

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E013 OF 2024

**PETER
SANG-----
PLAINTIFF**

KIRWA

VERSUS

**ROSE
LAGAT-----DEFENDANT
BENJAMIN L. LAGAT-----2ND
DEFENDANT
JOAN JEBET BARTAI-----
3RD DEFENDANT**

JEPKOECH

DEFENDANT

2ND

RULING

1. The main hearing in this matter commenced after the Pre-Trial Conference directions of **3/11/2025**. Following re-examination of PW1, the plaintiff asked for an adjournment and summons to issue to the County Land Adjudication and Settlement Officer to provide a copy of a loan statement for **Trans Nzoia/Maridadi/317**.
2. Learned counsel for the defendants opposed the request since, in the list of witnesses and documents dated **2/4/2024**, filed before the Pre-Trial Conference, there was no indication that the intended witness or

document was going to form part of the plaintiff's evidence.

- 3.** Learned counsel submitted that the intention was clear that the plaintiff was intending to fill in gaps which had arisen out of the cross-examination. Learned counsel submitted that all the listed documents by the plaintiff had been produced by consent of the parties and that the presumption was that all were the only documents the plaintiff was intending to rely upon.
- 4.** The learned counsel submitted that the loan statement had already been produced, and if the plaintiff had intended to rely on a longer version of it, they would have requested it before the hearing commenced; otherwise, to now seek the production of the same through the intended witness would be prejudicial to the defendants. Further, learned counsel submitted that an expedited hearing of the suit was critical since there were interim orders of status quo.
- 5.** Learned counsel Mr Ambutsi for the plaintiff submitted that the intended witness is an expert, who can be summoned by the court anytime to assist, and in this case, the documents and the receipts are already on the court record, hence the issue of prejudice does not

arise as the witness will only come to shed light on the repayment of the loan.

6. Learned counsel for the plaintiff invoked **Sections 1A** and **1B** of the Civil Procedure Act, **Articles 50** and **159(1), (2)** and **(3)** of the Constitution and the discretion of the court under **Section 5, 62** and **146 (1),(2),(3)** and **(4)** of the Evidence Act, that the defendant will have an opportunity to cross-examine the witness.
7. Learned counsel submitted that expert witnesses do not write witness statements and are only served with a summons to come and produce documents, and in this case, no lacunae will be cleared.
8. The learned counsel submitted that the additional evidence will not make a fresh case or fill a gap, but shall shed light for the court to make a just and conclusive decision in the matter. Learned counsel submitted that the said document can be accessed by the parties.
9. Further, learned counsel for the defendants submitted that the oral application must fail for; **(a)** being filed late; **(b)** lack of sufficient cause or justification for the failure to identify, disclose, or call the said witness at the appropriate time contrary to the principles governing orderly trial; **(c)** it will cause serious

prejudice to the defendants, as it amounts to trial by ambush, hence delaying them an opportunity to prepare adequately and respond; **(d)** it amount to patch up weakness after the hearing has commenced, hence is an abuse of the court process, **(e)** Litigation must come to an end and under **Article 159** of the Constitution and **Sections 1A** and **1B** of the Civil Procedure act and that parties must expedite the hearing.

10. Similarly, learned counsel submitted that the issues to be filled in arose during the cross-examination, hence the intention was to plug such gaps.

11. The learned counsel submitted that parties had adequate time before the hearing commenced to file and exchange documents, and it was only after the plaintiff's case had commenced and was almost closing that the alleged weaknesses was realised; otherwise, the alleged evidence does not fit the threshold that, with use of reasonable diligence, was not obtained or was not within his knowledge.

12. Learned counsel submitted that the matter has been pending for close to two years. Reliance is placed on **Stephen Kibiwott Cheruiyot -vs- Luka Chemweno & 3 others; Commissioner of Lands,**

County Lands Registrar (3rd Party) [2021]
KEELC 986 (KLR).

13. The governing principles on an application seeking leave to file additional or new evidence out of time were set out in **Mohamed Abdi Mohamed -vs- Ahmed Abdulahi Mohamed & Others SC Petition No. 7 and 9 of 2018 [2018] eKLR**, as follows:

- (a) The additional evidence must be directly relevant to the matter and be in the interest of justice.*
- (b) It must be such that it will influence or impact upon the results of the verdict, although it may not be decisive.*
- (c) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit.*
- (d) It will show that it could not have been obtained with reasonable diligence for the reasons at the trial, or was not within the knowledge of, or could not have been produced at the time the suit was filed.*
- (e) It must be credible.*
- (f) Must not be voluminous.*
- (g) Whether a party would reasonably have been aware of and procured it is an essential consideration to ensure fairness and due process.*

- (h) The court must be satisfied that the additional evidence is not utilised for purposes of removing a lacuna and filling gaps in the evidence.*
- (i) The court must be satisfied that the further evidence is needful.*
- (j) Proportionality and that the prejudice of the additional evidence must be assessed.*
- (k) The court has to assess the balance between the significance of the additional evidence on the other hand and the need for the swift conduct of litigation, together with any prejudice that might arise from the additional evidence on the other hand.*

14. Applying the foregoing principles to the instant application, the bone of contention between the parties herein is over Title No. **Trans Nzoia/Maridadi/629**, whose initial owner was the Settlement Fund Trustees. The plaintiff alleges that he acquired the land out of the estate of the late **Gabriel Rotich Bartai**, then known as **Trans Nzoia/Maridadi/317**, which has mutated to the present title No. **Trans Nzoia/Maridadi/629**.

15. On the other hand, the defendants have opposed the suit and filed a counterclaim against the plaintiff and another defendant, alleging trespass and denying the alleged sale, terming the said transaction as fraudulent, since the 3rd plaintiff in the counterclaim is the legitimate owner.

- 16.** The 2nd defendant to the counterclaim in his defence and dated **13/5/2025**, alleges that he purchased title No. **Trans Nzoia/Maridadi/629** on subdivision of No. **Trans Nzoia/Maridadi/317** in **2013**, from the primary plaintiff, who was the legal beneficiary of the estate of the late Gabriel Bartai.
- 17. P. Exhibit. No. 1(k)** is a letter dated **22/3/1990**, referring to a loan repayment for plot **No. 317**, Maridadi Settlement Fund Trustees, Trans Nzoia. **P. Exhibit. No. 1(l)** is a demand for outstanding land rents from the Ministry of Land and Settlement, Nairobi, dated **31/10/2002**.
- 18. P. Exhibit. No. 1(m)** and **(n)** are demand notices for the loan arrears by the PS Administration of the Settlement Fund. **P. Exhibit. No. 2** are receipts and an account for plot **No. 317**. The loan statement dated **12/3/2012** appears incomplete. All these exhibits were served upon the defendants alongside the plaint.
- 19.** This court is alive to the provisions of the repealed **Section 167(2)** of the Agriculture Act Cap **318**, on the role of the Settlement Fund Trustees in the settlement scheme before the coming into force of the Land Settlement Fund Trustees under **Sections 134** and **135** of the Land Act. See ***Bandi -vs- Dzomo &***

Others Civil Appeal No. 16 of 2022 [2022] KECA 584 [KLR].

20. Calling for a complete loan statement from the maker of the documents cannot amount to new or irrelevant evidence to help the plaintiff fill in any gaps or patch up any weak points in the case. The plaintiff is not the custodian of the said documents, but the Count Land Adjudication and Settlement Officer through the Land Settlement Fund Trustees, the successor of the defunct Settlement Fund Trustees. See **Kombe Harrison Garama -vs- Kenga Stanley Karisa & Others SC Petition No. E020 of 2023.**
21. The issue for the court's determination is who among the parties herein has a valid root title to the land from the issuing authority. See **Botwa Farm Co. Ltd -vs- Settlement Fund Trustees & Another [2019] eKLR and Benja Properties Ltd -vs- Syedna Mohamed B. Sahed & Others [2015] eKLR.** Official documents held by the office of the defunct Settlement Fund Trustees are what will help this court come to the just conclusion of the matter. See **Diasproperty Limited & another -vs- Githae & 8 others (Petition E019 of 2024) [2025] KESC 19 (KLR) (11 April 2025) (Judgment).**

- 22.** The evidence of the County Land Adjudication and Settlement Officer and the production of the said document(s) will not prejudice the defendants in any way, for they will have occasion to cross-examine the witness and perhaps also call for additional evidence to sustain their amended defence and counterclaim.
- 23.** The evidence sought to be adduced falls within the parameters set in the **Mohamed Abdi Mohamed** (*supra*). The defendants do not deny its relevance, authenticity, and central role in the overall determination of the dispute. It cannot be said to raise a new cause of action irrelevant, an afterthought, or arising out of the cross-examination by the defendants. To the contrary, the PW1 testified on how he went to the Settlement Fund Trustees' offices in Nairobi with some of the defendants to establish the status of the loan arrears repayment, and to which he had cleared some of the loan arrears as part of the consideration for the subject land.
- 24.** The defendants, on the other hand, allege that they are the ones who cleared the loan arrears. So, the evidence will assist both parties, and more so the court, to reach a just determination of the matter.

25.The application is allowed. Witness summons to issues to the County Land Adjudication and Settlement Officer, Trans Nzoia.

26.Orders accordingly.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 3rd day of December 2025.

In the presence of:

Court Assistant - Dennis

Miss Karani for plaintiff/applicant present

Tororei for 1st - 3rd defendants present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**