



Kariuki (Suing as the Administratrix of the Estate of Samuel Kariuki Waithiani (Deceased)) v Gichoni & 3 others (Environment & Land Case 53 of 2021) [2023] KEELC 22172 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 53 OF 2021
AE DENA, J
DECEMBER 11, 2023**

BETWEEN

**JOAN WANGARI KARIUKI PLAINTIFF
SUING AS THE ADMINISTRATRIX OF THE ESTATE OF SAMUEL KARIUKI
WAITHIANI (DECEASED)**

AND

**BEATRICE IGOKI GICHONI 1ST DEFENDANT
DAVID KARIUKI WAITHIANI 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. The application the subject of this ruling is dated 22/5/2023. The Plaintiff is seeking to reopen her case and introduce new evidence in her possession. The Notice of Motion thus seeks for the following verbatim prayers;
 1. Spent
 2. That the plaintiff/applicant be granted leave to file a further list of documents in view of the amended plaint dated 12/5/2021.
 3. That the plaintiff be granted leave to produce documents and give further evidence in view of the amended plaint dated 12/5/2021
 4. That there be stay of proceedings herein pending the hearing and determination of this application.



5. That the court be pleased to issue any further or further relief that this honorable court may deem fit and just to grant
6. That costs of this application be provided for.
2. The application is supported by grounds on its face and the affidavit by Joan Wangari Kariuki the applicant herein. The plaintiff/Applicant's case is that at the time of filing the instant suit, she was not in possession of copies of the 2nd Defendants Birth Certificate and National Identity card. However, after more effort and due diligence, the same are now within her possession. According to the Plaintiff, she has obtained the birth certificate for the 2nd defendant who is alleged to have been registered according to the adjudication records as one of the proprietors of Kwale/gandini/32 when he was hardly 5 years old.
3. The Plaintiff/Applicant is keen on being recalled as a witness in the suit in order to produce a further list of documents which includes the document mentioned herein above. It is noteworthy that this suit proceeded for hearing on 23/3/2023 where the Plaintiff testified and produced her list of documents.
4. The 1st and 2nd Defendants did not participate in the application.
5. In response to the application, the 4th Defendant filed a replying affidavit sworn by Wilmer Ambetsa Advocate. It is averred that the suit was commenced by a plaint dated 6/6/2005 and the same was amended on 2/3/2021 and further amended on 12/5/2021. That the plaintiff further filed a bundle of documents on 24/9/2014. That the pleadings were then closed and the parties held a pretrial conference after which the matter proceeded for hearing on 23/3/2023. The Plaintiff testified and produced her documents.
6. The Plaintiff's prayer to reopen her case and adduce further evidence is termed an afterthought and the court is urged not to allow the same. According to the deponent, since the plaintiff/applicant was able to obtain and produce a death certificate in her bundle of documents, then she had the ability to procure the birth certificate as both documents originate from the same office being the Ministry of Interior and Coordination of National Government State Department for Civil Registration [Births and Deaths Certificate Office]. That the Applicant has not demonstrated any sufficient reason to warrant grant of the orders sought and as such the application herein should be dismissed.
7. The application was dispensed by written submissions. The Plaintiffs/Applicants submissions are dated 12/7/2023 while the 4th Defendant's submissions are filed before court on 4/7/2023. The court has duly considered the same.

Determination

8. The Civil Procedure Rules of 2010 require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in Order 3, Order 7 and Order 11 of the Civil Procedure Rules. From this provisions of the law, one thing is certain, that pleadings ought to be filed and served within a stipulated period of time and before commencement of a suit in terms of hearing of the evidence by both parties. However, certain circumstances call for reopening of a case even after the same has been closed in order to accommodate further evidence/documents. The application at hand happens to fall under such occasions where the courts discretion is called upon.
9. I have perused the list of documents that is intended to be produced by the Plaintiff in the event that leave sought is granted by this honourable court. The gist of the suit as per the amended plaint on record is ownership of the suit property Kwale/Gandini/32. The Plaintiff's case is that together with her late husband they purchased the suit property from one Mwanjereko in year 1977. The land was then



- registered in the name of the deceased in trust for himself and the Plaintiff. That sometime in the year 2004 the Plaintiff conducted a search of the property and found it was registered in the name of the 1st Defendant and her son the 2nd defendant. The Plaintiff disputed the transfer to the said defendants and terms the same as being fraudulent since her deceased husband died on 13/10/1997 yet the title deed to the defendants appears to have been issued on 20/4/1999. The prayers sought are for injunction and cancellation of the title of the suit property from the names of the 1st and 2nd defendants and issuance of a new title in the names of the deceased as it earlier was.
10. The 1st Defendant on the other hand states that she was the wife to the deceased whom she got married to under customary law and cohabited with until his demise. That the suit property was indeed in the names of the deceased until 25/10/1995 when he recommended that the same be transferred to the 1st defendant and his son the 2nd Defendant.
 11. Having given a brief background of the suit, I will embark on making a determination on the application. In making a finding on whether or not to allow this application, I am guided by the holding in the case of *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, where the Court stated as hereunder;
 - a. The jurisdiction is a discretionary one and is to be exercised judiciously to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party.
 - b. Re-opening of the case is not intended to fill the gaps in the evidence of the applicant.
 - c. There is no inordinate and unexplained delay on part of the applicant.
 - d. That the evidence sought to be introduced could not have been obtained with reasonable diligence at the time of hearing of the case.
 - e. That the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not to be decisive.
 - f. The evidence must be apparently credible, though it need not to be incontrovertible.
 12. The question therefore is whether these additional documents and production of the same will cause any prejudice to the defendants if allowed on record. In answering this question, this court is mindful of the peculiar circumstances under which the need to have the documents filed arose. It is noted that the 1st and 2nd Defendants have not prosecuted their case and, in my view, the fact that the said parties have alleged ownership of the land by way of transfer from the deceased himself, and the Plaintiff having found that the transfer was effected after the death of the deceased and to an alleged minor, the circumstances necessitate the need for additional documents by the Plaintiff in cementing her claim. Moreover, the Defendants will have the opportunity to dispute this evidence by way of cross examination and in view of the fact that they are yet to prosecute their case. The assertions by the Plaintiff may be countered in their testimonies if they so wish. It is also noteworthy that there is no inordinate delay in bringing forth the application.
 13. The overriding objective of this court as stipulated under section 3 of the *Environment and Land Court Act* is to facilitate the just, expeditious, proportionate and accessible resolution of disputes. The court is enjoined by article 159[2][d] of the *Constitution* to do justice to all parties regardless of the procedural technicalities that might arise. See *Esther Wambui Njenga v Harrison Mwangi Nyota & 2 others* [2018] eKLR where the court stated that it is fair to allow each party to fully ventilate their case if for no other reason but so that the whole truth is revealed.



14. Further in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR Justice Munyao held as follows: -

This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159 (2) (d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document,”

15. The upshot is the application dated 23/5/2023 is hereby allowed as prayed save for the prayer to stay proceedings as the same has clearly been overtaken by events. There shall be no orders as to costs. The parties herein to schedule the matter for further hearing on priority as the suit is part heard.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2023.

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A.E DENA

JUDGE

Mr. Nyangoro for Plaintiff Applicant

Ms. Ambetsa for the 4th Defendant

No appearance for the rest of the parties

Mr. Dennis Mwakina Court Assistant

