



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLOS NO. E005 OF 2023

BEDAN KIHARA KIUNJURI..... PLAINTIFF/APPLICANT
VERSUS
PETER KIMANI BEN NYAHU
BEATRICE WANJIKU MBUUDEFENDANTS/RESPONDENTS

RULING

- 1) This ruling is on the notice of motion dated 28-7-2025. The motion which is brought under **Order 18 rule 10 Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeks one main prayer which is as follows.
 1. **This suit be reopened for further hearing and production of documents/evidence and examination of witnesses.**
- 2) The motion is based on Six(6) grounds and is supported by an affidavit of the Applicant dated 28-7-2025. The gist of the grounds and the affidavit is as follows. One, the document produced as exhibit No. 4 is not complete. Two, the error/omission was due to an honest mistake. Three, the Plaintiff is now ready to produce the original document in evidence and it is directly relevant to the issues for determination by the Court. Four, the Defendants were aware of the contents of the documents in question and will not be prejudiced. Finally, production of the documents will ensure fairness, equity and justice to the parties.
- 3) The motion is opposed by Defendants and the 1st Defendant has sworn a replying affidavit dated 2-9-2025 in which he states as follows. Firstly, the motion is incompetent, bad in law, a gross abuse of the Court process, brought in bad faith, unmeritorious and militates against the very provision of law it is anchored on. Secondly, on 16-7-2025, the Plaintiff had a chance to present his evidence including any documents he deemed relevant but failed to do

so. Thirdly, the alleged omission is not an innocent error but an afterthought intended to cure fatal evidentially deficiencies exposed during the trial and if the application were allowed, it would prejudice the Defendants who have already tendered their evidence in rebuttal of the Plaintiff's case. Re-opening of the case will subject the Defendants to additional costs, delay and procedural unfairness. Fourthly the introduction of the new evidence will prejudice the Defendants because it introduces new issues that have not been pleaded. Finally, the new documents will not have any impact or influence the outcome of the case. For the above and other reasons, the Defendants pray for the dismissal of the motion dated 28-7-2025.

4) Counsel for the parties filed written submissions dated 17-11-2025 and 24-11-2025 respectively. The only issue identified by the learned counsel for the parties is,

“ whether the Plaintiff has met the legal threshold for reopening his case and introducing additional documents at this stage.”

5) According to the Defendants' counsel, the motion fails the test for additional evidence set in the case of **Raila Odinga and another vs IEBC and Others (Presidential Election Petition No.1 of 2013)**. Also cited in the cause of **Moses Macharia Kigo vs. The DPP and Others Civil Appeal No.E561 of 2023** where the following principles were laid down on allowing additional evidence in Appellate Courts in Kenya.

(a) The additional evidence must be directly relevant to the matters before the court and be in the interest of justice.

(b) It must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive.

(c) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.

(d) 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.

(e) The evidence must be credible in the sense that it is capable of belief.

- (f) **The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively.**
- (g) **Where a party would reasonably have been aware of and provided further evidence in the course of trial is an essential consideration to ensure fairness and due process.**
- (h) **Where the additional evidence discloses a strong prima facie case of willful deception of the Court.**
- (i) **The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.**
- (j) **A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in their case.**
- (k) **The Court will consider the proportionality and prejudice when allowing additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might have arisen from the additional evidence on the other.**

6) There is no doubt that the Court has discretion under **Order 18 rule 10** of the **Civil Procedure Rules** to allow the recall of any witness who has been examined. The said discretion is to be exercised within some of the eleven parameters above. Some of the parameters relate to appeals and this matter not being an appeal, those parameters have no application. The applicable ones are **(a), (b), (c), (d), (e), (f), (g), (h)** and **(i)** only.

While the Plaintiff's case is that he is entitled to L.R. No. Loc.12/Sub-Loc.1/3578 (Original L.R. No. Loc.12/Sub-Loc.1/1567) through the doctrine of adverse possession for a period in excess of 12 years, the defence by the Defendants is that neither the Plaintiff nor his late wife Jane Wangari B. Kihara ever occupied the suit land. Secondly, the sale agreements are null and void and of no legal effect because they are evidence of intermeddling with the estate of the deceased contrary to Section 45 of the Law of Succession Act.

- 7) Looking at the additional evidence sought to be adduced, I find that it is relevant to issues that arise in the suit and they will have an impact on whether there was a sale or not. Secondly, the Plaintiff has explained why the said evidence was left out. This was due to alleged omission by his shop assistant. This is not disputed by the Defendants. Further the evidence is not voluminous and it is easy for the Defendants to respond to it. Thirdly, the Defendants have already responded to the evidence of sale vide paragraph 5 and 7 of their replying affidavit. So they are not being taken by surprise.
- 8) The Constitution in **Article 50(1)** provides that every person has a right to a fair hearing. Locking out evidence that may assist the Court in a fair resolution of this dispute is not fair especially because the Defendants will be given a chance to rebut the additional evidence. I find **merit** in the motion dated 28-7-2025. The Plaintiff to avail the original evidence at the hearing. The Defendants at liberty to file and serve additional evidence in rebuttal of the additional evidence.

It is so ordered.

Dated, signed and Delivered virtually at Murang'a this 2nd day of March, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of; -
Court Assistant – Jackline
Plaintiff's Counsel – Mr Kimani
Defendant's Counsel – Mr. Mbue Ndegwa