



**Epusi v Orodi (Environment & Land Case 143 of 2014)
[2023] KEELC 21506 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 143 OF 2014
BN OLAO, J
NOVEMBER 15, 2023**

BETWEEN

RT. REV. DR. ZAKAYO ITEB EPUSI PLAINTIFF

AND

JUSTUS ETYANG' ORODI ALIAS ETYANG OKACHO DEFENDANT

RULING

1. This matter is part heard and the Plaintiff closed his case on 26th April 2023. Mrs Change counsel for the Defendant then sought an adjournment on the ground that she is new in the matter and needed to file further documents on behalf of the Defendant. Mr Murunga counsel for the Plaintiff had no objection and the hearing was adjourned to 26th July 2023.
2. By a Notice of Motion dated 25th July 2023 and filed under certificate of urgency, the Defendant/Applicant seeks the following orders:
 1. Spent
 2. That the Defendant/Applicant to be granted leave to enlarge time to comply with order 11 of the Civil Procedure Rules.
 3. That the Defendant/Applicant's further list of documents, the supplementary list of documents dated 22nd May 2023, 2nd June 2023 annexed with the documents thereof and the witnesses statement of Demitila Ikaddn Barasa dated 2nd June 2023 respectively which are already filed in Court and served upon the Plaintiff's counsel be deemed as duly and properly filed.
 4. That the costs of this application be provided for.
3. The application is premised on the provisions of Sections 1, 1A, 1B, 3, 3A, 63(e) and 95 of the *Civil Procedure Act*, Order 11 Rule 2(a), (b), (f), (n) and (o) of the *Civil Procedure Rules* and all other enabling



provisions of the law. It is premised on the grounds set out therein and supported by the affidavit of Mrs Elizabeth Chungwe counsel for the Defendant/Applicant.

4. The gist of the application is that Mrs Chungwe took over from the Defendant's/Applicant's case of Seth Ojienda & Company Advocates and following due diligence, she discovered that one Demitila Ikaan Barasa who is the Defendant's/Applicant's sister and who has been adversely mentioned by the Plaintiff is a potential witness whose evidence will assist this Court reach a suitable and meritorious verdict in the interest of justice. That the Defendant's/Applicant's counsel has filed statement but did not seek leave to file additional witness statements. The application is made in good faith and in the interest of justice.
5. Annexed to the application are the following documents:
 1. Statement of Demitila Ikaan Barasa dated 2nd June 2023.
 2. Defendant's supplementary list of documents dated 2nd June 2023 comprising:
 - a. Letter from area chief Amagoro Location dated 16th March 2023.
 - b. Death certificate for Yokosafati Otwane Ete.
 3. Defendant's further list of documents dated 22nd May 2023 comprising:
 - a. Minutes of Boundary dispute and report dated 7th November 1999.
 - b. Defendant's defence and counter-claim dated 13th July 2018.
 - c. Defendant's list of witnesses dated 15th July 2018.
 - d. Statement of Justus Etyang Orodhi alias Etyang Okacho dated 15th July 2018.
 - e. Defendant's list of documents dated 15th July 2018.
6. The application is opposed and the Plaintiff has filed a replying affidavit dated 9th August 2023 in which he deposed, inter alia, that the application is misconceived, bad in law and an afterthought which is extremely prejudicial to him. That although this suit was filed in 2014, it was not until 26th April 2023 that the hearing continued. That on 14th April 2021, the Defendant/Applicant's application dated 5th February 2018 seeking extension of time to file a statement of defence and relevant documents was allowed and he was granted 14 days to file and serve the same before pre-trial on 19th May 2021. However, he did not comply and the suit was set down for hearing on 3rd November 2021.
7. That the Defendant/Applicant has all along been adjourning this case for various reasons ranging from lack of instructions on the part of her counsel and also for reason of the Defendant/Applicant himself.
8. On 13th March 2023, the Defendant/Applicant's counsel sought an adjournment on account of being indisposed and also that she had not familiarized herself with the case. As the Plaintiff has prosecuted and closed his case on the basis of the issues framed and the documents filed, it will be prejudicial to him for new documents to be admitted at this state as he will not have an opportunity to respond to them in rebuttal. The interest of justice will best be served if the application is dismissed.
9. The application has been canvassed by way of written submissions filed by Mrs Chungwe instructed by the firm of Elizabeth Chungwe & Company Advocates for the Defendant/Applicant and by Mr Murunga instructed by the firm of J. O. Makali & Company Advocates for the Plaintiff.
10. I have considered the application, the rival affidavits and submissions of counsel.



11. What the Defendant/Applicant seeks is a further extension of time to file and serve the witness statement of Demitila Ikaan Barasa dated 2nd June 2023 and further supplementary list of documents dated 22nd May 2023 and 2nd June 2023. The explanation for seeking the leave is that counsel for the Defendant/Applicant is new in the matter having taken over the brief from a previous counsel. Counsel for the Defendant/Applicant has in her submissions cited among others the provisions of Sections 1A, 1B, 3, 63 and 95 of the *Civil Procedure Act* as a basis of the orders sought. Counsel from the Plaintiff has on the other hand submitted that the Defendant/Applicant is guilty of laches and is applying delaying gimmicks in order to further delay the disposal of this matter. That in any event, the provisions cited by the Defendant/Applicant also require a litigant to ensure that just disposal of disputes and having been given an opportunity to do earlier, the Defendant/Applicant has not explained the reasons for the delay.
12. It is true that the Defendant/Applicant has been accommodated before. Indeed following an application dated 5th February 2018, the Defendant/Applicant was allowed time to file his defence and documents out of time by Omollo J. It is also not in dispute that this is an old case having been filed way back in 2014 some 9 years ago. Article 159 2(b) of the *Constitution* demands that justice shall not be delayed while Sections 1A and 1B of the *Civil Procedure Act* requires the Court to determine disputes expeditiously and efficiently. It is not in dispute that Mrs Change only came on record for the Defendant/Applicant on 14th March 2023 following a Notice of Appointment of Advocate dated 10th March 2023. She has averred in her supporting affidavit that she discovered that documents, including the statement of one Demitila Ikaan Barasa who has been referred to by the Plaintiff, should be filed in the interest of justice. I have looked at the evidence of the Plaintiff as adduced on 26th April 2023 and it is correct that he referred to one Demitila ETE during his oral testimony. It has not been suggested that the documents which the Defendant/Applicant desires to file are neither relevant nor authentic. The lapse in not filing them was no doubt on the part of the previous counsel of the Defendant/Applicant. It has been stated before, and it bears repetition, that the mistake of counsel should not be visited on a party. In the case of *Tana And Athi Rivers Development Authority -V- Jeremiah Kimicho Mwakio & Others* 2015 eKLR the Court stated that:

“From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of counsel if it affects a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should be visited on a client, it should be remembered that counsel’s duty is not limited to his client, he has a corresponding duty to the Court in which he practices and even to the other side.”

The Court went on to add that:

“Under this duty counsel is unequivocally obliged to exercise candor and not and a litigant in submission of justice. Even though the determination of whether or not counsel has failed in his obligation is dependent on the circumstances of a case, as a custodian of justice, the Court must always stay alive to the interest of both parties. This is of paramount importance.”

On the issue of discretion to extent time, the Supreme Court in the case of *Nicholas Kiptoo arap Korir Salat v I.E.B.C* application NO. 16 of 2014 [2014 eKLR] set out the following principles to guide a Court:

1. Extension of time is not a right but an equitable remedy available only to a deserving party at the discretion of the Court.



2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court.
3. Extension of time is a consideration to be made on a case to case basis.
4. Where there is a delay, it should be explained to the satisfaction of the Court.
5. Whether extension of time will prejudice the other party.
6. Whether the application has been brought without delay.
7. Whether in certain cases, like election petitions, public interest should be considered for extending time.

The Plaintiff's main grievance in objecting to the application is that the Defendant/Applicant has previously been accommodated and has also been the beneficiary of several adjournments previously. Further, that the Plaintiff has already closed his case and will be prejudiced.

13. On the issue of the Defendant/Applicant's previous accommodation in this matter, his previous counsel was really to blame and on the issue of prejudice, the Plaintiff will have an opportunity to cross-examine the Defendant/Applicant on the documents sought to be filed some of which I notice have infact also been filed by the Plaintiff himself such as boundary dispute report on 7th November 1999 and correspondences. With regard to the statement of Demitila Ikaan Barasa, she will be available for cross-examination. On the issue of delay Mrs Chungu only came on record on 10th March 2023 and there is a letter dated 11th March 2023 in which she sought time to familiarize herself with the proceedings as she was un-well. The delay is explained and the Plaintiff can be compensated with costs.
14. Considering all the above and in the interest of justice, I am persuaded to allow the Notice of Motion dated 25th July 2023. I make the following orders:
 1. The Defendant/Applicant shall within 7 days of the delivery of this ruling serve upon the Plaintiff the list of documents and statement of Demtila Ikaan Barasa already filed herein as annexed to the application.
 2. The Plaintiff, if he so wishes, is at liberty to file and serve any further documents within 7 days of such service.
 3. The Defendant/Applicant shall meet the Plaintiff's costs of this application which is assessed at Kshs.10,000. The same to be paid within 7 days of this ruling.
 4. Mention on 22nd November 2023 for purposes of taking a hearing date.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 15TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

15 TH NOVEMBER 2023

