

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CIVIL CASE NO. E114 OF 2019

RUTH NJERI GATHUNGU (Suing on her own behalf and as an
Administrator of the Estate of George Gathungu
Gitu.....PLAINTIFF

-VERSUS-

ELIZABETH NJUHI GATHUNGU.....1ST
DEFENDANT

GEORGE JOSEPH KANGETHE2ND
DEFENDANT

ELLAH KARWITHA KANGETHE3RD
DEFENDANT

KAJIADO LAND REGISTRAR.....4TH
DEFENDANT

RULING

(In respect of the 1st - 3rd Defendants' application for admission of documents filed out of time)

Introduction

1. On 23rd February 2026, when this matter was scheduled for hearing, the Plaintiff's advocate Mr. Harrison Kinyanjui informed the court that the 1st - 3rd Defendants' advocates were attempting

to serve him with documents in court after the matter had been confirmed for hearing. The said documents had been filed two or so days earlier.

2. When the matter was virtually mentioned in the morning for purposes of time allocation, the Defendants' advocates did not disclose this information, neither did they seek leave of the court to admit the documents which were obviously filed out of the timelines given by the court.
3. It was only after the issue was raised by the Plaintiff's advocate that the Defendants' advocate apologized to the court and his colleague and prayed for the admission of the documents. He pleaded with the court to uphold substantive justice by allowing his clients' documents which he said were critical for purposes of the just determination of the case.
4. Under **Order 11 Rule 3(1) of the Civil Procedure Rules**, the purpose of a case management conference is expressed to be promoting the expeditious disposal of a case; affording the parties an opportunity to use alternative dispute resolutions mechanisms to determine the case and an opportunity to settle the case;

determining any other matter relating to the management, hearing and disposal of the case; dealing with pre-trial applications at first instance or formulation of a timetable to deal with them as the court may deem fit; and identifying the issues for determination.

5. Adherence with the pre-trial procedures and directions ensures that there are no surprises once the trial begins. Odunga J (as he then was) in the case of **Interactive Gaming and Lotteries Limited -vs- Flint E.A. Limited & 2 others (2013) eKLR**, observed that the provisions of **Order 11 of the Civil Procedure Rules** are meant to ensure that parties to a suit disclose their evidence upfront before the commencement of the hearing of the suit in order to avoid trial by ambush.
6. Referring to his earlier decision in **National Bank of Kenya Limited -vs- John Aswani Litondo & another (NBI HCCC 171 of 2016)**, the Odunga J stated that;

“The rationale of Order 11 is to discourage trial by ambush and ensure that the provisions of Sections 1A and 1B of the Civil Procedure Act are meaningfully

implemented to create a level playing field for all the parties before the court by ensuring the principle of equality of arms is maintained and as far as practical to place the parties on equal footing. To conceal documents until after the plaintiff's case is closed was the kind of mischief that the rules intended to cure. Trial by ambush is no longer acceptable in Civil Litigation".

7. What the Defendants were attempting to do by filing and serving their documents at the very last minute is clearly trial by ambush contrary to the letter and spirit of the provisions of Order 11 of the Civil Procedure Rules. They should have been forthright and acknowledge their mistake rather than attempt to sneak in the documents.
8. There is always room for judicious exercise of discretion even under Order 11 to take care of human frailties. The Court of Appeal explained this in **Philip Chemwolo & Another v Augustine Kubende [1986] eKLR,** where it stated that;

“Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

9. Considering that the hearing of this case has not commenced, it is in the interest of justice that the parties be afforded an opportunity to bring forth all their evidence but within strict timelines. The documents filed by the Defendants out of time are admitted on record with corresponding leave to the Plaintiff to file any further necessary documents in 30 days after service of the Defendants' documents.
10. There shall be a mention date to confirm compliance before fixing the matter for hearing.

11. I need to remind the 1st -3rd Defendants that they must also comply with the orders on payment of costs to the Plaintiff as directed on 23rd March 2026 for occasioning the adjournment.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 5th Day of March 2026.

M.D. MWANGI
JUDGE

In the virtual presence of:

Mr. Harrison Kinyanjui for the Plaintiff

Mr. Kiptoo for the 1st - 3rd Defendants

N/A for the 4th Defendant

Court Assistant: Mpoye

M.D. MWANGI
JUDGE