



**Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party); Kangaita Coffee Estates Limited (Counter Claimer); Trendseters Investments Ltd & 4 others (Defendant to the Counterclaim) (Environment & Land Case 4 of 2021) [2025] KEELC 1453 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1453 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 4 OF 2021**

**JO MBOYA, J  
MARCH 20, 2025**

**BETWEEN**

**MARRIOT AFRICA INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

**MARGARET NYAKINYUA MURIGU ..... 1<sup>ST</sup> DEFENDANT**

**MARY WANJIKU KANYOTU ..... 2<sup>ND</sup> DEFENDANT**

**WILLY KIHARA ..... 3<sup>RD</sup> DEFENDANT**

**KANGAITA COFFEE ESTATES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**UKOMBOZI HOLDINGS LTD ..... INTERESTED PARTY**

**AND**

**KANGAITA COFFEE ESTATES LIMITED ..... COUNTER CLAIMER**

**AND**

**TRENDSETERS INVESTMENTS LTD .... DEFENDANT TO THE COUNTERCLAIM**

**MARRIOT AFRICA INTERNATIONAL LTD .... DEFENDANT TO THE COUNTERCLAIM**

**UKOMBOZI HOLDINGS LTD ..... DEFENDANT TO THE COUNTERCLAIM**

**THE CHIEF LAND REGISTRAR ..... DEFENDANT TO THE COUNTERCLAIM**

**THE HON. ATTORNEY GENERAL . DEFENDANT TO THE COUNTERCLAIM**



## RULING

1. The Instant matter came up for further hearing of the defence case. In particular, the case for the 1<sup>st</sup> Defendant to the counterclaim was heard and concluded.
2. Following the conclusion of the case by and on behalf of the 1<sup>st</sup> Defendant to the counterclaim, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim sought to introduce a witness, namely; the Principal Land Registrar and who was to tender evidence on behalf of the said 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim.
3. Nevertheless, the attempt by the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim to introduce a witness was objected to by learned counsel for the Plaintiff; interested party and by the 1<sup>st</sup> Defendant to the counterclaim, respectively.
4. It was the submissions by learned counsel for the Plaintiff that the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim did not file their pleadings; list and bundle of documents and the witness statements within the prescribed/statutory timelines. Furthermore, it was contended that the impugned pleadings by and on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim were filed on the 25<sup>th</sup> October 2024; long after the Plaintiff/2<sup>nd</sup> Defendant to the counterclaim had closed its case.
5. Moreover, it was submitted that the impugned documents were filed by and on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim outside the statutory timeline and without leave of the court having been sought for and /or obtained beforehand.
6. Additionally, it was submitted that the adoption and reliance on the pleadings; list and bundle of documents and the witness statement on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim shall occasion undue prejudice and grave injustice to the Plaintiff/2<sup>nd</sup> Defendant to the counterclaim. In this regard, it was submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim cannot be allowed to call a witness whilst their documents were filed outside the statutory timeline.
7. Finally, learned counsel for the Plaintiff contended that this court rendered a ruling on the 4<sup>th</sup> April 2024 and wherein the court proceeded to and expunged pleadings; list and bundle of documents and witness statements which had been filed by and on behalf of the interested Party/3<sup>rd</sup> Defendant to the counterclaim. It was contended that the interested party/3<sup>rd</sup> Defendant to the counterclaim had also filed documents and witness statement without leave of the court and the court found and held that same [court] is devoid of jurisdiction to validate documents filed without leave.
8. To this end, learned counsel for the Plaintiff implored the court to adopt the same ruling and to decree that the pleadings; list and bundle of documents and witness statement ought to be expunged from the record.
9. The objection canvassed by the Plaintiff was supported by the interested party and the 1<sup>st</sup> Defendant to the counterclaim, who reiterated that the pleadings and documents filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim were filed without leave of the court.
10. Moreover, it was submitted that the reliance on the documents in question shall occasion undue prejudice and grave injustice to the interested party and the 1<sup>st</sup> Defendant to the counterclaim.



11. Other than the foregoing, it was submitted that the court ought to facilitate the litigation and disposal of the subject matter on equal footing and at arms-length for all the parties. In this regard, the court was implored to adopt and deploy the provisions of Article 27[1] [2] of *the Constitution* 2010.
12. Learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim opposed the objection and submitted that even though the pleadings; list and bundle of documents and the witness statement were filed out of time, the court is obligated to ensure that all bits of evidence necessary are taken and included on the record of the court.
13. Furthermore, it was submitted that the objection being taken and canvassed by learned counsel for the Plaintiff and the rest of the advocates is technical in nature and thus same [objection] ought to be disregarded. In any event, it was posited that the court is obliged to invoke and deploy the provisions of Article 159[2][d] of *the Constitution* 2010.
14. Thirdly, it was submitted that the documents that are sought to be relied upon; and in particular, the witness sought to be called is the Principal Land Registrar, who is the custodian of records pertaining to the landed property.
15. It was further submitted that the documents sought to be tendered and the evidence in question, shall enable the court to unearth the issues in dispute and thereafter to render a substantive decision informed by all the available evidence.
16. Additionally, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim has also submitted that courts of law do not exist to mete out discipline and/or punishment on parties. On the contrary, it was submitted that courts of law exist to administer justice in accordance with the law and *the constitution*.
17. At any rate, learned counsel submitted that this court has to rise to a higher calling and ensure that all the available evidence are admitted for purposes of effective and effectual determination of the dispute.
18. Furthermore, learned counsel contended that striking out of pleadings and or documents is a draconian measure, which ought to be invoked and deployed sparingly and as a last resort. To this end, learned counsel cited the decision[s] in *James Kanyiita Nderitu v Philotas Ghikas* [2016]eKLR; *Philip Keipto Chemwollo & Another v Augustine Kubende & Another* [1996]eKLR, and *Philemon L Wambia v Gaitano Lusitsa Mukofu*[2019]eKLR, respectively.
19. Finally, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim conceded that the impugned pleadings; list and bundle of documents and the witness statement were filed on the 25<sup>th</sup> October 2024, long after the Plaintiff had closed its case. Furthermore, it was conceded that the documents in question were filed without leave of the court.
20. Regarding the issues as to whether this court has the jurisdiction to validate pleadings; documents and witness statements [if any] filed out of time, learned counsel admitted that the supreme court has since rendered itself on the issue. To this end, learned counsel acknowledged the dicta in the case of *Nicolas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014]eKLR.
21. Notwithstanding the foregoing, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim implored the court to exercise its discretion and to admit the pleadings; documents and witness statement and thereafter to allow the witness to tender evidence before the court.
22. The foregoing position by and on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim was supported by learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, respectively.



23. In addition, learned counsel for the 4<sup>th</sup> Defendant invited the court to observe that the documents filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim which are being objected to are indeed public documents and thus the honourable court should take judicial notice of the said documents. To this end, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim cited and referenced the provisions of Section 59 of the *Evidence Act*, Chapter 80 Laws of Kenya.
24. On the other hand, learned counsel for the 4<sup>th</sup> Defendant also ventured forward and submitted that the document[s] sought to be tendered and produced by the witness whose testimony is being objected to, relates to the records obtaining at the land registry. Furthermore, it was contended that all the parties herein have since tendered and produced copies of the said records. In this regard, counsel contended that no prejudice is likely to arise and/or be occasioned to the Plaintiff, if the documents were to be admitted.
25. Arising from the foregoing, learned counsel for the 4<sup>th</sup> Defendant joined hands with learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to invite the court to find and hold that the objection under reference, is devoid of merits and thus ought to be dismissed.
26. Having considered the objection, taken by learned counsel for the Plaintiff and upon taking into account the oral submissions of the advocates for the parties, I come to the conclusion that the determination of the objection herein turns on two [2] salient issues, namely; whether this honourable court is seized of the requisite jurisdiction to validate pleadings; documents and witness statement filed out of time and without leave of the court; and whether the adoption and deployment of the impugned pleadings, documents and witness statement shall occasion undue prejudice and grave injustice to the Plaintiff/2<sup>nd</sup> Defendant to the counterclaim or otherwise.
27. Regarding the first issue, namely; whether this court is seized of the jurisdiction to validate pleadings; documents and witness statements which have been filed out of time and without leave of the court, it is imperative to state that all parties are obligated to comply with and/or adhere to the statutory timelines that are prescribed under the law. For good measure, compliance with the statutory timelines is a mandatory prescription intended to ensure that court processes are undertaken timeously and with due promptitude.
28. Furthermore, it is important to recall and reiterate that the statutory timelines have an implication on the ability of the courts to hear and dispose of matters without undue and inordinate delay. To this end, it is imperative to underscore that compliance with statutory timelines also constitutes a significant tenet of the rule of law. [See Article 10[2] and 159[b] of *the Constitution*].
29. Other than the foregoing, I beg to outline that all litigants and their advocates are also called upon to assist the court to ensure that matters are heard and disposed of justly, proportionately and without undue delay. Pertinently, the obligations of the parties to assist the court in ensuring just, proportionate, reasonable and expeditious disposal of matters has been highlighted vide Section 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
30. With the foregoing in mind, it is therefore pertinent to state that the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim were obliged to ensure that their pleadings; list and bundle of documents and the witness statement [if any] were filed within the set timelines and not otherwise.
31. Nevertheless, where there was a default to file and serve the pleadings; list and bundle of documents and the witness statement, then it behooved the counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim to procure and obtain leave of the court before filing the impugned documents. Suffice it to state that the leave must be procured and obtained before the filing of the offensive documents.



32. Moreover, there is no gainsaying that the request/application for leave must be duly justified and reasons be availed to the court. For coherence, the leave of the court does not issue as a matter of right. Similarly, there is no gainsaying that the leave of the court does not issue for the mere asking.
33. Back to the issue as to whether this court has the jurisdiction to validate pleadings; documents and witness statement filed out of time and without leave. Suffice it to state that a party desirous to file any pleadings and/or documents out of time must obtain leave beforehand.
34. Where a party proceeds to and files documents without leave, the documents so filed are a nullity and thus incapable of validation by a court of law. To proceed and validate such documents would be tantamount to sanitizing and white-washing an illegality. In any event, such a scenario would then render the exercise of discretion a process in futility.
35. The legal position as to whether or not documents filed out of time can be validated was the subject of calibration by the Supreme Court of Kenya [the apex Court] in the case of *Nicolas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014]eKLR.

36. The Supreme Court stated as hereunder

What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time.

However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.

37. Similarly, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* (Civil Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) (Ruling), where the Supreme Court stated as hereunder;

35. We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such 'novel' principles as urged by applicant so as to validate that



petition and deem it as properly filed. We buttress this Court's position in Nicholas Salat when this Court stated thus:

...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the least (sic) he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record." Consequently, were we to grant extension of time in this matter, we will not hesitate to accede to the respondents' request, if the same is found to be the position that a petition of appeal had in fact been filed in this Court without leave of Court extending time.

38. The Supreme court was dealing with the filing of an appeal out of time without leave having been sought for and/or obtained beforehand. However, the ratio decidendi that colours the holdings in the decision [supra] is to the effect that a party cannot file a pleading; documents and statements out of time albeit without leave of the court and thereafter approach the court to validate [sic] the illegal filings.
39. What I hear the supreme court to be highlighting is to the effect that exercise of discretion is dependant on proof of various factors and that in any event, the exercise of discretion is not to be undertaken in a mechanical manner. Furthermore, the supreme court has also underscored that exercise of discretion and granting of leave is not the right to any party, irrespective of the status of such a party.
40. Flowing from the foregoing, I come to the conclusion that the pleadings; list and bundle of documents and the witness statement that were filed on behalf of the 4th and 5th Defendants to the counterclaim outside time and long after the Plaintiff had closed its case, are a nullity and incapable of validation.
41. Before departing from this issue, it is also important to point out that learned counsel for the 4th and 5th Defendants to the counterclaim did not endeavour to even account for the failure to file the



documentation within the circumscribed timeline. Simply put, learned counsel was content with the facts that the documents were filed out of time and no more.

42. Respecting the second issue, namely; whether the Plaintiff/2nd Defendant to the counterclaim shall suffer undue prejudice and grave injustice if the pleadings; list and bundle of documents and the witness statement are relied on, it is apposite to state that the Plaintiff/2nd Defendant to the counterclaim closed its case on the 22nd February 2024.
43. Furthermore, it is evident and apparent that by the time the Plaintiff/2nd Defendants to the counterclaim closed its case, the impugned pleadings; documents and witness statement had not been filed. To this end, there is no gainsaying that the plaintiff's witness testified without knowing the contents of the documents that are now sought to be brought on board ex-post-facto.
44. Additionally, it is not lost on this court that the contents of the witness statement that is sought to be deployed by and on behalf of the 4th and 5th Defendants to the counterclaim was also not brought to the attention of the Plaintiff's witness. In this regard, it is common ground that the Plaintiff's witness did not have the opportunity to counter and/or respond to the allegations and the evidence sought to be introduced.
45. To my mind, the provisions of Article 50[1] and [2] of *the Constitution*, 2010; require that all the parties be granted equal opportunity and reasonable facilities to ensure that the issues in dispute are heard and determined fairly and with impartiality.
46. Furthermore, it is important to underscore that discovery of documents and evidence to be relied upon by the parties forms a critical tenet of the right to fair trial. In this regard, where a party seeks to spring documents and evidence at the tail end of the proceedings such an endeavour must be frowned upon. In any event, it is imperative to outline that such an endeavour constitutes litigation by ambush and Surprise.
47. The scope of the right to fair hearing and fair trial has received judicial pronouncement[s] in a number of decisions. Nevertheless, it suffices to cite and reference the decision of the Supreme Court in the case of Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment), where the court stated as hereunder;

68. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR (Njoki Ndungu, SCJ, Concurring), this court made the following finding concerning the right to a fair trial under article 50(1) and 50(2):

“(255) Article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms ‘fair hearing’ and ‘fair trial’ are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect...

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias.



Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2<sup>nd</sup> Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled....

- (261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v United Kingdom*, [2005] ECHR 103, paragraph 59).
48. To my mind, the adoption, deployment and use of the pleadings; documents and the witness statement filed by the honorable attorney general and which were admittedly filed long after the close of the Plaintiff’s case would violate the Plaintiffs right to fair hearing; fair trial; due process of the law and by extension the rule of natural justice.
49. It is common ground that any action and/or omission that impacts on the right to fair hearing and fair trial automatically leads to undue prejudice and grave injustice. Furthermore, such an act would disturb the level playing filed for the parties.
50. I agree with the submissions of learned counsel for the Plaintiff/2nd Defendant to the counterclaim that the Plaintiff shall be exposed to undue prejudice and grave injustice. Moreover, there is no gainsaying that new documents and evidence would be brought forth long after the close of the Plaintiffs case. To this end, the Plaintiff will not be in a position to controvert and/or rebut the new documents and evidence and thus culminating into the prejudice.
51. In the premises, I come to the conclusion that the objection raised and canvassed by learned counsel for the Plaintiff and supported by learned counsel for the interested party/3rd Defendant to the counterclaim; and the 1st Defendant to the counterclaim, is meritorious.

### **Final Disposition:**

52. For the reasons that have been highlighted and outlined in the body of the Ruling, it must have become evident, nay apparent that the objection under reference is merited and ought to be upheld.
53. In the circumstance, the final orders that commend themselves to the court are as hereunder;
- i. The Objection herein be and is hereby upheld.
  - ii. The Statement of defence to the counterclaim; the list and bundle of documents and the witness statement filed by the honourable attorney general be and are hereby expunged from the record of the court.
  - iii. The Intended witness by the 4th and 5th Defendants to the counterclaim is hereby barred from testifying.
  - iv. Costs of the objection shall abide the outcome of the suit/proceedings.



54. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF March 2025.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of;

Benson - Court Assistant

Mrs. Wangui Koech for the Plaintiffs

Mrs. Wangui Koech for the Defendants

Ms. Kiunga h/b for Mr. Eric Theuri for the 1<sup>st</sup> Defendant

Mr. Ruiru Njoroge for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant[s].

Mrs. Wangechi Akedi for the 4<sup>th</sup> Defendant

Mr. Guandaru Thuita for the Interested Party/3<sup>rd</sup> Defendant to the counterclaim

Mr. O.M.T Adala for the 1<sup>st</sup> Defendant to the Counterclaim

Mr. Allan Kamau [Principal Litigation Counsel] for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the counterclaim.

