



REPUBLIC OF KENYA



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**United States International University & 2 others v Moi & 10 others (Environment & Land Case 840, 771 & 1040 of 2016 (Consolidated)) [2024] KEELC 6712 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6712 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 840, 771 & 1040 OF 2016 (CONSOLIDATED)**

**MD MWANGI, J**

**JULY 24, 2024**

**BETWEEN**

**UNITED STATES INTERNATIONAL UNIVERSITY ..... 1<sup>ST</sup> PLAINTIFF**

**MUTHAIGA LUXURY HOMES LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**MAESTRO CONNECTIONS HEALTH SYSTEMS LTD ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ESTATE OF H.E DANIEL TOROITCH ARAP MOI ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**BALOZI COOPERATIVE SOCIETY LTD ..... 3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**OMWANZA OMBATI ..... 6<sup>TH</sup> DEFENDANT**

**ICEA LION LIFE ASSURANCE COMPANY LTD ..... 7<sup>TH</sup> DEFENDANT**

**ANDREW SUNKULI ..... 8<sup>TH</sup> DEFENDANT**

**TRIPPLE OK LAW ADVOCATES LLP ..... 9<sup>TH</sup> DEFENDANT**

**RILEY SERVICES LTD ..... 10<sup>TH</sup> DEFENDANT**

**DPS INTERNATIONAL LTD ..... 11<sup>TH</sup> DEFENDANT**



## RULING

(In respect to the objection raised by the 2<sup>nd</sup> Plaintiff's Advocates against the use of the letter dated 2<sup>nd</sup> August, 2018, listed in the 3<sup>rd</sup> Plaintiff's supplementary dated 28<sup>th</sup> February, 2024 in cross-examination of the 2<sup>nd</sup> Plaintiff's witness).

### Background

1. This ruling is in respect to the objection raised by the 2<sup>nd</sup> Plaintiff's Advocates in the course of cross-examination of their witness, Dr. James Mwangi, the Equity Group CEO, about his role in the issuance/processing of the loan facility granted to the 3<sup>rd</sup> Plaintiff by Equity Bank Ltd for purposes of purchase of the suit property. The 2<sup>nd</sup> Plaintiff's Advocates' objection was premised on the ground that the letter that the 3<sup>rd</sup> Plaintiff's Advocates were referring to was not properly on the court record since the 3<sup>rd</sup> Plaintiff's supplementary list of documents dated 28 February 2024 was filed after the close of the pre-trial procedures and without leave of the court.
2. The 2<sup>nd</sup> Plaintiff's advocates, Mr. Githaara and Mr. Kago made reference to this court's ruling of 9<sup>th</sup> July 2024, where the court expunged from its record the list of documents filed by the 8<sup>th</sup> Defendant after the hearing of this case had commenced and without leave of the court. Their assertion was that that 3<sup>rd</sup> plaintiff's list of documents dated 28<sup>th</sup> February 2024 should suffer the same fate as the impugned list of documents by the 8th defendants. They urged the court to uphold the principle of 'equity of arm.'
3. In their rejoinder, the Advocates for the 3<sup>rd</sup> Plaintiff submitted that the issue at that moment was not about the production of the document. They were merely cross - examining the witness on the dock about the letter he had allegedly signed for him to either confirm whether he signed it or not. Mr. Kanjama (SC), referred the court to section 153 of the [Evidence Act](#) to justify the use of the letter in questioning the witness to test his credibility on his assertion that he was not involved in any way with a loan facility advanced to the 3<sup>rd</sup> plaintiff to purchase the suit property.
4. Counsel for the other parties in this case presented their respective arguments on the issue under consideration. I have considered their submissions.

### Determination.

5. In making this determination, I am conscious that the hearing of this case is ongoing. I will therefore be deliberately economical with my words.
6. The Black's Law Dictionary, 11<sup>th</sup> Edition, defines cross-examination as;  

“ ... the questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness testified. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions, but is traditionally limited to matters covered on direct examination and to credibility issues.”
7. The above definition largely encompasses the provisions of the [Evidence Act](#) on the subject of cross-examination. The upshot is that the cross-examination is not restricted in scope as long as the matters



are otherwise relevant and admissible. It is generally ‘wide open’ to any questions, limited only by relevance. The court has the discretion, however, to guard against unfair prejudice, confusion of issues, and time wastage.

8. The objection by the 2<sup>nd</sup> Plaintiff’s Advocates, in my view, was, strictly speaking, more an objection to the 3<sup>rd</sup> Plaintiff’s supplementary list of documents filed without leave of the court and less of an objection to the question put to the witness by Mr. Okatch, Advocate for the 3<sup>rd</sup> Plaintiffs.
9. The Court’s ruling of 9<sup>th</sup> July 2024 was clear on filing of documents after the closure of the pre-trial procedures without leave of the court. I need not restate the same in this ruling. The 3<sup>rd</sup> Plaintiff’s supplementary list of Documents dated 28<sup>th</sup> February 2024, is not properly on record. I think I need to be more forthright; it is not on the record of the court. The mere filing of a document does not make the document a part of the court record especially when it is so filed unprocedurally.
10. Having said so, I will now consider the application of section 153 of the Evidence Act in the situation before the court. As I stated earlier, Mr. Kanjama (SC) submitted that all the issues raised in the objection by the 2<sup>nd</sup> Plaintiff’s Advocates were taken care of by the provisions of section 153 of the Evidence Act. Section 153 addresses cross-examination of witnesses on statements made by them in writing and relevant to matters in question.
11. Section 153 of the Evidence Act as held in the case of M’Nkiria Petkay Shem Miriti –vs- Ragwa, Samuel Mbae and 2 others Election Petition No. 20 of 2013, relates to cross-examination of witnesses on any statements made by them in writing and relevant to matters in question. It does not necessarily relate to documents prepared by the witness, whether relevant or not to the matters in question, which relates to formal matters reduced in writing.
12. Going by the testimony by the witness in his examination in chief, the question put to the witness by the 3<sup>rd</sup> Plaintiff’s Advocates, whether he signed the letter dated 23<sup>rd</sup> August 2018, under the letterhead of Equity Bank is of course relevant to the case. It is about the credibility of the witness. It is about bringing out the contradictions in the witness’s evidence. It is therefore allowable in cross-examination. I agree with senior Counsel Kanjama that the provisions of the Evidence Act are applicable in this situation.
13. For purposes of this case however, I will treat the letter simply as an alleged statement in writing that is relevant to the matters in question. It will not be marked for identification since it is not properly on record. The 3<sup>rd</sup> Plaintiff’s Advocates are therefore at liberty to cross-examine the 2<sup>nd</sup> Plaintiff’s witness on the contents of the letter.
14. The filing of the 3<sup>rd</sup> Plaintiff’s supplementary list is a sure indication that the 3<sup>rd</sup> Plaintiff intends to rely on the documents therein in their case. Questions were posed as to how the court will handle the production of the document that the 3<sup>rd</sup> Plaintiffs’ Advocates intend to use in cross-examining the witness while it is not properly on record at the time when the 3<sup>rd</sup> Plaintiff applies to produce it.
15. I note that the documents in the supplementary list including the letter, the subject matter of this ruling, are copies. There are adequate provisions in the Civil Procedure Act and Rules as well in the Evidence Act governing the production of documents. We shall cross that bridge when we get there. The 3<sup>rd</sup> Plaintiff has not yet applied to produce the documents in its supplementary list of Documents.
16. I wish to conclude this ruling with a plea to the parties in this case and their Advocates to assist the court to achieve the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of this matter; as enjoined under Section 1A (3) of the Civil Procedure Act.

It is so ordered.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Ashitiva for the 1<sup>st</sup> Plaintiff

Mr. Githara with Mr. Kago for the 2<sup>nd</sup> Plaintiff

Mr. Kanjama (SC), Mr. Okatch & Mr. Musyoka for the 3<sup>rd</sup> Plaintiff

Mr. Kemboy, with Mr. Kere and Mr. Makwei for the 1<sup>st</sup> Defendant

Mr. Allan Kamau for the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants

Mr. Lawson Ondieki for the 5<sup>th</sup> Defendant also h/b for Mr. Kiche for the 9<sup>th</sup> Defendant

Mr. Thiga for the 6<sup>th</sup> Defendant

Mr. Katwa for the 7<sup>th</sup> Defendant also h/b for Mr. Elkington for the 8<sup>th</sup> Defendant

N/A for the 10<sup>th</sup> and 11<sup>th</sup> Plaintiff

Yvette: Court Assistant

