



**Kahohi v Nganga & 3 others (Environment & Land Case
E061 of 2021) [2024] KEELC 4571 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E061 OF 2021**

BM EBOSO, J

JUNE 5, 2024

BETWEEN

FRANCIS NGANGA KAHOHI PLAINTIFF

AND

SERAH WANJIRA NGANGA 1ST DEFENDANT

THE LAND REGISTRAR - RUIRU 2ND DEFENDANT

KENYA COMMERCIAL BANK LTD 3RD DEFENDANT

LUCY WANJIRU NDIRANGU 4TH DEFENDANT

RULING

1. Falling for determination in this ruling is the notice of motion dated 20/12/2023, brought by Francis Nganga Kahohi [the applicant]. Through the motion, the applicant seeks leave of the court to file and serve a supplementary list of documents containing a document examination report to be relied on during the hearing. The application is premised on the grounds outlined in the motion and in the applicant's supporting affidavit sworn on 20/12/2023. It was canvassed through written submissions dated 8/3/2024, filed by M/s Kabue Thumi & Company Advocates.
2. The case of the applicant is that, he filed and served a document examination report at the inception of the suit but the said report was incomplete. He therefore seeks leave of the court to file and serve a complete document examination report. The applicant contends that no prejudice will be occasioned to the defendants [respondents] if the leave is granted, noting that copies of the report had already been served upon them. The applicant further contends that none of the parties has commenced nor closed their respective cases and that the respondents will be accorded an opportunity to cross-examine the witness on the veracity of the report. The applicant adds that the admission of the supplementary list of documents will enable the court to effectually and completely adjudicate upon and settle all the questions arising in the suit.



3. The 4th defendant [4th respondent] opposed the application through her replying affidavit sworn on 24/1/2024 and written submissions dated 14/3/2024, filed by M/s Wokabi Mathenge & Company Advocates. The 4th respondent contends that the application was filed in bad faith and is meant to seal glaring gaps that may have been exposed during cross-examination on 17/5/2023. The 4th respondent faults the applicant for serving further documents on the eve of the date scheduled for further hearing. The 4th respondent further argues that the document examination report that the applicant seeks to introduce was procured on 11/8/2023 after the commencement of the hearing of the suit. The 4th respondent further contends that the applicant had all along been in possession of the said report. The 4th respondent further argues that there is no plausible explanation as to why the applicant failed to procure and avail the report during pre-trial or before the hearing. The 4th respondent states that the orders sought are legally baseless.
4. The court has considered the application and the parties' rival submissions. The single question to be determined in the application is whether the applicant has satisfied the criteria upon which trial courts exercise jurisdiction to allow the filing of additional evidence after trial has commenced.
5. The relevant guiding principle on the question was outlined by the Supreme Court of Kenya in *Raila Odinga & others v IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions nos 3, 4, 5/2013 [2013] eKLR. The Supreme Court considered whether to allow additional evidence filed outside the stipulated timelines in a presidential election petition and outlined the principles applicable as follows:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”
6. The application under consideration was brought after the plaintiff had tendered his evidence-in-chief and had been cross-examined. He had, however, not closed his case. Secondly, he had not led evidence relating to forensic examination of the documents that are the subject of the dispute. Thirdly, he had shared a document examination report and made it known that he intended to lead evidence relating to specific documents. He did so by sharing the document examination report that he now says is incomplete. Fourthly, at this stage, the defendant would have adequate opportunity to interrogate the report and, if necessary, lead controverting evidence. Six, the evidence already tendered during cross-examination did not focus on the forensic aspect of the documents that are the subject of the report.
7. Taking the above into account, the court takes the view that the criteria for leave to lead additional evidence after commencement of trial has been met. The court will grant the plaintiff 21 days within which to file and serve his supplementary trial bundle. For taking the 4th defendant through this motion, the plaintiff will pay the 4th defendant's Advocates throw-away costs of ksh 25,000 within 30 days from today.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE
2024**

B M EBOSO

JUDGE

In the Presence of: -

Mr Chege Maina for the Plaintiff

Ms Nyambura for 1st and 4th Defendant

Court Assistant: Hinga

