



**Gitau & 2 others v Attorney General & 13 others (Environment & Land  
Case 57 of 2021) [2024] KEELC 7169 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7169 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 57 OF 2021**

**AE DENA, J**

**OCTOBER 23, 2024**

**BETWEEN**

**JOSEPH MWANIKI GITAU ..... 1<sup>ST</sup> PLAINTIFF  
MILKA NJERI GITAU (BOTH Suing AS THE ADMINISTRATORS OF THE  
ESTATE OF THE LATE SAMSON MWAURA GITAU) ..... 2<sup>ND</sup> PLAINTIFF  
BRIGITTE KARL GITAU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT  
THE LANDS REGISTRAR OF KWALE ..... 2<sup>ND</sup> DEFENDANT  
SAID H BEDZENGA (SUED AS THE KADHI OF KWALE ..... 3<sup>RD</sup> DEFENDANT  
THE ESTATE OF THE LATE JUMA A KIMETSE  
MWACHIMAKO ..... 4<sup>TH</sup> DEFENDANT  
HAMISI T CHIMETSE ..... 5<sup>TH</sup> DEFENDANT  
SAID RAMADHAN GUAYA ..... 6<sup>TH</sup> DEFENDANT  
FATUMA SAID KIMETSE ..... 7<sup>TH</sup> DEFENDANT  
MWANALIMA SAID NIMUGUPU ..... 8<sup>TH</sup> DEFENDANT  
FATUMA RAMA MWAPAZIA ..... 9<sup>TH</sup> DEFENDANT  
ASHA SAID KIMETSE ..... 10<sup>TH</sup> DEFENDANT  
LIPI SAID CHIMETSE ..... 11<sup>TH</sup> DEFENDANT  
REHEMA JUMA KIMETSE ..... 12<sup>TH</sup> DEFENDANT  
JOHN ERIC MUSYOKA ANNAN ..... 13<sup>TH</sup> DEFENDANT**



## RULING

### The Application

1. The application subject of this ruling is dated 26<sup>th</sup> September 2024 filed under Certificate of Urgency. The urgency exhibited by the Applicants herein is that they seek to adduce additional evidence by way of documents. The application is made pursuant to the provisions of Article 50(1) of *the Constitution* of Kenya 2010, Order 11,18 Rule 10, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 3A of the *Civil Procedure Act*, Section 146 of the *Evidence Act* Cap 80 and in addition, an order of this court issued on the 25<sup>th</sup> of September 2024.
2. Defendants/Applicants seeks that; -
  1. Spent
  2. That this Honourable Court be pleased to grant leave to the Applicants to file additional and or supplementary list of documents herein pending hearing and determination of this Application.
  3. That this Honourable Court be pleased to deem as duly filed additional and or supplementary list of documents annexed to this application
  4. That the costs of this application be in the cause.
3. The application is based on the grounds that:
  1. The Applicant was represented by counsel who apparently had not filed and served the documents in his possession.
  2. The mistake of the counsel should not be visited upon his client.
  3. The failure to file and or serve these documents was neither intentional nor malicious but seems to be an advertent mistake on the face of the record.
  4. The Applicant has a meritorious defense and should be afforded an opportunity to defend the same by filing and serving the supplementary list of documents.
  5. No prejudice whatsoever shall be occasioned and or visited upon the Respondents if orders sought herein are granted as the Plaintiffs/Respondents will be granted liberty to cross examine on the same.
  6. It is necessary and in the interest of justice that the court grants the orders sought.

### Supporting Affidavit

- 4 The application is further supported by the affidavit of John Eric Musyoka-annan And whose contents are reproduced here below;
  1. That the deponent is the 10<sup>TH</sup> Defendant/Applicant and his wife Gerardine Mumbua Musyoka is the 11<sup>th</sup> Defendant



2. That the matter herein has proceeded to the defence hearing but the Applicant is yet to conclude his testimony.
3. That while he was being cross examined by counsel for the Plaintiffs he discovered crucial documents had not been filed.
4. That he had retained counsel to act for and on his behalf but he later on made an application to cease from acting.
5. That he had now realized that his previous Counsel on record did not file his documents of ownership in respect to the property previously known as Kwale Diani SS/217 which had mutated to Kwale Diani SS/3046, Kwale Diani SS/3047, Kwale Diani SS/3048, Kwale Diani SS/3049 AND Kwale Diani SS/3050
6. That this failure to file these crucial documents was inordinate and was never motivated by ill will or malice on the part of counsel.
7. That even if this fact was a mistake on the part of counsel who had conduct of these matter, its now trite law that the same should not be visited upon an innocent client.
8. That these documents as so crucial in their nature and would help the court in adjudicating and reaching a fair decision ultimately.
9. That the deponent has annexed a supplementary List of documents which inter alia; contains, sale agreements, payments bank transfers, Letter of Consent to transfer, transfer, copies of title deeds.
10. That the applicants have a good defense that raises triable issues to the Plaintiffs/Respondents claim.
11. That no prejudice will be suffered by the Plaintiffs/Respondents if this application is granted and the Respondents would have a corresponding leave to cross examine the applicant on the veracity and probative value of these documents.

## **Response**

- 5 In opposing the application, the Plaintiff filed a replying affidavit sworn on 3/10/2024. It is averred that the matter has come up for pretrial conferences on various dates when the Applicant was represented by the firm of Sigey & Co Advocates. The same includes various notices of motion including the ones to enjoin the 10<sup>th</sup> and 11<sup>th</sup> Defendants as parties and to substitute the deceased parties.
- 6 It is stated that the 1<sup>st</sup> list of documents filed by the Applicants herein was dated 5/10/2016 and indicated copies of searches dated 28/7/2015 prior to alleged sale and transfer dated 15/9/2015. That the Applicants in the instant application filed a list of supplementary documents which was undated but filed on 26/7/2023. That the Plaintiffs have closed their case and so have the rest of the Defendants and the applicants cannot rely on the Plaintiffs documents to advance their cause.
- 7 The Plaintiff/Respondents question the authenticity of the documents that the Applicants seek to introduce without calling the makers. That if anything the documents have been in the custody of the Applicants since 2015 over 9 years. That further the documents ought to be examined by an expert witness through an intense forensic examination.



## Grounds Of Opposition

- 8 The Plaintiffs/Respondents further filed grounds of opposition dated 3/10/2024. The grounds are listed as follows;
1. The application is an ambush as the filing of additional and/or supplementary list of documents will prejudice the plaintiff who had already closed his case and the said documents had been in custody of the defendant even before the pre-trial conference deliberately hiding the same from the Plaintiff and the court during the whole trial to gain an undue advantage with the pre-planned ambush at this stage when he is the last witness.
  2. The Plaintiff stands denied from cross examination of the witnesses [makers of the documents] giving an undue advantage to the 10<sup>th</sup> Defendant [being the last witness] who is now sneaking the documents at the 11<sup>th</sup> hour through the backdoor knowing very well that recalling the other 9 Defendants inclusive of the Plaintiff and his witnesses will be starting the case de novo since each of the witnesses will be required to comment on the said documents.
  3. That Order 11 Rule 7[3] provides that any party or advocate who willfully fails or omits to comply with the provisions of this order shall be deemed to have violated the overriding objectives as stipulated in sections 1A and 1b since it is mandatory that parties are to file documents within a certain parameters and the 10<sup>th</sup> defendant deliberately misled the court and actively participated in the proceedings whilst the said documents either were in his custody hidden from the plaintiff and the court or they were nonexistent at the time of trial and have been manufactured after the plaintiffs closed their case.
  4. These documents do not form new and compelling evidence that would persuade the court to exercise its discretion to allow the same to be relied upon since the defendant deliberately hid the same from the other defendants, the Plaintiff and his witnesses and the court and admitting them on the eve of the trial whilst they are the last witnesses at this stage would constitute a mistrial since all the witnesses who have testified are denied the opportunity to be tested on this supplementary list of documents.
  5. The application is an afterthought and the list of documents are forged and tailored to fit the 10<sup>th</sup> defendants case after observing how the case about to be finalized had proceeded.

## Further Affidavit

- 9 The Applicants filed a further affidavit in response to the Plaintiff's pleadings opposing the application which included grounds of opposition and a replying affidavit. The same was as follows;
1. That the application dated 26th September 2024 is not in any way intended to be an ambush and, in any event, does not in any way prejudice the Plaintiff since the documents were partly in possession of the Plaintiff in their list of documents.
  2. That the admission of the Defendants' documents can in no way be said to be starting the case De Novo as it is on record that the 4th to 9th Defendants had entered into a sale agreement with the 10th & 11th Defendants.
  3. That it is well established by DW3(Ngetich the land registrar) that the ownership of the properties known as Diani settlement SS 3046 to 3050 respectively was lawfully transferred to the 10th & 11th Defendants and new titles issued to that effect.



4. That it was established in court that three of the Defendants had passed on and had been substituted in the said suit with the consent of the Plaintiffs and that DW 6 ( Saidi Ramadhan Guaya) substituted for the late Hamisi Kuzi the then 5th Defendant.
  5. That when Saidi Ramadhan Guaya gave evidence in Court under oath that he had gave evidence on behalf of the other defendants, Lipi and Fatuma were present and identified by the said Saidi Guaya, counsel of the Plaintiffs did not raise any objection, the said Saidi Guaya confirmed the said Defendants had indeed entered into a sale agreement and had sold the suit property to the 10th & 11th Defendants, the plaintiffs through counsel did not challenge this part of evidence.
  6. That what was mentioned in the application dated 26th September 2024 is reiterated, the omission and or mistake was purely inadvertent and not in any way intended to ambush the Plaintiffs since they still have an opportunity to be cross examined the 10th & 11th Defendant who at the point of objection raised by counsel for the Plaintiffs was still under cross examination and that counsel for the Plaintiffs would still have the opportunity to cross examine the 10th & 11th Defendants.
  7. That if the Plaintiffs are in doubt either of the existence or veracity of the sale agreement. Mr. Ramadhan Aminga Advocate who drew up and witnessed the said agreement is, with the leave of the court, willing and ready to testify.
  8. That it is necessary and in the interest of justice that the court grants the orders sought for ends of justice to be met as Article 159 of the constitution states clearly that substantive justice cannot be defeated by undue technicalities
- 10 The 1<sup>st</sup> and 2<sup>nd</sup> Defendant did not respond to the application.

### Submissions

- 11 The 10<sup>th</sup> and 11<sup>th</sup> Applicants filed their submissions electronically before court. The said parties highlighted the main issue for determination as follows:

**a. Whether the 10th Defendant/Applicant is entitled to the orders sought in the application dated 26th day of September 2024.**

- 12 It is submitted that the 10th Defendant/Applicant primarily seeks leave of Court to obtain orders and leave of this Honorable Court to adduce additional evidence by way of documents in this matter, pending the hearing and determination of this application and of the main suit thereof. It is stated that the 10th Defendant/Applicant was a mere bonafide purchaser of value for all land parcel previously known as Kwale Diani SS/217 which had mutated to Kwale Diani SS/3046, Kwale Diani SS/3047, Kwale Diani SS/3048, Kwale Diani SS/3049 and Kwale Diani SS/3050 with no notice as to any defect in title and the same was effected through a proper Transfer of Title. The Applicants refer to the holding by the Court of Appeal in the case of Weston Gitonga & 10 others vs Peter Rugu Gikanga & another as regards a bona fide purchaser and further in the Ugandan case of Katende v. Haridar & Company, the court has noted the contents thereof.
- 13 The court is further referred to the contents of Section 3(3) of the Law of Contract and states that the additional evidence satisfies the test in Mohammed Abdi Mahamud v. Ahmed Abdullahi Mohamed and is likely to settle the factual and legal questions that are in dispute in the main suit. Further that the additional documents relate to the subject matter in the suit, are valid, have been issued by public bodies that can verify their authenticity, are not voluminous and are capable of effective response and



interrogation by the Respondents. It is stated that the Applicant has met the threshold for the grant of leave to present additional evidence pursuant to Rule 18 of the Supreme Court Rules, 2012.

- 14 The 10<sup>th</sup> Defendant/Applicant states that vide the Sale Agreement executed he has enough grounds to lay a claim before this Honorable Court for ownership and enjoyment of quiet possession of all land parcel previously known as Kwale Diani SS/217. Which had mutated to Kwale Diani SS/3046, Kwale Diani SS/3047, Kwale Diani SS/3048, Kwale Diani SS/3049 AND Kwale Diani SS/3050. The 10<sup>th</sup> & 11<sup>th</sup> Defendants'/Applicants' hence invite this Court to give effect to the Sale Agreements thereof not to unmake or rewrite them. Defendant/Applicant's application dated 26<sup>th</sup> day of September 2024 has satisfied the threshold to prosecute this same case fairly and in the interests of justice. The court is urged to allow the application as prayed.
- 15 The Plaintiff respondent did not file submissions.

### **Determination**

- 16 I have perused the supplementary list of documents whose admission or otherwise is the basis of this ruling. The same documents are listed therein as follows;
1. Certificate of official search
  2. Sale agreement Hamisi Juma Kuzi
  3. Sale Agreement Fatuma Said Kimetse, Mwanalima Said Nimugupu, Rehema Juma Kimendze & Asha Said Kimetse
  4. Bank transfer slips, CFC Stanbic bank (4)
  5. Transfer of Title
  6. Valuation report
  7. Letters of consent from Land Control Board (4)
  8. Copies of original titles (5)
- 17 The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the 10<sup>th</sup> and 11<sup>th</sup> Defendants to adduce the additional documents as pleaded.
- 18 The Civil Procedure Rules of 2010 require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in Order 3, Order 7 and Order 11 of the Civil Procedure Rules. It is provided that a Defendant[s] when filing defence and counterclaim should also avail documents to be relied upon as evidence. The same is drawn as follows: -

#### Order 7 rule 5

Documents to accompany defence or counterclaim. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- (a) an Affidavit under order 4 rule 1(2) where there is a counterclaim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and



- (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.

19 From the provisions of Order 11 of the Civil Procedure Rules, the court is permitted to exercise discretion by allowing parties to file further documents even after the pretrial conference and the matter is set down for hearing. The court in the case of *Alois Oceano D’sumba v Rajnikant Narshi Shah & another* [2017] eKLR held as follows:

“ 10. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff’s case.”

20 The above is further stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act*, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in Article 50(1) of *the Constitution*. This position was reiterated in *Raila Odinga & others v IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR, where the Supreme Court considered whether to allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as-materially:

“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.”

21 From the pleadings on record and having heard the case partly, the 10<sup>th</sup> and 11<sup>th</sup> Defendants allegedly purchased the suit property from the rest of the Defendants herein specifically the 3<sup>rd</sup> to 9<sup>th</sup> Defendants. This was confirmed in the testimonies of DW3 and DW6. However, at some point the Plaintiffs raised the issue of undervaluation of the suit property and ownership by the said defendants who are the vendors. The Plaintiffs maintain that they are the legal and legitimate owners of the disputed parcel the same having been purchased by a deceased whose estate they administer. The 10<sup>th</sup> and 11<sup>th</sup> Defendants on the other hand are adamant that their purchase of the suit property was legal as the land belongs to the 3<sup>rd</sup> to 9<sup>th</sup> Defendants and hence the defence of their claim over the land.



- 22 According to the 10<sup>th</sup> Defendant, some of the documents in the supplementary list of documents are infact part of the Plaintiff's documents and have been referred to by the rest of the Defendants in prosecuting their case. From the courts perusal of the file, the Plaintiffs have in their pleadings referred to the searches in the names of the 3<sup>rd</sup> to 9<sup>th</sup> defendants and the green cards bearing their names.
23. The 10<sup>th</sup> Defendant has in his affidavit stated that he had served his advocate on record with the documents contained in the supplementary list of documents herein. That however the said documents were not filed as expected as the said advocate ceased acting on his behalf. The 10<sup>th</sup> Defendant pleads that the mistakes of his former counsel should not be visited on him. Whereas the general principle of the maxim of mistake of counsel should not be visited upon client is applicable in the instant situation, it is also noteworthy that the client herein is infact an advocate of the High Court of Kenya and has actively participated in this proceedings, the court admonishes the indolence exhibited in failing to ensure that Order 11 had been complied with in the stipulated time. However, it is also common knowledge that inadvertent mistakes do occur in the course of litigation, infact, even the court in itself sometimes errors in law or fact and sometime in both.
- 24 I believe the failure to file the documents was an honest mistake and the same should not bar the 10<sup>th</sup> Defendant from exercising his right to be heard on merit. I am guided by the finding in *Belinda Muras & 6 Others –Vs- Amos Wainaina* [1978] KLR in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”
- 25 I have also noted that this suit was first instituted before the court vide a plaint dated 13<sup>th</sup> January 2016 which was 6 years ago. I believe that both parties herein are interested in having the matter concluded and in a fair and just manner and which includes giving all of them a chance to ventilate their respective cases. The court in *Esther Wambui Njenga Versus Harrison Mwangi Nyota & 2 Others* [2018] eKLR opined that it is fair to allow each party to fully ventilate their case if for no other reason but so that the whole truth is revealed.
- 26 In my opinion, the supplementary list of documents by the 10<sup>th</sup> and 11<sup>th</sup> Defendants are to simply cement their claim on having purchased the suit property herein. I note that some of the said documents specifically the land sale agreements have already been referred to in the evidence of the previous defence witnesses and who have acknowledged sale of the land to the 10<sup>th</sup> and 11<sup>th</sup> defendants. The Plaintiff/Respondents claim that the said documents will cause great prejudice to them as they have already closed their case. I however note that the documents will be produced in the 10<sup>th</sup> Defendants evidence in chief and the Plaintiff will certainly have the opportunity to examine on the contents of the same. In any event the court is vested with power to recall a witness under Order 18 Rule 10 of the Civil Procedure Rules. Additionally, section 146 (4) of the *Evidence Act* the court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.





27 It is trite that in carrying out its mandate and which is the administration of justice, the court can exercise its inherent powers in making orders necessary for the ends of justice. The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR observed that: -

“Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

28 In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by

“inherent power” it means that “Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.... inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

29 The 10<sup>th</sup> Defendant states that the maker of the land sale agreement one Adv. Aminga is ready and willing to testify on the authenticity of the same. I have also seen the bank transaction slips on payment of the funds to the Purchaser's form part of the documents in the supplementary list. If required, the 10<sup>th</sup> defendant will also avail someone from CFC Stanbic bank to testify on authenticity of the same. On the issue of the documents being a forgery, this is definitely an issue to be proved by the Plaintiff in order to substantiate the allegation. It has not been established by the Plaintiff/Respondents of how or in what way the documents will alter the case for the 10<sup>th</sup> and 11<sup>th</sup> Defendants.

30 Based on the foregoing, this court hereby exercises its discretion and invokes the overriding objective of the law as stipulated in Sections 1A and 1B of the *Civil Procedure Act* including section 13 of the *Environment and Land Court Act* and in exercise of its inherent powers the court is inclined to allow the application by the 10<sup>th</sup> and 11<sup>th</sup> Defendants.

31 Accordingly, the following orders issue' to dispose of the application dated 26<sup>th</sup> September 2024.

1. That leave is granted to the 10<sup>th</sup> and 11<sup>th</sup> Defendants/Applicants to file additional and or supplementary list of documents attached to the application.
2. That the additional and or supplementary list of documents annexed to the application are deemed as duly filed
3. That any of the parties is at liberty to recall a witness for purposes only of the additional and supplementary list of documents annexed to the application
4. That costs of this application shall be in the cause

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF OCTOBER 2024**

**A E DENA**

**JUDGE**

Mr. Tindi for the Plaintiff



Mr. Waga for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

N/a for Mr. Sigey for the 5<sup>th</sup> -9<sup>th</sup> Defendants

Musyoka Annan acting in person and for the 11<sup>th</sup> Defendant

Ms. Asmaa Maftah-Court Assistant

