



REPUBLIC OF KENYA



**Makau v Kimuyu & 2 others (Environment & Land Case 275 of 2017)  
[2024] KEELC 13809 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13809 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 275 OF 2017  
TW MURIGI, J  
DECEMBER 10, 2024**

**BETWEEN**

**ESTHER MUNINI MAKAU ..... PLAINTIFF**

**AND**

**STEPHEN KIKO KIMUYU ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MUASYA ..... 2<sup>ND</sup> DEFENDANT**

**MALILI RANCH LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> July 2019 brought under Sections 1A, 1B, 3, 3A and 22 of the [Civil Procedure Act](#), Articles 159(2)(b) & (d) of the [Constitution](#), the Applicant seeks the following orders;
  1. That this Honourable Court be pleased to order which it hereby does that the 3<sup>rd</sup> Defendant/ Respondent furnish the 1<sup>st</sup> Defendant/Applicant with certified copies of the following documents:-
    - a. The list of plot allotment to shareholders by the Board of Directors of the 3<sup>rd</sup> Defendant/Respondent.
    - b. The list of shareholders whose plots are in Konza techno city area.
    - c. The schedule of payments to shareholders whose plots are in Konza techno city including the plot numbers, name of payee and mode of payment e.g cash or cheque number.
    - d. A copy of the survey plan showing the whole division wherein the suit property lies including the Konza City plots.



- e. A copy of the minutes of shareholder meeting retaining the firm of E.K Mutua & Co Advocates as the lawyers for the 3<sup>rd</sup> Defendant/Respondent including the attendance list.
  - f. A copy of the minutes of the 3<sup>rd</sup> Defendant/Respondent authorising the board members to instruct the firm of E.K Mutua & Co Advocates to sell the suit property including the attendance list.
  - g. A copy of the minutes of the shareholders appointing the Board members of the 3<sup>rd</sup> Defendant/Respondent who instructed the firm of E.K Mutua & Co Advocates to conduct the sale including the attendance list.
  - h. A copy of the Registration certificate of the 3<sup>rd</sup> Defendant/Respondent.
  - i. Most recent Annual Returns for the 3<sup>rd</sup> Defendant/Respondent.
  - j. A copy of the registration certificate for Malili Ranch Co. Ltd.
  - k. A copy of the annual returns for Malili Ranch Co. Ltd.
  - l. A copy of the instrument used to change the 3<sup>rd</sup> Defendant/Respondent from Malili Ranch Ltd to Malili Ranch Co. Ltd i.e a copy of the Kenya Gazette Notice and relevant documents filed with the Registrar of companies.
  - m. List of shareholders for Malili Ranch Co. Ltd.
  - n. List of Shareholders for Malili Ranch Co. Ltd.
  - o. Confirmation that the proceeds for the sale moved from the firm of E.K Mutua & Co Advocates to Malili Ranch Ltd.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Kiko sworn on even date.

### **The Applicant's Case**

3. The Applicant averred that he no longer has interest in the suit property as he sold and transferred his shares in Malili Ranch Co Ltd to the Plaintiff herein. He further averred that he is no longer a member of the 3<sup>rd</sup> Defendant and therefore, he is unable to shed any light with regards to the transaction regarding the suit property without the documents that he has requested for. That in order to participate in the proceedings herein, it is necessary that he is supplied with the said documents since the issues for determination relate to his membership in the 3<sup>rd</sup> Defendant. In conclusion, he urged the court to allow the application as prayed.

### **The 3<sup>rd</sup> Respondent's Case**

4. The 3<sup>rd</sup> Respondent opposed the application through the affidavit of its Director Leonard Kyania Kitua filed on 11/03 2022. He averred that the 3<sup>rd</sup> Defendant is a limited liability company which conducts its business in accordance with the Companies Act and the Memorandum and Articles of Association. According to the deponent, the issues raised by the 1<sup>st</sup> Defendant cannot be dealt with in the present suit or through an interlocutory application as they are substantive in nature.
5. The deponent averred that the documents sought by the Applicant are not in the custody of the 3<sup>rd</sup> Defendant and therefore, they cannot be procured as they were and are subject to Criminal Case No.



2141 of 2009 which has been concluded and Criminal Case No. 19 of 2014 which is still on going. He averred that the the documents pertaining to the organization, directorship and allotment of plots were taken away by the police. He further averred that the 3<sup>rd</sup> Defendant no longer conducts business nor holds any bank accounts. That following the resolution of two general meetings held on 7<sup>th</sup> may 2005, it was resolved that the Directors of the 3<sup>rd</sup> Defendant company should remain in office for the sole purpose of finalizing, processing and issuing title documents for the properties allocated to members. He further averred that the firm of E.K Mutua was appointed to act fo the 3<sup>rd</sup> Defendant in this matter as well as in many other matters involving the company. According to him, the company does not require the resolution of the shareholders to appoint a legal Counsel since the board of directors is mandated to deal with such issues.

6. He contended that the application herein amounts to a fishing expedition as some of the documents requested for do not relate to the issues before the court. He further contended that the Applicant has used the wrong procedure in seeking the production of the documents and argued that the 3<sup>rd</sup> Defendant has no obligation to assist the Applicant in adducing evidence in support of his case. In conclusion, he urged the court to dismiss the application with costs.
7. The application was canvassed by way of written submissions.

### **The 1<sup>st</sup> Defendant/Applicant's Submissions**

8. The Applicant's submissions were filed on 4<sup>th</sup> November 2022.
9. On his behalf, Counsel submitted that the discovery sought is intended to assist the court to resolve the dispute between the parties herein. Counsel argued that the Applicant has demonstrated that the documents sought will assist the court to determine the matter with finality. Counsel further submitted that the 1<sup>st</sup> Defendant having sold the suit property to the Plaintiff ceased being a member of the 3<sup>rd</sup> Defendant and requires the assistance of the court to obtain the documents related to his membership and the management of the 3<sup>rd</sup> Defendant with regards to his share which was disposed for a second time without his knowledge. To buttress his submissions, Counsel relied on the case of *Lutsman & Company 1990 Limited v Corporate Business Centre Limited & 4 others* HCCC NO. 311 of 2018
10. Concluding his submissions, Counsel urged the court to allow the application as prayed.

### **The 3<sup>rd</sup> Respondent's Submissions**

11. The 3<sup>rd</sup> Respondent submissions were filed on 31<sup>st</sup> March 2022.
12. On his behalf, Counsel submitted that the 3<sup>rd</sup> Defendant is a limited liability Company whose affairs are governed under the Companies Act and its Memorandum and Articles of Association. Counsel submitted that it is only members/shareholders of the company who can enjoy certain rights by virtue of their membership. That the rights include but are not limited to voting rights, right to requisition a meeting, right to require an audit, right to financial statements and director's reports, right to inspect and obtain copy of Memorandum, right to circulation of written resolution and right to appoint a proxy. Counsel contended that since the 1<sup>st</sup> Defendant admitted that he is not a member of the 3<sup>rd</sup> Defendant, he ought to have exercised his rights as a member of the public under Sections 852 to 859 of the Companies Act by applying for inspection and copies of the register and records held at the office of the Registrar of Companies.
13. Counsel further submitted that the *Access to Information Act* provides for an elaborate mechanism under which a party may request and obtain information in exercise of Article 35 of the *Constitution*.



Counsel submitted that Section 14 of the Act provides that where a person is denied information whether by a public or private body he is required to apply in writing to the Commission on Administrative Justice requesting a review of such denial. Counsel argued that the 1<sup>st</sup> Defendant has not indicated whether he invoked the provisions of Section 14 of the Act before bringing the present application. Counsel further submitted that the documents sought to be produced are in the custody of the police and the court.

14. With regards to the Minutes of the shareholder meeting to retain the firm of E.K Mutua and Co Advocates to act on behalf of the 3<sup>rd</sup> Defendant, Counsel argued that the issue can be interrogated by the court where such appointment is contested by the 3<sup>rd</sup> Defendant or by its Directors. It was submitted that no contestation was availed as the deponent confirmed that the firm of E.K Mutua & Co Advocates was appointed to act on behalf of the 3<sup>rd</sup> Defendant
15. It was further submitted that the shareholders do not appoint Advocates to act on behalf a company since a limited company manages its affairs through the Board of Directors. In addition, Counsel contended that a copy of the certificate of registration was attached to the replying affidavit.
16. On the proceeds of sale, Counsel argued that it is difficult for the 3<sup>rd</sup> Defendant to speculate and provide information on a subject matter which has not been identified or disclosed. It was further submitted that the subject matter of the dispute is not related to the information sought.
17. Concluding his submissions, Counsel submitted that the application is premature as it offends the doctrine of exhaustion of remedies. Counsel urged the court to dismiss the application with costs.

#### **Analysis and Determination**

18. Having considered the application, the respective affidavits and the rival submissions, the issue that arises for determination is whether the Applicant is entitled to the orders sought.
19. Section 22 of the [Civil Procedure Act](#) gives the court power to issue orders of discovery of documents as follows:-

“subject to such conditions and limitations as may be prescribed, the court may at any time, either on its own motion or on the application of any party-

  - a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.”
20. Order 11 Rule 3(2) of the [Civil Procedure Rules](#) also provides for discovery of documents as follows:-

In addition to any other general power the court may at the case conference – (d) Order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogaries which may be appropriate to the case.”
21. In the case of [ABN Amro Bani N.V v Kenya Pipeline Company Limited](#) (2014) eKLR the court held that :-

“Discovery is a compulsory disclosure at the request of a party of information that relates to the litigation in civil suits is provided in Section 22 of the [Civil Procedure Act](#) and Order 11 Rule 3(2) of the [Civil Procedure Rules](#) and given the nature of discovery, I would class it as a means of access to the information in the sense of Article 35(2) (b) of the Constitution .....



the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial”.

22. The purpose of discovery is to ensure that the parties have a level playing field by ensuring full disclosure of documents by either party at the earliest opportunity.
23. In an application of this nature, the Applicant is required to show the relevance of the documents being sought to the matter. With regards to the minutes appointing the firm of E.K Mutua & Co Advocates and the minutes authorising the board of directors to instruct the firm of E.K Mutua & Co Advocates, the Applicant has not demonstrated the relevance of these documents to this matter. The Respondent contended that the documents sought to be discovered are in possession of the police and the court. The Applicant has not rebutted the 3<sup>rd</sup> Defendant’s contention that the documents in question are not in their possession. In the circumstances, the 3<sup>rd</sup> Respondent cannot be compelled to produce what is not in its possession.
24. In the end, I find that the application dated 5<sup>th</sup> July 2019 is not merited and the same is hereby dismissed with costs to the 3<sup>rd</sup> Respondent.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 10<sup>TH</sup> DAY OF DECEMBER, 2024.**

In the presence of:

Okoth for the 1s Defendant/Applicant

Mundia for the 2<sup>nd</sup> Defendant.

C/A Alfred

