter. Counsel further argued that the Applicants are on a fishing expedition, seeking to obtain evidence to strengthen their case rather than pursuing legitimate issues arising from the pleadings.

17. On the substantive issue, counsel submitted that the original subject property, LR No. Kajiado/Kaputiei North/23550, ceased to be part of these proceedings upon the amendment of the Plaintiff on 21st October 2021, following discovery of fraud and changes in the

Defendants' positions. The live dispute now solely concerns LR Nos. Kajiado/Kaputiei North/4154 and 4155. It was therefore improper for the Applicants to seek to recall the Plaintiff for cross-examination on parcel 23550, which was no longer in contention.

18. Counsel relied on the decision in **Blue Shield Insurance Co. Ltd v Joseph Mboya Oguttu [2009] eKLR**, where the Court of Appeal held that once pleadings are amended, earlier pleadings become irrelevant unless fraud or prejudice is demonstrated. Reliance was also placed on **Trusted Society of Human Rights Alliance v Mumo Matemu [2015] eKLR**, where the Court emphasized that pleadings define the scope of litigation and parties cannot stray beyond them. Similar reasoning was echoed in **Elijah Kipngeno Koech v Kenya Commercial Bank Ltd & Another [2021] eKLR**, **Compact Freight System Ltd v DPP & Others [2024] KEHC 2602 (KLR)** and **Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2018] eKLR** which affirmed

that an amended pleading supersedes the original pleading, and the case proceeds only on the amended pleadings.

19. It was further submitted that although this Court has discretion under **Order 18 Rule 10 of the Civil Procedure Rules** to recall a witness for further cross-examination, that discretion must be exercised judiciously and sparingly. In the present case, the Applicants have neither presented new evidence nor demonstrated exceptional circumstances to justify the recall of the Plaintiff. Counsel noted that the Applicants had a full opportunity to cross-examine the Plaintiff when she testified on 17th July 2025, and no cogent reason has been advanced to explain why that opportunity was not adequately utilized.

20. Counsel submitted that the present application is nothing more than a fishing expedition, aimed at filling gaps in the Applicants' case. In support, reliance was placed on **Kenyatta International Convention Centre v Greenstar Systems Ltd [2018] eKLR**, where the

Court declined to recall a witness on similar grounds. As such, the application should be dismissed with costs.

Analysis and determination

21. I have considered the Notice of Motion, the affidavit in support and the responses thereto, the written submissions and the authorities cited. I find that the single issue for determination is:

i. Whether the Application to recall the Plaintiff for further cross-examination should be allowed.

22. Before this Court is the **Notice of Motion** dated **14th July 2025**, seeking orders to recall the Plaintiff (PW1) for further cross-examination. The application is premised on the grounds that upon perusal of the court record, the Applicants discovered new documents and information pertinent to the resolution of this dispute. The Applicants claim that they discovered these documents on 14th July 2025 and the same had been filed before their joinder in the suit.

23. The Plaintiff contested this application on grounds that once they amended the pleadings, all previous pleadings became void and only the Further Amended Plaint and consequent documents were applicable.

24. While the Plaintiff's claim that Amended pleadings supersede original pleadings, and filed cases to support this argument, this Court is of the opinion that an amendment does not erase the court record, which remains a repository of all documents and proceedings filed. This Court is also mindful that documents and proceedings forming part of the court record remain relevant in ensuring a just and effective resolution of the dispute. Even where the parcel of land is no longer expressly pleaded in the Amended pleadings, it is on record that in the Plaint filed in 2017, the Plaintiff claimed ownership of LR No. Kajiado/Kaputiei North/23550 and the Ruling dated 26th June 2018 was in regard to this parcel of land.

25. While amended pleadings supersede original pleadings and define the scope of litigation, they do not extinguish

the Court's inherent power to consider documents on the record where such documents are necessary for a fair and just determination of the dispute.

26. **Section 146 (4) of the Evidence Act** provide: **The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross examination, and if it does so, the parties have the right of further cross-examination and re- examination respectively.**

27. **Order 18 Rule 10 of the Civil Procedure Rules** also provides that: **The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.**

28. The Applicants having discovered the said documents after the Plaintiff had testified, and land being an emotive issue, then this Court in its discretion finds that it is only fair and just that the Plaintiff be recalled for cross-examination.

29. The application is therefore allowed as prayed.

30. Costs of this application shall abide outcome of the suit.

**Dated, Signed and Delivered virtually at Kajiado this
2nd day of October 2025.**

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Kithure for Mr. Kirimi for the Plaintiff.

Mr. Kurgat for the 1st - 4th Defendants.

Ms. Wetinga for Mr. Dachy for the 7th Defendant.

Ms. Shumula for the 8th Defendant.

Mr. Osoro for the 9th, 10th Defendants.

Mr. Serpepi for the 11th Defendant.

Court Assistant - Peter.