



**Nyaga & 19 others (Suing on behalf of the 150 members of Kismayu Farmers Company)
v Martin Ngunyi – Deputy County Commissioner Langa’ata, Sub-County & 5 others
(Environment & Land Petition 17 of 2022) [2024] KEELC 4714 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 17 OF 2022
JO MBOYA, J
JUNE 13, 2024
(FORMERLY HIGH COURT PETITION NO. 86 OF 2016)**

BETWEEN

- ABISHAG NYAGA 1ST PETITIONER**
- JANE K MUSEMBI 2ND PETITIONER**
- FRIDA KHAVERE 3RD PETITIONER**
- JAMES KABUI 4TH PETITIONER**
- CAROLINE ACHIENG 5TH PETITIONER**
- JOSEPHINE K WAMBUA 6TH PETITIONER**
- JOHN MUINDE 7TH PETITIONER**
- BEATRICE WANJIRU 8TH PETITIONER**
- SAMUEL KYALO 9TH PETITIONER**
- JULIUS NDONGA 10TH PETITIONER**
- NEWTON IBREHA 11TH PETITIONER**
- FETUS GAKUO 12TH PETITIONER**
- JOHN M. NJOROGE 13TH PETITIONER**
- MARK M. JUSTO 14TH PETITIONER**
- TITUS MUTUKU 15TH PETITIONER**
- JOSEPH MAINA 16TH PETITIONER**
- JOSEPH OKARU 17TH PETITIONER**



PAUL MUINDE 18TH PETITIONER
IRENE NYAWIRA 19TH PETITIONER
CICILIA WANJIRU 20TH PETITIONER
SUING ON BEHALF OF THE 150 MEMBERS OF KISMAYU FARMERS
COMPANY

AND

MARTIN NGUNYI – DEPUTY COUNTY COMMISSIONER LANGA’ATA, SUB-
COUNTY 1ST RESPONDENT
SARAH KINYANJUI (OCS) WILSON AIRPORT POLICE
STATION) 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
THE NATIONAL LAND COMMISSION 4TH RESPONDENT
KENYA AIRPORTS AUTHORITY 5TH RESPONDENT
MASAAL GENERAL AGENCIES LIMITED 6TH RESPONDENT

RULING

Introduction And Background:

1. The Petitioners/Applicants have approached the court vide the Notice of Motion application dated the 16th of May 2024; and which is brought pursuant to the provisions of inter-alia Section 106 B (4) of the *Evidence Act*; Order 18, Rule 10, Order 51, Rule 1 of the Civil Procedure Rules 2010, as well as the provisions of Section 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
2. Pursuant to the application under reference the Petitioners/Applicants have sought for the following reliefs [verbatim];
 - a. That this application be certified as urgent and it be heard Ex-parte in the first instance and service thereof be dispensed with.
 - b. That the Petitioners be granted leave of this honourable court to file the certificate of electronic evidence in support of the electronic evidence in the Petitioners bundle of documents dated 17th March 2021.
 - c. That the Certificate of Electronic evidence annexed herewith, be deemed as properly filed upon payment of the requisite court fees.
 - d. That upon granting of prayer 2 above, this Honourable court be pleased to grant leave to the Petitioners to recall its witness PW2 to produce the electronic evidence in its bundle of documents dated 17th March 2021.
 - e. That in the alternative, this Honourable court be pleased to grant leave to file a complaint supplementary bundle of documents afresh.
 - f. That the costs of this Application be in the cause.



3. The instant Application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of John N. Mugambi, learned counsel for the Petitioners/Applicants and which affidavit has been sworn on even date.
4. Upon being served with the subject application, the 1st, 2nd and 3rd Respondents filed Grounds of opposition dated the 17th of May 2024; and in respect of which the named Respondents have contended that the subject application is contrived and intended to defeat the objection which was taken and/or raised by and on behalf of the named Respondents.
5. Furthermore, learned counsel for the 1st, 2nd and 3rd Respondents has also contended that the subject application is informed by bad faith [mala-fides] and in any event, the Applicants herein have not demonstrated the reason[s] why the electronic certificate was not filed.
6. On the other hand, the 6th Respondent has also filed grounds of opposition dated the 22nd of May 2024 and in respect of which same [6th Respondent] has also contended that no credible basis has been established and/or demonstrated to warrant the exercise of discretion in favour of the Petitioners/Applicants.
7. The subject application came up for hearing on the 20th of May 2024, whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. Consequently, the court proceeded and circumscribed the timelines for the filing and exchange of the written submissions.
8. Pursuant to the directions in terms of the preceding paragraph the Petitioners/Applicants filed written submissions dated the 4th of June 2024; whereas the 1st, 2nd and 3rd Respondents filed written submissions dated the 17th of May 2024.
9. Other than the foregoing, the rest of the Respondents did not file written submissions. For the avoidance of doubt, learned counsel for the 4th, 5th and 6th Respondents intimated to the court that same shall be adopting and relying on the written submissions filed by the 1st, 2nd and 3rd Respondents.
10. Be that as it may, it suffices to point out that the two [2] sets of written submissions [details in terms of the preceding paragraphs], form part of the record of the court.

Parties Submissions:

Petitioners'/applicants' Submissions;

11. The Petitioners/Applicants herein filed written submission dated the 4th of June 2024 and in respect of which same [Petitioners/Applicants] have adopted and reiterated the grounds contained at the foot of the application as well as the averments in the body of the supporting affidavit.
12. Furthermore, learned counsel for the Petitioners/Applicants has thereafter raised, highlighted and canvassed three (3) salient issues for consideration by the court.
13. Firstly, learned counsel for the Applicants has contended that the certificate of electronic evidence dated the 17th of March 2021, and which is sought to be tendered and produced before the court satisfies and complies with the provisions of Section 106 B (4) of the *Evidence Act*, Cap, 80 Laws of Kenya. For good measure, learned counsel has pointed out that the law does not require that the Electronic certificate reproduce word for word the ingredients and wordings contained under the statute, either in the manner contended by the Respondents or at all.



14. To the contrary, learned counsel for the Applicants has submitted that it suffices that the electronic certificate adverts to and alludes to the details of the electronic device that was deployed for purposes of generating the electronic evidence in question, confirmation that the device under reference was functional and that same [electronic device] was under the control of the person who generated the electronic document which is the subject of production before the court.
15. As pertains to the electronic certificate beforehand, learned counsel for the Applicants has submitted that same had been generated by the 1st Applicant, who is the owner of the cellphone that was utilized for purposes of taking the photographs and thereafter the production of the electronic evidence [photographs before the court].
16. At any rate, learned counsel for the Applicants has submitted that it is the 1st Applicant herein who thereafter took the images [photographic images] to the Cyber Cafe for purposes of downloading the images and the subsequent printing of same [photographic images] through the Cyber Café printer.
17. In short, learned counsel for the Applicants has submitted that the electronic certificate dated the 17th of March 2021 and which is sought to be tendered and produced before the court satisfies and meets the requisite threshold in accordance with the provisions of the Section 106 B of the *Evidence Act*.
18. Secondly, learned counsel for the Applicants has submitted that the electronic certificate dated the 17th of March 2021, was duly generated by and on behalf of the Applicants herein but same was not included in the Applicants' bundle of documents which were filed before the court on the basis of mistake and/or inadvertence of the learned counsel.
19. Be that as it may, learned counsel for the Applicants has submitted that the mistake, failure and/or inadvertence of the advocate for the Applicants ought not to be used to deny the Applicants the opportunity to tender and produce all the requisite documents before the court for purposes of enabling the court to determine the dispute on merits.
20. Furthermore, learned counsel for the Applicants has submitted that the electronic certificate under reference has always been available save that same [electronic certificate] was omitted by the counsel for the Applicants during the compilation of the record/bundle of documents.
21. Owing to the foregoing, learned counsel for the Applicants has submitted that it is incumbent upon the court to consider the request by the Applicants and to exercise discretion and thereby allow the Applicants to tender and produce the electronic certificate and the photographs images attendant thereto as evidence before the court.
22. In support of the foregoing submissions, namely, that the court has the jurisdiction and discretion to allow the production of the electronic certificate, same [learned counsel for the Applicants] has cited and relied on the holding in the case of *George Gabriel Kiguru & Another Vs Republic* [2022] eKLR and *Marble Muruli Vs Wycliffe Ambetsa Oparanya & 3 others* [2013] eKLR, respectively.
23. Lastly, learned counsel for the Applicants has submitted that upon liberty being granted to allow the electronic certificate to be produced on behalf of the Applicants, the court ought to grant leave to have the 1st Petitioners/Applicants [PW2] to be recalled and same to tender further evidence relating to the production of the photographic images, which were marked for identification as well as the electronic certificate.
24. Additionally, learned counsel for the Applicants has submitted that PW2, was privy to and knowledgeable to the taking of the photographs and in any event, the photographs describe the manner in which the Applicants were evicted from the suit property by the Respondents herein.



25. Further and at any rate learned counsel for the Applicants has submitted that it is the 1st Applicant who took the photographs and hence same [1st Applicant] ought to be allowed to tender the photographic images before the court and same can only be done if leave is granted for purposes of recalling the said witness.
26. As pertains to the parameters to be satisfied before a witness can be recalled, learned counsel for the Applicants has contended that same [learned counsel] has submitted that the Applicant has satisfied the requisite parameters and thus warranting the grant of the orders sought.
27. In any event, learned counsel for the Applicants has submitted that the mistake leading to the non-filing of the electronic certificate was the mistake and failure by the counsel and hence same ought not to be punished. For good measure, learned counsel has invited the court to take cognizance of the holdings in the case of Murai Vs Wainana [NO. 4] [1982] KLR and Philip Chemwolo & Another Vs Augustine Kubende & Another [1986] eKLR respectively.
28. Premised on the foregoing, learned counsel for the Applicants has therefore implored the court to find and hold that the application beforehand is meritorious and hence same [application] ought to be granted in the manner sought.

1st, 2nd and 3rd, Respondents' Submissions;

29. The 1st, 2nd and 3rd Respondents filed written submission dated the 17th of May 2024 [which submissions predates the ones filed by the Applicants]. Nevertheless, the written submission under reference have reiterated the grounds of opposition dated 17th of May 2024 and most pertinently, the contention that the electronic certificate dated the 17th of March 2021, which the Applicants seek to tender and produce before the court, is contrived and otherwise calculated to dupe the court that same [electronic certificate] was indeed available at the time when the list and bundle of documents was prepared, which is contended not to be the case.
30. Be that as it may, learned counsel for the named Respondents has highlighted and canvassed three (3) pertinent issues for consideration and determination by the court.
31. First and foremost, learned counsel for the named Respondents has submitted that the electronic certificate, which the Applicants seek to produce the court was never available at the onset of the suit. For good measure, learned counsel for the named Respondents has submitted that the electronic certificate beforehand has been prepared with a view to distorting the obtaining facts and not otherwise.
32. For coherence, learned counsel for the named Respondents has submitted that the electronic certificate dated the 17th of March 2021, shows that the 5th Respondent was already a party as at the 17th of March 2021, yet the 5th Respondent was joined into the proceedings and thereafter appointed M/S Wambugu & Muriuki Advocates to act for and on their behalf on the 2nd of May 2023.
33. Arising from the foregoing, learned counsel for the named Respondents has submitted that it was not possible for the Applicants to have included the names of the 5th Respondent as a party in the suit, in the manner contained in the body of sic the title of the electronic certificate.
34. Consequently and in the premises, learned counsel for the named Respondents has submitted that what the Applicant have endeavored to do is to manufacture the electronic certificate and thereafter backdate same, in an endeavor to mislead the court that the electronic certificate was available, which is not the case.



35. In short, learned counsel for the named Respondents has submitted that where a party, the Applicants not excepted resorts to manipulation and distortion of facts, with a view to attracting the equitable discretion of the court, the court ought to frown upon such endeavor by dismissing the application or such other proceedings which are inflicted [characterized] with distortion.
36. In support of the foregoing submissions, learned counsel for the named Respondents has cited and relied upon the holding in the case of *Fadhi Juma Kiswa Vs Kenya Ports Authority* [2021] eKLR.
37. Secondly, learned counsel for the named Respondents has submitted that the application by and on behalf of the Applicants herein to be allowed to file and rely upon the electronic certificate, has been filed and/or launched with an unreasonable delay, which vitiates the equitable discretion of the court.
38. In any event, learned counsel for the named Respondents has submitted that the electronic certificate which is required under the provisions of Section 106 B (4) of the *Evidence Act* is a mandatory document and same [electronic certificate] must accompany the electronic evidence sought to be tendered and/or produced.
39. Furthermore, learned counsel for the named Respondents has submitted that where a party, the Applicants not excepted fail[s] to file and/or lodge the requisite electronic certificate alongside the electronic evidence, the failure renders the electronic evidence inadmissible.
40. At any rate, it is the submission by learned counsel for the named Respondents that the provisions of the Sections 78A and 106B (4) of the *Evidence Act*, Chapter 80, Laws of Kenya; are coached in mandatory terms and hence same must be complied with. Besides, learned counsel has added that the said provisions are substantive provisions of the law and thus do not constitute procedural technicalities curable by the invocation of and reliance upon Article 159 (2) (d) of *the Constitution* 2010.
41. In support of the foregoing submissions, learned counsel for the named Respondents has cited and relied upon the decision in the case of *County Assembly of Kisumu and 2 others Vs Kisumu County Assembly Board and 6 others* [2015] eKLR, and *Republic Vs Barisa Wayu Matuguda* [2011] eKLR respectively.
42. Finally, learned counsel for the named Respondents has submitted that the prayer at the foot of the application and as pertains to the filing of supplementary list and bundle of documents shall occasion undue prejudice to the Respondents herein. In this regard, counsel has pointed out that such an endeavor would be tantamount to allowing the Applicants to bring forth documents to plug [seal] the gaps which were exposed in the Applicants case during the time of cross-examination.
43. In a nutshell, learned counsel for the named Respondents has submitted that the request to file and serve further list of documents is inimical to the rule of law and the right to fair hearing. Consequently, learned counsel for the named Respondents has implored the court to decline the invitation to allow the Applicants to file a further list and bundle of documents.
44. In view of the foregoing, learned counsel for the named Respondents has submitted that the Applicants herein have neither tendered nor demonstrated any plausible cause to warrant the grant of the orders sought at the foot of the subject application. Pertinently, learned counsel has invited the court to dismiss the application.



4th, 5th and 6th Respondents' Submissions;

45. Though the advocates for the named Respondents [4th, 5th and 6th Respondents] were present during the time when the directions pertaining to and concerning the filing of the written submissions were issued, same however, failed to file and/or serve written submissions.
46. Nevertheless, when the matter came up for mention on the 10th of June 2024, learned counsel for the named Respondents intimated to the court that same shall not be filing any written submissions. In any event, the Learned counsel for the named Respondents intimated that same shall be adopting the written submissions filed on behalf of the 1st, 2nd and 3rd Respondents.

Issues For Determination:

47. Having reviewed the application dated the 16th of May, 2024; and the written submission filed by the respective advocates, the following issues do emerge [crystalize] and are thus worthy of determination;-
 - a. Whether the electronic certificate dated the 17th of March 2021 and which is sought to be tendered before the court satisfies the requisite threshold in accordance with the law or otherwise.
 - b. Whether the Applicants herein have established and demonstrated sufficient cause or basis to warrant the exercise of judicial discretion in their favour or otherwise.

Analysis And Determination :

Issue Number 1 Whether the electronic certificate dated the 17th of March 2021 and which is sought to be tendered before the court satisfies the requisite threshold in accordance with the law or otherwise

48. Learned counsel for the 1st, 2nd and 3rd Respondents has contended that the electronic certificate date the 17th of March 2021 and which the Applicants herein are seeking leave to be allowed to tender and produce before the court, does not meet and/or satisfy the statutory requirements provided for under the provisions of Sections 106 B (4) of the [Evidence Act](#) Cap 80 Laws of Kenya.
49. On the contrary, learned counsel for the Applicants has submitted that the electronic certificate which is sought to be tendered and produced before the court satisfies the conditions and ingredients highlighted under the provisions of Sections 106 B (4) of the [Evidence Act](#) Cap 80 Laws of Kenya.
50. At any rate, learned counsel has submitted that the electronic certificate beforehand alludes to the type and model of the electronic device which was deployed by the 1st Applicant in taking the photographic images as well as the fact that the said electronic device belonged to and was under the control of the 1st Applicant.
51. Furthermore, learned counsel for the Applicants has submitted that the 1st Applicant has also demonstrated that it was herself who took the photographic images under reference and then caused same [photographic images] to be printed at a Cyber Café printer.
52. Having considered the rival submissions pertaining to and concerning whether or not the electronic certificate dated the 17th of March 2021, meets and/or satisfies the statutory threshold, I beg to take the following position.
53. Firstly, it is worthy to state and underscore that though the provisions of Sections 106 B (4) of the [Evidence Act](#) Cap 80 Laws of Kenya stipulates that one requires to generate an electronic certificate and



file same alongside the electronic evidence sought to be produced, the said provisions have however not provided a template as to how the electronic certificate should be prepared.

54. Be that as it may, the named provisions of the *Evidence Act* stipulates the various ingredients, which must be captured in the body of the electronic certificate. In this regard, any party is at liberty to generate an electronic certificate, irrespective of the form taken [whether in the sense of a certificate or affidavit], provided that the document under reference contains the requisite ingredients provided for and highlighted at the foot of Sections 106 B (4) of the *Evidence Act* Cap 80 Laws of Kenya.
55. In view of the foregoing observation, I beg to point out that the electronic certificate date the 17th of March 2021, which is the subject of the current application meets and satisfies the requisite provisions of Sections 106 B (4) of the *Evidence Act* Cap 80 Laws of Kenya. For good measure, the impugned electronic certificate has identified the type and nature of the electronic device that was deployed by the Applicant in taking the photographic images, the fact that the electronic device was functional and furthermore, that same [electronic device] was under the control and authority of the 1st Applicant.
56. Other than the foregoing, the electronic certificate also adverts to the manner in which the photographic images were downloaded from the electronic device and thereafter printed vide Cyber Café printer, albeit in the presence of the 1st Applicant.
57. In a nutshell it is my finding and holding that the impugned electronic certificate substantially complies with the statutory provisions of Sections 106 B (4) of the *Evidence Act* Cap 80 Laws of Kenya.
58. As pertains to whether or not the electronic certificate ought to take a particular format, it is instructive to take cognizance of and reiterate the holding of the Court of Appeal in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR where the court held thus:-
 66. Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”
 67. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:

“106B Notwithstanding anything contained in this Act, any information contained in an

 - (1) electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or



- process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its



being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

68. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.
69. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
59. Taking into account the foregoing excerpt, I encounter no difficulty in finding and holding that the impugned electronic certificate complies with and satisfies the requisite statutory conditions and hence same [electronic certificate], would be admissible.
60. Nevertheless, as to whether the court is disposed to grant the liberty that is sought to have the electronic certificate tendered and produced before the court, alongside the photographic images, hitherto marked for identification, is the subject of the next issue.

Issue Number 2 Whether the Applicants herein have established and demonstrated sufficient cause or basis to warrant the exercise of judicial discretion in their favour or otherwise

61. It is instructive to point out that the electronic certificate [whose details and contents has been discussed in the preceding paragraphs], ought to accompany the electronic evidence that is sought to be tendered and produced before the court. For good measure, the requirement pertaining to the filing of the electronic certificate is peremptory and mandatory. [See Sections 106 B (4) of the *Evidence Act* Cap 80 Laws of Kenya].
62. Arising from the foregoing, there is no gainsaying that the Applicants herein were obliged to generate and file the electronic certificate at the same time when same tendered and filed the list and bundle of documents containing the photographic images that are sought to be relied upon.
63. However, the Applicants herein failed to tender and/or file the electronic certificate alongside the photographic images and thus same [Applicants] have now approached the court vide the instant application seeking to be granted leave to file the electronic certificate ex-post facto, that is long after the photographic images had been filed.
64. Suffice to point out that any Applicant desirous to procure and obtain leave and/or liberty [condonation] to file a document, the electronic certificate not exempted, out of time is called upon to justify, account for and to avail plausible [believable] reasons for the failure to perform the act in good time and in accordance with the timelines set under the law or better still, pursuant to an order of the court.
65. Put differently such an Applicant is obliged to tender and produce before the court plausible and cogent explanation [reasons] why there was a failure and/or neglect to perform the act timeously. For good measure, such an Applicant is required to be frank and candid with the court. [See the holding of the court of appeal in the case of *Njoroge v Kimani (Civil Application Nai E049 of 2022)* [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)].



66. Furthermore, the explanation and/or reason being tendered must be honest and reasonable and in any event, a person desirous to partake of equitable discretion must him/herself demonstrate candour and not a tinge of dishonesty.
67. Having pointed out that the foregoing, it is now appropriate to revert to the reasons and/or explanation being ventilated by the Applicants herein as the basis for the failure to tender and/or file the electronic certificate dated the 17th of March 2021. Notably, the Applicants contend that the electronic certificate was indeed prepared and same [electronic certificate] has been available since the said date.
68. However, the Applicants have ventured forward and stated that though the electronic certificate was prepared and ready on the 17th of March 2021, same [electronic certificate] was not filed because of a mistake and/or inadvertence on the part of the learned counsel for the Applicants. Consequently, it has been contended that the court ought not to visit the mistake and/or inadvertence of the advocate on the client.
69. Despite the foregoing, contention, a few issues do arise and merit discussion by the court. Firstly, the electronic certificate which has been annexed to the current application bears the full title of the matter containing the details of all the six (6) Respondents including the 5th and 6th Respondents herein.
70. Notwithstanding the foregoing, it is worth recalling that as at the time when the petition was filed, the 5th and 6th Respondents were not parties to the suit and hence any document, pleading and in particular, the electronic certificate in question would not have borne the names of the 5th and 6th Respondents. For good measure the said 5th and 6th Respondents were not parties.
71. Be that as it may, the Applicants herein have exhibited the said electronic certificate and same are contending that the same electronic certificate was duly prepared and available on the 17th of March 2021, even though it is evident from the 1st Applicant's response/replying affidavit to the 3rd Respondent's preliminary objection sworn on 29th March 2022, that the 5th and 6th Respondents were not parties even as on the said date.
72. Additionally, I have also reviewed the entire file and I have come across the Order that was made by Hon. Lady Justice H.I. Ong'udi Judge, on the 28th of April 2022 and which related to the pending application for joinder by the 5th Respondent.
73. Quite clearly, it does not require rocket science for one to discern that the 5th and 6th Respondents were not parties to the instant suit and hence their names could not prophetically be contained on the face of a document [Read electronic certificate], which is [sic] contended to have been prepared on the 17th of March 2021.
74. From the foregoing, it is not lost on me that the Applicants herein have generated the purported electronic certificate long after the objection was taken against reliance on the photographic images and long after the court had made a Ruling on the non-admissibility of the photographic images in the absence of the electronic certificate and thereafter backdated the purported electronic certificate.
75. Having backdated the electronic certificate, learned counsel for the Applicants are brave enough to approach the court and tell the court that the impugned document was made on 17th of March 2021 and has been available since then, save for the fact that there was a mistake and/or inadvertence on the part of the counsel.
76. I beg to point out that where a party approaches a court of law and of equity, seeking to partake of equitable discretion, it behooves such a party to be honest and candid. Simply put the conduct of the



Applicants must meet the threshold of equity, which decrees that he/she who comes to equity must do so with clean hands.

77. Having ascertained that the Applicant herein has manipulated the electronic certificate and thereby backdated same, it is evident that the Applicants have not approached the seat of justice with clean hands and in good faith. To the contrary, it is evident that the conduct of the Applicants is wrought of and replete with mala-fides.
78. In the circumstances, it is difficult to fathom why an Applicant who wishes to partake of equitable discretion would want to deploy inequitable conduct. Simply put, what comes out of the entire scenario is a party who having failed to comply with the law and having been caught up with the law is now resorting to unorthodox tactics, to defeat and/or defraud the due process of the law.
79. I beg to state that I am not minded to countenance any conduct and/or behavior that falls below the equitable threshold. Indeed to countenance such a conduct would be tantamount to sanitizing inequity; and legitimizing Dishonesty.
80. Before departing from the subject issue, I therefore beg to point out that whereas the court is possessed of the requisite discretion [mandate] to allow the filing of the electronic certificate ex-post facto, such discretion can only be exercised upon sufficient cause being shown.
81. To this end, I adopt and reiterate the holding in the case of Wachira Karani v Bildad Wachira [2016] eKLR, where the court stated and held thus:-

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy

82. Additionally, what constitutes sufficient cause [which is pertinent] prior to exercise of the discretion of the court was also enunciated in the case of Attorney General vs The Law Society of Kenya & Another Court of Appeal Civil Appeal No. 133 of 2011 [2013]eKLR, where Musinga JA, stated as hereunder;

28. “Sufficient cause” or “good cause” in law means:

“.....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.



83. Finally, it is common ground that a court of law frowns upon any endeavor to mislead the court with a view to obtaining favorable orders. For coherence, once the court discovers that an Applicant is less than honest, then the court must decline to dignify such an Applicant with discretion.
84. To this end, it is instructive to adopt and take cognizance of the holding of the Court in *Madara Evans Okanga Dondo v Housing Finance Company of Kenya* [2005] eKLR, where the court while dealing with a similar situation like the one beforehand, stated and held thus:-

As submitted by the defendant, the plaintiff failed to make material disclosure to this court when he sought the said interim orders. The plaintiff was prepared to conceal crucial facts from this court to achieve his objective of obtaining interim orders of injunction. The plaintiff's conduct is, to say the least, dishonest. The said conduct amounts to an abuse of the due process of the court. It should attract immediate sanction of this court.

The Court of Appeal in *Uhuru Highway Development Ltd – Vs – Central Bank of Kenya & 2 others* CA Civil Application No. NAI 140 of 1995 (65/95 UR) had the opportunity to comment on a similar situation where a litigant failed to disclose material facts to the court. Omolo J.A. stated at page 2 of his ruling;

“Once the learned Judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the court.”

85. In view of the foregoing, it is my humble position that the Applicants have been less than candid with the court and hence their conduct is devoid of candour. In such a scenario, I am minded to decline to dignify the Applicants herein who have no respect for candour, with Equitable discretion.
86. Simply put, my answer to issue number (ii) is twofold. Firstly, the Applicants have not demonstrated sufficient cause to warrant the invocation and application of Judicial discretion in their favour.
87. Secondly, the Applicants herein have not approached the seat of justice with clean hands and thus same [Applicants] are not entitled to partake of and/or benefit from Equity.

Final Disposition:

88. Flowing from the discussion [details in terms of the preceding paragraphs] I have come to the conclusion that the application beforehand, is neither meritorious nor deserving of the discretion of the court.
89. Consequently and in the circumstances, the application dated the 16th of May 2024; be and is hereby dismissed with costs to the Respondents.
90. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF JUNE 2024

OGUTTU MBOYA,

JUDGE.



In the presence of:

Bryan – Court assistant

Mr. Mugambi and Njenga for the Petitioners/Applicants

Mr. Motari [principal litigation counsel] for the 1st, 2nd and 3rd Respondent s

Ms. Wanini for the 4th Respondent

Mr. Emmanuel Eredi for the 5th Respondent

Mr. Hassan Nura for the 6th Respondents

