Maru v Wafula (Environment & Land Case 103 of 2008)
[2023] KEELC 15742 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 103 OF 2008

FO NYAGAKA, J

FEBRUARY 23, 2023

BETWEEN

MANSUKHALAL JESANG MARU ..... PLAINTIFF

AND

FRANK WAFULA ..... DEFENDANT

RULING

(On admission of documentary evidence and utilization of others as Exhibits post - witness testimony)

The Application

1. On 09/02/2023, the Defendant/Applicant moved this Court by way of a Notice of Motion bearing the same date. He brought it under Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Section 35(1) and 79 of the *Evidence Act*, Order 51 Rule 12 of the *Civil Procedure Rules*, 2010 and Article 50 (1) and (4) and 159 (2) of the *Constitution* and all enabling provisions of law. The Applicant sought the following specific orders:

    a) ...spent

    b) ...spent

    c) Thatupon grating prayer No. (b) the Honourable Court do give an order that the document referred to as conversion table produced by PW1 in Court on 23/10/2018 as P. Exhibit 3 is an un-signed document and therefore incapable of being admitted as documentary evidence.

    d) Thatan order be and is hereby issued that the letter of Allotment dated 28/11/1991 bearing the name of Mansukhalal Jesang Maru which was produced in Court on 23/10/2018 by the Respondent/Plaintiff as P. Exhibit 7(a) and (b) respectively was that the allotment outrightly

illegal and the copy was not certified under the hand of the authorized officer in the Ministry of Lands to warrant the same being utilized as exhibit.

e) That costs of and incidental to this application be provided to the Applicant.

2. The Prayer No. (b) that the Applicant referred to, which upon being granted the substantive ones would be considered, was that the Court grants him leave to present the instant Application. Its background was that in this matter, the Applicant had since filed so many applications, most of which had been ruled frivolous and or an abuse of the process of the Court and some in intention to delay the conclusion of this matter, that twice before the Court had directed that before filing any other the Applicant ought to seek the leave of Court to do so. While the two orders subsisted they ought to be obeyed. It is with that background in mind that this Court states that it could have struck out the instant Application for want of leave but since the Applicant combined the prayers in it with that for leave, by dint of Article 159(2)(d) of the *Constitution* of Kenya and Section 3A of the *Civil Procedure Act*, it deemed that failure as a curable technicality and exercised its discretion in the interest of justice to grant the leave at the ex parte stage.

3. This was one of the very rare or exceptional circumstances, and perhaps the only one now and in the future, the Court excused want of leave and determined the Application on merits for the reasons I give hereinafter. But it must be abundantly clear to the Applicant that that is not the usual and expected procedure in cases where such a step is required to be taken. The law is and shall remain that leave must be sought first so that once granted then the party applies for orders or moves the Court appropriately. So much so that if it is not granted, the matter ends there or he seeks the relief of an Appellate Court on the exercise of the discretion in refusing the leave, if the law permits it. Absent of that, any document or matter filed or brought to Court without leave of the Court where it is required is illegally before it and the Court must strike it out. There is no dearth of authorities over such a point.

4. In this Application, this Court had to grant leave to move the instant application even though the leave was sought simultaneously as the other prayers for reason that it bore in mind the Applicant has previously vexed it with application after another to delay this matter. The Court may be wrong regarding the view that the instant Application was brought purposely to scuttle the further defence hearing which is due on 23/02/2023. The Court holds so because, as is clear, the Applicant moved the Court only thirteen (13) days prior to the further hearing date which was fixed much earlier, knowing well that it would require long timelines to determine it in the wake of much backlog of cases. In the instant Application he raised issues which, if indeed meritorious, had been in the Court record since 23/10/2018, four and a quarter (4¼) years since they allegedly fell due for consideration.

5. This move is an absolutely cunning device aimed at seeing to it that this suit does not proceed on 23/02/2023. That is why, when this Court informed the parties that it had decided to burn the midnight oil to prepare this ruling before the hearing date, the Applicant raised two issues: one, that he needed leave to file a further Affidavit to respond to the issues raised in the Replying Affidavit filed herein. When the Court asked him to point out which of the issues required a factual rebuttal by way of further deposition, he failed to point out a single one. Therefore, he withdrew the prayer for time and leave to file a further affidavit. Second, when the court directed that the ruling be delivered on 23/02/2023, being the date for further defence hearing, the Applicant protested that that would not be sufficient to allow him prepare his witnesses to proceed with the hearing. Asked to explain the correlation of the prayers sought herein with the said witnesses, he could not explain any. Thus, the Court proceeded to retire to prepare the ruling.

6. As can be seen from the conduct of the Applicant in relation to the instant Application, the Application was designed to achieve a certain end, and the Court was subtly being put on the spot to

fail to hear and determine the Application for reason of absence of leave, and the next time would be for another application for something else or a false cry of foul play. The Court had to bite its nail hard as to extend its discretion as wide as possible to accommodate the error of the Applicant so as to go around the ingenious hurdle he laid on the way of justice in order to conclude this Application on time.

7. The Application was premised on ten (10) grounds enumerated on its face from (i) to (x). The Application was supported by an affidavit which Frank Wafula swore on 09/2/2023. To it were attached copies of the documents he wished the Court to pronounce itself on as prayed. The Applicant more or less repeated the contents of the grounds in the affidavit. Therefore, this Court analyzes them simultaneously, starting with the grounds and adding onto the contention the facts deponed in the Affidavit that may not have been captured in the form of grounds. It is worth noting that the Application was opposed through the Affidavit sworn by one Mansukhalal Jesang Maru on 13/02/2023. I now summarize the Application and arguments thereon.

8. The grounds in support of the Application were that this Court had discretion to grant the orders sought; the Letter of Allotment dated 28/11/1991 and the Conversion Table dated 27/03/1992 produced in Court on 23/10/2018 were photocopies and in absence of certification as required under Section 79 of the *Evidence Act*, they were incapable of being admitted as documentary evidence; that during cross-examination on 06/06/2022 the Respondent admitted that the Letter of Allotment was backdated to indicate payment vide receipt No. A688238 dated 15/02/1993 and therefore any title based on a forged letter of allotment was null and void; P-Exhibit 3 was worthless as it was not signed by the maker nor the same certified under the hand of the Director of Survey as required by law; P-Exhibit 3 sought to introduce a completely new and inconsistent basis for the Plaintiff's suit because conversion of Plot LR. No. 2116/1124 Kitale Municipality to Kitale Municipality Block 12/26 had no root in the Respondent's pleadings.

9. The further contention was that the P-Exhibit 3 was a photocopy and therefore the witness, one Bainito Hussein, who produced it could not be the maker and did not lay down the basis for its production; the two documents were produced in Court in the Applicant's Advocate's absence hence he did not have audience to raise objections thereto; the law permits him to raise such objections at this stage before the suit is heard and determined; that PW1 was not a party to the suit but a witness hence not competent to introduce and produce the document hence his actions were a well calculated move to compromise the outcome of the suit: that the Applicant stood to lose his plot if the Application was disallowed; and the Respondent would not suffer any prejudice if the order sought were granted since it is a cardinal rule of natural justice that a party is entitled to a fair hearing and Article 50(4) of the *Constitution* provides documents obtained in breach thereof be not recognized by a Court.

The Supporting Affidavit

10. Besides the grounds alluded to above, the Applicant deponed that he had realized that the 1st Advocate representing him was absent from Court on 23/10/2018. That for reason of the absence of his Advocate, he did not have audience to object to the production and admissibility of the two documents impugned herein and that after that he decided to act in person. His deposition was that the mistakes of his Advocate should not be visited on him. That if he did not raise the admissibility of the two documents now further proceedings would render his right to fair trail impossible. His further deposition was that the Application was brought in good faith and not aimed at scuttling the hearing of 23/02/2023. On the Conversion Table, while annexing as FW1 a copy of it produced in Court, he repeated the contents of the ground.

11. About the Letter of Allotment dated 28/11/1991, while annexing a copy of it as FW2, he deponed that the Respondent was a victim responsible for obtaining and holding the letter in respect of

Kitale Municipality Block 12/26 while knowing or having reason to know that the allotment was fraudulently procured or obtained. Again, he stated that the Respondent was a victim of an illegal land transaction and the Courts of law do not cover such transactions.

12. Further, on both documents impugned he deponed that they were photocopies which absent of certification as required by Section 79 of the *Evidence Act* were incapable of admission as documentary evidence. His further deposition was that the Respondent purported to pay Kshs. 4,300/= vide receipt No. A688238 on 15/02/1983 for allotment when the land was not available for allocation and he himself was a foreign student based in Kisumu and had no valid permit to hold land in Kenya.

13. He then deponed that when PW1 was recalled for cross-examination he admitted that there was no conversion of the Respondent's parcel of land hence both the Conversion Table and Letter of Allotment ought to be excluded from evidence. He swore that the Respondent wanted to obtain land parcel No. LR. No. 2116/1124 through lies.

14. He then deponed that he was apprehensive that his right to be heard on 23/02/2023 would be compromised it he tried to raise an Application. He spoke to the fact of natural justice demanding that parties to a suit be accorded audience by a Court and the instant Court should not make out a case not pleaded. He swore that the Application was made in good faith and prayed for the orders sought.

The Response

15. The Respondent opposed the Application strongly. He filed a replying affidavit on 14/02/2023. It was sworn on 13/02/2023. In it, deponed that the Application had no merit and had been overtaken by events since the impugned documents formed part of the evidence on record already. He deponed further that the Applicant was attempting to reopen his case through the backdoor. He swore that the Applicant was given time to cross-examine the Plaintiff and his witnesses in respect of the evidence adduced, more specifically, on the documents referred to. He then stated the issues the Applicant raised were matters of submissions and not an application.

16. His oath was that this was another of the delaying tactics of the Applicant in the matter. He deponed, reminding the Court, that the last time the suit was in Court the Applicant sought adjournment on account of bereavement and yet it was indirectly designed to secure an adjournment then and a ploy to enable him file such a frivolous, scandalous and false Application which he swore was an abuse of the process of the Court. He deposed that the Court was yet to make a determination of the main suit but the defendant was for no good reason not allowing the Court to hear the defence and determine the case. He advised the Applicant to focus on prosecuting his Defence and leave the instant issues for submissions. He then deponed that the Applicant would suffer no prejudice if the Application was dismissed. Regarding the prayer for costs of the Application, the Respondent swore that on the contrary it was the Applicant who increased costs of litigation through unnecessary applications. He prayed for the dismissal of the Application.

Submissions

17. This Court directed that the application be heard by way of submissions. The parties filed their respective submissions, with the Applicant filing his on 13/02/2023 and the Respondent on 15/02/2023.

18. The Applicant summarized the prayers of the Application and posed three issues for determination but since the first one was on whether or not the Court should grant leave for him to file the Applicant that was spent on 10/02/2023 when the Court, *suo moto* and in the interest of justice and expeditious

disposal of the instant Application, granted the prayer *ex parte*, as explained above in paragraphs 4, 5 and 6 above, I will not waste time on it. I will now summarize the remaining two.

19. The first issue he gave was whether the document dated 27/03/1992 which, according to him, was unsigned was admissible. On this issue he submitted that the document, produced and marked as P-Exhibit 3 was unsigned by the maker and not certified by him, being the Director of Survey. He argued that the law required that the Director certified it before production. He also submitted that the document had an alteration on it which was that the LR. No. 2116/1124 was replaced with 26 which was not explained and authenticated by signature. He stated that the document was a worthless paper with no probative value. He relied on the case of *Okafor v. Okpala* (1995) NWLR (Pt 374) 749 at 758. He cited the specific excerpt of the Court on the point where it stated that common sense and good practice required that a judge who had wrongly admitted certain evidence to expunge it in line from the record when he is properly addressed on it, if he is satisfied that it was erroneously admitted.

20. He then submitted that the competency of the witness, PW1, a Mr. Bainito Hussein, to certify the document. His view on this was that Mr. Bainito did not have a Power of Attorney donated to him by the Director of Survey and duly registered under the law for him to act in that behalf. He then contended that Mr. Bainito misled the Court that there was a conversion of LR. No. 2116/1124 to Kitale Municipality Block 12/26 yet when recalled for Cross-examination he said that there was none. He argued that the P-Exhibit 3 was illegal and designed to connect the Plaintiff to the Applicant's suit land.

21. The Second issue was whether a Letter of Allotment can be certified by an Advocate and be admissible in evidence. The Letter of Allotment was the document produced as P-Exhibit 7(a) and (b). On this he submitted that the Advocate who certified it lacked capacity to do so for a public document as the *Evidence Act* stipulates. He submitted that the said Advocate did not have the original in his possession and the document was backdated *vide* receipt number A688238 whose payment was for Kshs. 4,300/=, dated 15/02/1983, which was eight years prior to the Allocation date of 28/11/1991. He argued also that the P. Exhibit 7(b) was a copy of a Physical Development Plan (PDP) which too was backdated with a survey Plan F/R No. 226/194 of 28/11/1991 yet the Survey Plan was issued around August, 1992. He then summed it that the backdating of public documents was illegal and unconstitutional and the failure by the Respondent to certify the documents by the relevant authorities was fatal to his case.

22. He relied on the case of Supreme Court of Nigeria in *I.B.W.A. v. Imano Ltd* (2001) 3 SCNJ 160 at 177. In the authority, the Court was clear that a court should admit and act on legal evidence, otherwise it should not act on it but discountenance it. He prayed that the Application be allowed with costs.

23. On his part, the Respondent did not take time to summarize the Application. However, he submitted that by virtue of Section 38 of the *Evidence Act*, which he cited, the conversion table was part of the records kept by the department of lands which is a government office and was certified as a true record kept by that department. Further, that it was not produced by a stranger since PW1 is the one who did it and was cross-examined on it. On the issue of the letter of allotment, he submitted that the circumstances under which it was produced in court as a copy were explained and that the Land Registrar who testified in Court on behalf of the Defendant actually confirmed that the parcel of land was registered in the name of the Plaintiff. About the authorities relied on by the Defendant, he submitted that they were not served and were actually not relevant to the application if ever they existed.

24. He then submitted that the Defendant was trying indirectly to reopen his case at the defence stage instead of giving evidence. He stated that PW1 did not require a power of attorney to testify. He then

reminded, in the submissions, the Applicant that he too called DW2, the Land Registrar, who testified but without the same power of attorney if at all it was required. He prayed for the dismissal of the Application.

Analysis, Issues And Determination

25. I have carefully perused and analyzed the Application, the Supporting Affidavit together with the annextures thereto, the Replying Affidavit and the Submissions by the parties. I have also considered both the statutory and case law cited. The following issues lie for me for determination:

    a) Whether the Application is merited

    b) Who to bear the costs of this application

26. This Court expected the Applicant or the both parties to submit on the relevance or otherwise of the provisions that were cited as the basis for the Application. It did not see anything much about that. Be that as it may, in summary, the Applicant relied on a number of provisions whose relevance and import in relation to the instant Application this Court summarizes here.

27. Beginning with the phrase "all enabling provisions of law", this Court pronounces itself that no such 'law' exists. And even where it is clear that a party had in mind another provision other than the ones cited and wished the Court to consider them, absent of specifying which ones they are, the phrase is a meaningless one which parties ought to stop including in drafting of Applications. It is time parties learnt to be serious in what they present to Court.

28. About Article 159 (2) of the *Constitution*, it is on principles the Court and tribunals should apply in the exercise of judicial authority. As it is, the provision is wide on application and required specificity and explanation on its relevance. Regarding Section 1A of the *Civil Procedure Act*, it is on the objective of the Act, which is on facilitation of the just and expeditious resolution of disputes. Section 1B is on the duty of the Court, which is to determine all matters presented before it in a just, timely and efficient manner using the resources at its disposal, including technology, efficiently for that purpose. Section 3 is on not limiting the special jurisdiction or power of the Court, in absence of any specific provision to the contrary. Section 3A is on not limiting the inherent power of the Court to make any orders for the ends of justice or avoid its process being abused.

29. The substantive prayers in this Application were basically on admission of evidence. Therefore, this Court will consider Sections 35(1) and 79 of the *Evidence Act* as it decides on the merits of the prayers sought. In regard to Order 51 Rule 12 of the *Civil Procedure Rules*, 2010, this Court was explained to why the provision was cited since it is an obvious one in the circumstances of the Application. It reads, "All applications or other process shall be deemed to have been made when filed in court." In the instant case, payment for the Application having been made and the documents presented in the Registry, the provision was spent hence its inclusion herein was of no much use.

30. The last provision cited was Article 50 (1) and (4) of the *Constitution*. While providing for the right to fair hearing, Article 50(1) provides that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." It simply means that where a dispute between parties is to be resolved by the law being applied (which means that others may be resolved within the law but not by the law, for instance, by prayer and fasting for believers in the Holy Word), it has to be done in a fair and public hearing either before a Court or other tribunal or body. But the institutions have to be independent and impartial.

31. Much can be said about what constitutes impartiality and independence of the institutions mandated for that purpose. Suffice it to say that the judiciary is independent and impartial. This right plays in the instant case well. Fair trial is not a one-sided tool in the filed of justice. It is designed to insulate all parties to a dispute handled in a Court of law. Thus, it cannot be said to be used only in favour of the Applicant, especially where it is clearly demonstrable, as in the instant case, that the Applicant is intent on abusing the process of the Court with numerous delaying tactics. Fair trial requires that a matter be heard in an expeditious manner for justice delayed is justice denied, and the Applicant is purposively keen on delaying the just determination of this suit.

32. Again, it has been held time and again by the Court, including this one, that the principles contained in Article 50 apply to both criminal and civil matters. For instance, in the case of *Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR, it was held, on Article 50, in relation to fair trial principles in civil cases as follows:

> " While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a Court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."

33. The Court went on to say:

> "... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system."

34. Article 50(4) of the *Constitution* is on the exclusionary provision which is to the effect of obligating courts, tribunals and bodies determining disputes as explained above to exclude evidence that is obtained in a manner that violates any right or fundamental freedom as provided for in the Bill of Rights in the *Constitution*. In the instant Application, the Applicant submitted that the "backdating of public documents was illegal and unconstitutional". That was, in my view, the basis for him citing the provision. To the extent that backdating of documents is illegal, I agree with the Applicant. But as to whether that can be stretched to constitutionality of conduct criminal I doubt.

35. Be that as it may, in so far as the instant Application is concerned, that is the Applicant's view. However, the Applicant invites this Court to make a finding at this stage of the proceedings that the impugned documents indeed backdated. In my view, to do so would be premature as it would lead to determination of the issue at an interlocutory stage yet it should be at the judgment stage. Additionally, the issue of illegally obtained evidence was never place before me for determination. The Applicant should know that there is a different between the process of obtaining evidence and that of changing illegally, if any evidence in possession of one.

a) Whether the Application is merited

36. Substantively, the Applicant prayed that this Court gives an order that the "conversion table" produced as P Exhibit 3 is an un-signed document and incapable of being admitted as documentary evidence, and the Letter of Allotment dated 28/11/1991 produced as P Exhibit 7(a) and (b) respectively was illegal and the copy not certified are required by law hence it be not utilized as an exhibit. The genesis

of the contention and prayer is that on 28/10/2018 the two documents were tendered in Court by PW1, one Bainito Hussein, when he testified.

37. The Applicant argued that the Letter of Allotment dated 28/11/1991 and the Conversion Table dated 27/03/1992 were photocopies and in absence pf certification as required under Section 79 of the *Evidence Act*, they should not be admitted as in evidence. Further, that on 06/06/2022 the Respondent admitted that the Letter of Allotment was backdated to indicate payment vide receipt No. A688238 dated 15/02/1993. His contention was that in view of the backdating, the title issued as a result thereof was null and void.

38. The further issue he took was that P-Exhibit 3 was a photocopy neither signed by the maker nor certified by the Director of Survey as required by law hence worthless. In any event, it introduced a completely new and inconsistent basis for the Plaintiff's suit.

39. Further, he argued that PW1 did not lay the basis for its production. His further concern was that when P-Exhibits 3 and 7(a) and (b) were produced in evidence, his Advocate was not in Court hence he did not have chance to object to it. He swore that he had just realized this fact of the Advocate being absent from the proceedings. Again, he contended that that was a mistake of his Advocate which should not be visited on him. In any event, he argued, PW1 was not a party to the suit hence not competent to introduce and produce the document.

40. His contention was that PW1 lied in examination-in-chief about the existence of a conversion table but admitted the non-existence in cross-examination. He also argued that the Respondent was a victim of fraud relying on documents not genuine. Moreover, he argued that the Respondent was pursuing in evidence a case he had not pleaded.

41. Lastly, he argued that he stood to lose his plot if the Application was disallowed yet the Respondent would not suffer any prejudice if the orders sought were granted. In any event, the Applicant had a right fair hearing and by virtue of Article 50(4) of the *Constitution*, documents obtained contrary it should not be recognized by a Court.

42. I have carefully scrutinized the record. It is clear that on 23/10/2018 when this suit came up for hearing, the Respondent's learned counsel was present while the Applicant was represented by learned counsel who held brief for the Advocate who was on record for him. The Applicant too was present. An adjournment was sought by the Applicant's learned counsel. It was declined and the Court directed that the hearing proceeds and when PW1 had testified in part, the Applicant informed the Court that he wished his Advocate to continue. PW1 was stood down. Then PW2 also testified in part and was stood down.

43. Again, on 21/03/2019, PW1 was recalled and was Cross-examined by learned counsel holding brief for that of the Applicant. As for PW2 he was cross-examined by the Applicant himself on 06/06/2022. Thus, it is clear that the rules of procedure and evidence were followed in relation admission, production and proof of the three sets of sought to be impugned by the instant Application. It is not only puzzling but extremely dishonest on the part of the Applicant to contend now that he was not given opportunity to question on the admissibility and test the issues in relation to the evidentiary process of the documents. Again, it is disingenuous of the Applicant to selectively lay claim on the evidentiary process and import of the documents produced in evidence by the two witnesses who testified when they tendered in evidence respectively the impugned documents.

44. The Applicant desires of this Court in the instant Application to pronounce itself on the validity and weight of the evidence in relation to the three sets of documents herein before judgment. With due respect, this is a clear misconception of processing of documentary evidence in civil trials. There are

five basic stages of this aspect. In terms of the current procedure, one starts with filing of copies of the documents intended for proof in Court. This is followed by tendering the same for production and laying the basis thereof, whichever form whether primary or secondary it may be in. Then is the production stage where the party has to lay a further basis for the production of the document itself, that is to say, in what capacity he/she is producing the document, followed by proof of the contents therein as the next stage. Lastly is the Court's duty of determining the evidentiary value of the document, at the end of the trial.

45. Of production of documents, in *Sofie Feis Caroline Lwangu v Benson Wafula Ndote* [2022] eKLR, this Court held as follows:

> " In summary it stated that first, the document is filed in court (according to the rules or legal requirements. Second, if the document is not the original, the party wanting to produce it will lay the basis for the production of the copy and not the original. Once the Court is satisfied with that basis, then third, the party will lay a further basis for production of the document. Fourth, the party will then prove the contents, state or physical appearance of the document."

46. Also, on the stages of production of documents and what constitutes documents, the Court is guided by the holding in *Lwangu v Ndote (Environment & Land Case 79 of 2010)* [2021] KEELC 2 (KLR) (10 November 2021) (Ruling). And in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR the Court of Appeal gave a summary of three stages alluded to above. At paragraph 18, their Lordships stated thus:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents - this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

47. In the instant case, it should not be lost sight of the fact that the record is clear that all the stages referred to in the above-cited authorities were fulfilled except the last one being the analysis of the evidence that has passed through the three documents. That is never and can never be at the interlocutory stage of the proceedings in any trial. The Applicant wants this Court prematurely pronounce itself on all the issues raised in relation to the three documents and the submissions that he made thereto at the interlocutory stage. To do so would be against the law and procedure. The Court and no other Court should buy into such a subtle invitation to put the cart before the horse and expect the no damage and injury to the cog and wheel of justice.

b. Who to bear the costs of this application

48. Therefore, the conclusion of the whole matter is that I find that the Application before me is misconceived and an abuse of the process of this Court. It is absolutely baseless. I dismiss it with costs.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT, THIS 23RD DAY OF FEBRUARY, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE

Ruling read in open **Court,** in the presence of:**

1. R. E. Nyamu Advocate for Plaintiff

2. Frank Wafula, Defendant