



Gathungu (Suing as the Personal Representative of the Estate of Newton G. Kibuchi) v Embakasi Ranching Company Limited & 3 others (Environment & Land Case 2 of 2022) [2025] KEELC 3418 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2 OF 2022**

AA OMOLLO, J

APRIL 30, 2025

BETWEEN

GEORGE KIBUCHI GATHUNGU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NEWTON G. KIBUCHI) APPLICANT

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST DEFENDANT

BARNABAS MUTURI C. MWANGI 2ND DEFENDANT

PURITY KARURI MWANIKI 3RD DEFENDANT

STEPHEN MWANIKI MACHARIA 4TH DEFENDANT

RULING

1. The Plaintiff/Applicant has filed the application dated 15th October 2024 seeking for the following orders;
 1. Spent;
 2. That this Honourable Court be pleased to grant leave to the Plaintiff to file additional documents being computation files and authentication slips from the Survey of Kenya for the maps FR 251/67, FR 251/26 and FR 267/22 in question before this Honorable Court and any other documents from Survey of Kenya regarding the said maps.
 3. That the documents be deemed properly filed.
 4. That the Honorable Court do issue timelines for the service of the documents thereof.
 5. The costs of this Application be in the cause.



2. The application is supported by an affidavit, further affidavit and supplementary affidavit all sworn by George Kibuchi Gathungu on 15th October 2024, 25th November 2024 and on 31st January 2025 respectively. The motion is also based on the grounds that; the Applicant/Plaintiff seeks to file computation files and authentication slips from the survey of Kenya for the maps FR 251/67, FR 251/26 and FR 267/22 in question before this Court which documents are intended to assist in determining the matters in issue between the parties herein.
3. The Applicant stated that the documents had been requested from the Survey of Kenya as evidenced in their letter dated 14th October 2024 to the Survey of Kenya and a further letter dated 22nd October 2024 requesting clarification in relation to the location of Nairobi Block 105/5823 and Nairobi Block 105/5963 as per the maps FR No.251/67 and F.R 251/26. That the requested documents were availed in the form of a letter dated 14th November 2024 and annexures thereto clarifying that the Survey of Kenya had cancelled the irregular alteration in FR. NO.251/67 and reinstated parcel number Nairobi Block 105/5823 in the map FR.No.251/67.
4. The Applicant stated that this court has the necessary discretion to issue such orders that it may deem necessary in the circumstances and no prejudice would be occasioned to the Defendant if leave is granted to file the additional documents. The Applicant explained the need to highlight the nature of the dispute herein so as to establish the need to have the letter from Survey of Kenya admitted as evidence before the court.
5. That the dispute between the parties concerns the location of the parcels Nairobi Block 105/5823 and 105/5963, rather than their ownership, with the Plaintiff being the owner of parcel 105/5823 and the 4th Defendant owning parcel 105/5963. That the Survey of Kenya, as the custodian of all maps, is the appropriate authority to clarify the location of these parcels.
6. In Opposition, the 2nd Defendant filed grounds of opposition dated 21st January 2025 stating that the application is mischievous, incompetent and bad in law as same contravenes the mandatory provisions of the Civil Procedure Code. That the application is tantamount to trial by ambush and is aimed at frustrating the expeditious hearing and conclusion of this suit as no legal justification has been advanced why the documents subject of application were not filed before close of pleadings.
7. That the documents have come too late to enable verification by the defendants which exhibits the casual manner in which the Plaintiff is treating the case and the application is clearly an afterthought that is intended to occasion undue delay to this suit therefore prejudicial to the 2nd Defendant and should be dismissed Ex-debito Justitae.
8. The 3rd and 4th Defendant /Respondents filed a replying affidavit sworn by Stephen Mwaniki Macharia on 20th January 2025 in opposing the application. The Respondents argue that the Plaintiff/Applicant had multiple opportunities to present all relevant evidence and failed to do so within the given timeframes.
9. That the Plaintiff's actions are an attempt to delay proceedings, pointing to their repeated requests for documents at the last minute and their failure to provide adequate explanations for the delays. The Respondents added that the Plaintiff's conduct amounts to contempt of Court and potentially criminal offenses, and argues that they are not entitled to any further accommodation by the Court.



Submissions

10. The Plaintiff/Applicant filed submissions dated 3rd February 2025 and supplementary submissions dated 3rd April 2025. He submitted that the issues for determination in this case revolve around whether they should be allowed to file additional documents and who should bear the costs of this application.
11. The Plaintiff stated that he seeks permission to include documents that were not available at the time of filing the initial pleadings, specifically a letter dated November 14, 2024, from the Survey of Kenya clarifying the locations of plots in question. The Plaintiff argues that this document is crucial for the proper ventilation of the case and that the right to be heard under Article 50(1) of the Constitution should take precedence over procedural technicalities, as stipulated by Article 159(2) of the Constitution.
12. In support of the application, the Applicant cited case law such as Kiai Mbaki & Others v Gichuhi Macharia & Another [2005] eKLR, and Moboko Shembekho Ltd v Kiptalam & 2 Others [2023] KEELC 19982 (KLR) which reinforce the principle that leave should be granted to file additional documents before the hearing begins, especially when they were not available during the initial pleadings.
13. The Plaintiff further contends that the introduction of this document would not prejudice the Defendants, as it is a one-page letter and the Defendants have been made aware of its existence. Additionally, that the Defendants will have the opportunity to file counter documents or respond during cross-examination, as emphasized in Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo [2022] eKLR.
14. The Plaintiff argues that, in the interests of justice and fairness, the court should allow the letter to be admitted in evidence, citing Article 159(2)(d) of the Constitution and Mbiti v Mureithi & Another [2024] KEELC 3448 (KLR), which highlights that courts should not be bound by procedural technicalities where doing so would unjustly impede a party's right to fully present their case.
15. The 3rd and 4th Defendants/Respondents submitted that the Plaintiff has previously been barred from filing further documents by a court order issued on 24th April 2024, after repeated delays in submitting documents. That despite this, the Plaintiff now seeks permission to file more documents, citing the constitutional right to a fair hearing under Articles 48, 50, and 159(2) of the Constitution of Kenya.
16. They stated that the Plaintiff's application is grounded in a claim for the inherent right to be heard, but they have used multiple opportunities to file documents and are now attempting to delay proceedings further. In support, the Defendants/Respondents cited the case of Ferruz Omar Mabendan & Others v Ahmed Mohamed Honey (2016) Eklr, which emphasize that the Court's discretion should not favor delays and misuse of the judicial process.
17. That in considering whether the Plaintiff should be allowed to file additional documents, the Court must examine whether the Plaintiff's conduct justifies granting such a request noting that the Plaintiff has already been granted several opportunities to file documents, which have been used to delay proceedings rather than advancing the case.
18. The 3rd and 4th Defendants argue that the Plaintiff's actions fall foul of the overriding objective to expedite justice, as outlined in Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) KECA 208 (KLR).
19. Additionally, that the Plaintiff's failure to explain why the documents were not filed earlier supports the view that this request is another attempt to delay the case and in support cited the case of Raila



Odinga v IEBC (2013) eKLR, which confirms that procedural timelines and compliance are crucial to the administration of justice, especially in complex cases where delay could undermine the fairness of proceedings.

20. The Defendants also submitted that allowing the Plaintiff to file additional documents would substantially prejudice their ability to respond, as it would introduce new evidence without prior notice. This is particularly concerning given that alterations to critical documents, such as the RIMs, were made unilaterally by a surveyor without involving all parties, in violation of the *Survey Act* and constitutional rights to fair administrative action.
21. Therefore, the Court must weigh the potential harm to the Defendants' ability to respond effectively and the delay this would cause, as established in *Raila Odinga & Others v IEBC & Others* (2013) eKLR.

Analysis and determination:

22. After considering the application, the response thereto and the submissions, the only issue that arises for determination is whether the Plaintiff/Applicant should be granted leave to file additional documents.
23. Order 2 rule 13 of the *Civil Procedure Rules* provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”
24. The Plaintiff/Applicant stated that the said documents were not in their possession when filing the amended Plaint and when given an opportunity to do so and that is why they were not filed. This case going by the date of filing is old and there have been several amendments of pleadings most of which were occasioned by the Applicant. In the intervening period, time was extended for parties to amend their pleadings and thereafter the matter was fixed for hearing.
25. Evidently, the parties had more than sufficient time to file their documents in support of their and to progress this matter, I made an order on 9th October 2024 after admitting documents filed late by the Plaintiff/Applicant that he was barred from further filings. Surely, order 11 of the *Civil Procedure Rules* was not made in vain and this court to exercise any more discretion in favour of the Applicant in reviewing the orders of 9th October 2024, he must demonstrate diligence.
26. There is no explanation given why the information/documents the Applicant want to introduce at this stage was not requested for at the time of filing of this suit and or the subsequent amendment of pleadings undertaken. The letter relied upon in bringing this application addressed to the Survey of Kenya is dated 14th October, 2024. No explanation is made for the delay in requesting for the documents listed in the said letter.
27. The application has not been amended and the documents asked for under paragraph 2 of the motion were not annexed. In the process the Applicant introduces by way of a further affidavit a letter from the survey of Kenya replying to their letter where the Director of Survey states that the documents were made accessible to the Plaintiff. The Applicant want this letter to form part of his evidence in lieu of the documents that are stated on the face of the application.
28. I hold that the present application was brought after undue delay and the information was readily available to the Plaintiff had he been diligent. The copies of documents requested to be introduced



were not annexed to the application hence there is no basis for the court to consider granting the order or otherwise. The Applicant urging the court that the court grants him leave to file the letter dated 14.11.2024 initially not mentioned in the prayers sought in the motion amounts to trial by ambush.

29. In the case of *Nicholas Kiptoo Arap Koriri Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR, the Supreme Court articulated the factors a court should consider in exercising its discretion to extend time as follows;

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;

30. It is therefore, my view that in the circumstances of this case, the application does not meet the above considerations. It is an abuse of the court process and there will be prejudice that will be occasioned to the Respondents in terms of delay in concluding the dispute and knowing what case to prepare for from a party who keeps filing documents every step of the way. The fact of opportunity of corresponding leave to file additional documents and or cross-examination should not be misused. In the upshot, the application dated 15th October 2024 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH APRIL, 2025.

A. OMOLLO

JUDGE

