



REPUBLIC OF KENYA



KENYA LAW
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**Wekesa & 2 others v Simiyu & 2 others (Environment and Land Case
42 of 2019) [2025] KEELC 7215 (KLR) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 42 OF 2019**

CK NZILI, J

OCTOBER 22, 2025

BETWEEN

EVERLYNE WEKESA 1ST PLAINTIFF

WHITNEY FARIDA WAFULA 2ND PLAINTIFF

PETER PRESTON WAFULA 3RD PLAINTIFF

AND

TIMOTHY WAFULA SIMIYU 1ST DEFENDANT

THE LAND REGISTRAR TRANS-NZOIA COUNTY 2ND DEFENDANT

RITA NALIAKA 3RD DEFENDANT

RULING

1. The commencement of the hearing of this suit was on 15/3/2022. After the plaintiff closed their case, DW1 took the witness stand on 14/11/2022. He continued with his evidence-in-chief on 12/6/2023. Come 6/5/2024, parties were given 10 days to file trial bundles after another defendant was added to the suit. Parties by consent agreed to proceed with the matter from where it had reached before the addition of a third defendant, save for the recalling of the plaintiff, who had introduced a further witness statement touching on the 3rd defendant for cross-examination.
2. The 3rd defendant, unfortunately, passed on on 16/12/2024. Efforts to have her substituted have been in vain.
3. The court is being asked by the 1st defendant to grant him leave to introduce an extra witness who is going to produce an agreement dated 28/7/2007, where he was a signatory, but was not cited to testify by the plaintiffs.



4. Learned counsel Mr. Samba for the 1st defendant urged the court to allow for his witness statement to be filed out of time. Learned counsel submitted that the witness is a critical one, to enable the court to reach a just decision. Learned counsel Miss Muigai for the plaintiffs objected to the introduction of the intended witness statement due to the prejudice to be suffered by the plaintiffs, who had already closed their case.
5. Learned counsel submitted that it will amount to trial by ambush. Further, the learned counsel submitted that though the court has discretion to allow for the same, it has to consider the prejudice to be suffered by the plaintiffs. Learned counsel submitted that it will mean reopening the matter, which is at the defence stage. In a rejoinder, Mr. Samba, learned counsel for the 1st defendant, submitted that the plaintiffs produced the sale agreement, purported to have been witnessed by the intended witness.
6. Counsel submitted that there will be an opportunity to cross-examine the witness after receiving the witness statement; otherwise, Noah Kibui, the intended witness, had been listed by the plaintiffs as well as the 1st defendant as a witness, but the plaintiff did not call him.
7. Learned counsel submitted that his witness statement is one page only, and his testimony will clarify the genuineness of the two agreements to which he is said to have been a signatory.
8. Orders 3 and 7 of the Civil Procedure Rules prohibit courts from accepting late filing of witness statements or documents. Article 50 of *the Constitution* provides for fairness to all parties and a fair hearing of any dispute. The primary duty of the court is to do justice to the parties by allowing them to present all the relevant evidence in support of their respective claims.
9. The court has discretionary power to consider whether or not to allow a party to file late statements of witnesses or documents, so long as it will not prejudice the opposite party, and where there are good and sufficient reasons why the statements and documents were not filed on time.
10. Order 7 Rule 5 of the Civil Procedure Rules provides that a defence shall be accompanied by a list of witnesses to be called at the trial, written statements signed by the witnesses except expert witnesses, and copies of the documents to be relied on at the trial.
11. With leave of court, Sub-Rule (c) provides that the same may be furnished at least 15 days before the trial conference.
12. Enlargement of time to comply may be done under Order 50 of the Civil Procedure Rules, Section 95 of the *Civil Procedure Act*, and Article 159(2)(b) of *the Constitution*. In Marclus Kiranga Nimrod & another -vs- Nussy Kuthii Justus & another [2017] KEELC 2067 (KLR) and Wanyama -vs- Lyani & another (Civil Application 163 of 2020) [2023] KECA 1090 (KLR) (22 September 2023) (Ruling), the court held that a party may be allowed to file documents and statements late in the trial, depending on the circumstances of each case, including the stage at which the trial is at and the prejudice, if any, that will be caused to the other party.
13. In Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR, the court laid down guiding principles in considering the filing of additional evidence. They include:
 - a. Relevance to the matter,
 - b. Interest of justice.
 - c. The influence or impact it will have on the result of the case.
 - d. Difficulties in procuring it through the use of due diligence.



- e. If it removes vagueness or doubts over its case.
 - f. Direct bearing on the main issue in the suit.
 - g. Credibility of the evidence.
 - h. It must not be so voluminous.
 - i. Whether the applicant could reasonably have been aware of and procured the further evidence.
 - j. Not to be used to remove lacunae or vagueness or fill in gaps in the applicant's case.
 - k. Proportionality and prejudice of allowing the evidence.
14. Applying the foregoing caselaw, the 1st defendant says that he had listed the intended witness as a witness in his list of witnesses. The applicant does not then explain why he did not see it fit at the time to cause him to write a witness statement and serve it on time if the witness was a crucial one from the word go.
15. The inability to procure his witness statement since 2019 has not been explained. If at all, the witness was not called by the plaintiffs, even though listed as a potential witness, then it means the 1st defendant had notice and should have taken action immediately after the plaintiffs closed their case in 2022, to seek to have the witness statement filed.
16. Even when the 1st defendant took the witness stand, he did not refer to the intended witness. Therefore, the application is an afterthought and has not been made in good faith. How else will the plaintiffs, who have closed their case, address the issues likely to be raised by the 1st defendant through such a witness? The mischief and the inference are clear that the witness is out to fill in some lacunae or gaps in favour of the 1st defendant and to discount the version given by the plaintiffs. Trial by ambush is where a party does not want to play on a level playing field.
17. In the circumstances, the court finds no basis to reopen the pleadings and allow for the addition of a new set of fresh evidence at the defence stage. The application is rejected.
18. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 22ND DAY OF OCTOBER 2025.

In the presence of:

Court Assistant – Dennis

Miss Muigai for the plaintiff present

Nabwile for Kidiavai for plaintiff present

Mr. Samba for the defendant

A.G. absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

