



**Kamau & another (Suing as the Legal Representatives of Nyambura Kamau (Deceased)) v Wainaina (Environment & Land Case 320 of 2017) [2025] KEELC 1283 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1283 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 320 OF 2017**

**JM ONYANGO, J  
MARCH 13, 2025**

**BETWEEN**

**GAITI KAMAU ..... 1<sup>ST</sup> PLAINTIFF  
RUTH WANJA KAMAU ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF NYAMBURA KAMAU  
(DECEASED)**

**AND**

**TERESIA WANJIKU WAINAINA ..... DEFENDANT**

**RULING**

1. What is before me for determination is the Defendant’s Notice of Motion dated 11/12/2024 seeking the following orders:
  - i. Spent
  - ii. That leave be granted to the Defendant to file and serve a witness statement by Jacinta Wanjiru Njoroge.
  - iii. That leave be granted to the Defendant to file and serve additional documents in support of her case.
  - iv. That the costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant’s Supporting Affidavit sworn on 11/12/2024. In the said affidavit she depones that she has secured a ‘crucial’ witness who was not available during the pre-trial stages and before the close of the Plaintiff/ Respondent’s case. She states that the witness has some vital information and documents which will



assist the court to make an informed decision in its judgment. She adds that no prejudice will be occasioned to the Respondent given that she will have an opportunity to cross-examine the witness.

3. The application is opposed by the Respondent through a Replying Affidavit sworn by Daniel Gaiti on 13/12/2024, in which he depones that the application is merely intended to delay the determination of the matter.
4. He further depones that the application is highly prejudicial to the Respondent who have testified and called four witnesses. He argues that the evidence of the proposed witness is not relevant and has no bearing on the case because land parcel number Ruiru/Ruiru East Block 2/5240 is not the subject matter in the suit. He adds that the proposed witness is not an official of Nyakinyua Investment Limited hence her evidence has no probative value.
5. He contends that the Applicant had an opportunity to cross-examine the chairlady of Nyakinyua Investment on all matters pertaining to the acquisition, allocation, balloting, list of former officials and all the history regarding the said company. He further contends that the Applicant has not explained why she did not avail her alleged witness from 2017 to 2024.
6. He argues that a company has perpetual succession and that the evidence of a director in office supersedes all other evidence including that of a former director. He further argues that this court cannot be held hostage by a decision of the Land Disputes Tribunal which the Applicant seeks to file as part of his evidence because the tribunal had no jurisdiction to determine land ownership disputes.
7. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully read and considered.

### **Applicant's Submissions**

8. In his submissions dated 24/01/2025, Mr Oduyo, counsel for the Applicant submitted that the Respondent will not be prejudiced if this application is allowed because they will have an opportunity to challenge the evidence of the Applicant's witness through cross-examination. He further submits that the Respondent can be recalled to comment on the proposed witness' evidence hence no prejudice will be occasioned to them.
9. Counsel urged the court to invoke the provisions of Article 50 (1) of *the Constitution* in determining this application. Counsel submitted that Order 11, Order 18 Rule 10 of the *Civil Procedure Rules*, 2010 and Section 146 of the *Evidence Act* allow the court to recall a witness at any stage of the proceedings. He relied on the case of *Hangover Kaakwacha Hotel Ltd vs Philip Adundo & Leonard Adundo t/ a Hangover Kaakwacha Hotel (2022) eKLR* in support of his submission. Counsel added that the proposed witness intends to clear the air on how allocations and surrender of titles were done, since she is a former official of Nyakinyua Investment Limited.

### **Respondent's Submissions**

10. On the other hand, Mr Muthomi, learned counsel for the Respondent submitted that the application was an afterthought and that the Applicant was guilty of inordinate delay. Counsel further submitted that the argument by the Applicant that the proposed witness was not available during the pretrial stages or before the close of the Respondent's case does not hold water given that she was within the Republic of Kenya.
11. Secondly, counsel contended that all evidence and questions of the operations of Nyakinyua Investment Limited were dealt with by the chairlady of the company and the Applicant was given the opportunity to cross-examine her. Counsel further contended that companies have perpetual



succession and being a legal entity, the said company cannot hold contradictory factual or legal positions.

12. Counsel argued that the purported “new documentary evidence” had no bearing on the subject matter of this case because the purported title deed for the intended witness was not on trial in the suit. Counsel further argued that the evidence of the decision of the Land Dispute Tribunal was not relevant to the suit and was not credible given that the said tribunal lacked jurisdiction to make the decision it made. It was counsel’s further contention that there was no legal provision that allows filing of documents after close of the pre-trial conference.
13. Counsel submitted that if the reliefs sought are granted, the Respondent will be greatly prejudiced given that their case is already closed. Counsel further submitted that the Applicant did not indicate that she was searching for the proposed witness during the pre-trial conference therefore the new evidence she seeks to admit amounts to trial by ambush contrary to Article 50 of *the Constitution* of Kenya 2010. He relied on the case of *Too vs Tim* (2014) eKLR where the court dismissed a similar application.
14. Counsel urged the court to dismiss the application and award the Respondent the costs.

### **Analysis and Determination**

15. Having considered the application, Replying Affidavit and the parties’ rival submissions as well as the authorities cited to me and the relevant law, the only issues for determination are:
  - i. Whether the Applicant should be granted leave to file and serve a witness statement by Jacinta Wanjiru Njoroge.
  - ii. Whether the Applicant should be granted leave to serve and file additional documents.
16. With regard to the first issue, the suit herein was filed in 2017. The court began hearing the matter on 29/6/2023. The Respondent called 5 witnesses and they closed their case on 19/9/2024. The Applicant waited almost two months thereafter to file this application on 11/12/2024. Before filing this application, the Applicant had never indicated to the court that she was in search of the proposed witness. The court is of the view that it would be unfair to the Respondents to allow them to bring an additional witness at this point. The prayer is therefore denied.
17. On the second issue, the Supreme Court in the case of *Mohamed Abdi Mahamud vs Ahmed Abdullabi Mohamed & 3 Others* [2018] eKLR, the stated as follows:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been



produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

18. The Applicant has made no effort to convince this court as to why the additional evidence sought to be filed was not filed or procured earlier. Therefore, the court finds that the Applicant is not deserving of the orders sought.

19. In the circumstances, I find no merit in her application and I dismiss it with costs to the Respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MARCH 2025.**

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**J. M ONYANGO**

**JUDGE**

In the presence of:

Mr Muthomi for the Plaintiff/ Respondent

Mr Odoyo for the Defendant/ Applicant

Court Assistant: Hinga

