



**Kensington Estates Limited v Lien Estate Developers Limited &  
11 others (Environment & Land Case 243 of 2020 & E21 of 2021  
(Consolidated)) [2022] KEELC 13471 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 243 OF 2020 & E21 OF 2021 (CONSOLIDATED)  
MAO ODENY, J  
OCTOBER 11, 2022**

**BETWEEN**

**KENSINGTON ESTATES LIMITED ..... PLAINTIFF**

**AND**

**LIEN ESTATE DEVELOPERS LIMITED & 11 OTHERS ..... DEFENDANT**

**RULING**

1. This ruling is in respect to two notices of motion dated February 7, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and one dated January 13, 2022 by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants sought that their amended statement of defence, witness statements, list and bundle of documents dated January 17, 2022 and filed on February 7, 2022 be deemed as properly filed. Similarly, the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants sought that their defence, list of witnesses and list and bundle of documents all dated December 15, 2021 and the witness statement dated December 9, 2021 be deemed as duly filed, served and properly on record.
3. Each of the applications was supported by the grounds listed thereon as well as the supporting affidavit of Hillary Cheboi sworn on February 7, 2022, and that of Denis Gatu Waithaka sworn on January 13, 2022 respectively.
4. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants' case that they were unable to file and serve their documents within time due to the fact that their previous advocates who had the custody of the ownership documents had inadvertently misplaced the same in the process of moving offices.
5. The applicant deponed that they had earlier filed some documents but they later filed an amended statement of defence, witness statement and a comprehensive list and bundle of documents which they pray to be deemed as properly filed and served.



6. The applicant further deponed that the plaintiff will suffer no prejudice if the application is allowed as prayed.
7. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants' case was that they only became aware of this suit sometimes in December 2021 when the 2<sup>nd</sup> defendant sought for a refund of the purchase price in respect of the properties MN/III/449, 450 and 451.
8. The applications were opposed through the replying affidavit sworn on March 1, 2022 by Lilian Opondo advocate on behalf of the plaintiff who deponed the defendants filed their defence and counterclaim dated January 21, 2021 on January 29, 2021.
9. Counsel deponed that before pleadings were closed, the plaintiff amended its plaint on April 19, 2021 and filed the same on May 7, 2021 which was served upon the defendants' advocates on May 18, 2021 and May 28, 2021 respectively That the defendants' advocates sought for leave to file an amended defence but failed to do so within the stipulated time.
10. In response to the second application, counsel deponed that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants were joined and individually served with the amended plaint through their respective email addresses on May 27, 2021 and on July 5, 2021 to Denis Gatu Waithaka via his mobile number. Further that service was effected by advertisement on October 29, 2021. Counsel therefore urged the court to dismiss the applications as they are meant to delay the hearing of this suit.
11. In rebuttal, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a supplementary affidavit sworn on March 9, 2022 by Joel Ashiachi Kusimba. Similarly, the 5<sup>th</sup> and, 6<sup>th</sup> and 7<sup>th</sup> defendants filed a supplementary affidavit sworn on March 7, 2022 by Denis Gatu Waithaka and urged the court to allow the applications as prayed.
12. Counsel agreed to canvas the applications vide written submissions which were duly filed.

**1<sup>st</sup> and 2<sup>nd</sup> defendants' submissions.**

13. Counsel reiterated the grounds on the face of the application together the contents of the supporting affidavit. Counsel submitted that Ms Lilian Opondo advocate for the plaintiff alleged at paragraph 11 of her affidavit that the documents which the defendants seek to be admitted are questionable and will require time to be interrogated and investigated thereby delaying the just and expeditious determination.
14. Mr Rapando submitted that it is settled law that an advocate should not swear an affidavit on contentious and unauthenticated matters in proceedings that they are in conduct of and relied on the case of *Yussuf Abdulgani V Fazal Garage [1953] 28 LRK 17* where court held that an advocate should not swear an affidavit on information supplied by his client if his client is available to swear his own affidavit.
15. Counsel further cited the case of [\*Republic v Attorney General \[sued for and on behalf of the ministry of lands\] & 2 others ex parte South and Central \[Thika\] Investments Limited \[2015\] eKLR.\*](#)
16. On the issue whether the court should admit the documents as requested Mr Rapando relied on the cases of [\*Marclus Kiringa Nimrod & another v Nesity Kuthii Justus & another \[2017\] eKLR;\*](#) and [\*Philip Keiptoo Chemwolo & another v Augustine Kubende \[1986\] eKLR\*](#) and further submitted that the plaintiff will not suffer any prejudice as if the documents are admitted they will have an opportunity to rebut them and cross examine.
17. Counsel relied on the case of [\*Joseph Mumbero Wanayama v Jared Wanjala Lyani & another \[2019\] eKLR\*](#) where the court admitted a statement which had been filed after trial had commenced.



18. Mr Rapando further submitted that by dint of order 2 rule 13 of the *Civil Procedure Rules*, the amended plaint was filed long after close of pleadings without leave of the court, hence it was underserving for the plaintiff to raise any objection to admission of the defendants' documents.
19. Counsel also invoked article 50(1) and 159(2)(d) of the *Constitution* of Kenya, and submitted that this court is enjoined to administer substantive justice without undue regard to procedural technicalities having in mind that the documents sought to be admitted will be relevant in the final, efficacious and effective determination of the dispute herein.

#### **5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> defendants' submissions**

20. Counsel for the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants submitted that order 6 rule 1 provides for the time within which a defendant should enter appearance while order 7 rule 1, the time within which a defence should be filed and served. Further, that interlocutory judgment cannot be entered in land matters as it was held in *Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR*.
21. Counsel further relied on the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & others [2013] eKLR* where the court held inter alia that deviation from and lapses in form and procedure which do not go to the jurisdiction of the court or the root of the dispute or which do not prejudice the other party should not be elevated to the level of a criminal offence attracting heavy punishment.
22. It was counsel's further submission that an omission to fully comply with a provision of rules is an irregularity which except in very clear cases, may be cured and cited the case of *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & another v Francis Bahati Diwani & 2 others [2014] eKLR* and urged the court to allow the application as prayed.

#### **Plaintiff's submissions.**

23. Counsel for the plaintiff submitted that the amended plaint was filed before the pleadings were closed hence leave of the court was not necessary and relied on the case of *Joseph Kipkirui Mutai v Richard Kibet & another [2015] eKLR* where the court held that from the provisions, pleadings close fourteen days after the service of the defence or last of the defences on the plaintiff.
24. On whether the defendants' documents should be admitted at this stage, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants having been served with summons and amended plaint on May 28, 2014, they were to file their defences within 14 days as required under order 7 rule 7 (1) of the *Civil Procedure Rules*. Further no proper reason has been advanced for failure to file the defences within the stipulated period.
25. Ms Opondo also submitted that the court has the discretion to allow the application but urged the court to condemn the defendants to pay costs if the court allows the application. Counsel relied on the case of *Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR*.

#### **Analysis and determination**

26. The issue for determination is whether the defendants' defences, list of documents and list of witnesses should be admitted and be deemed as properly filed.
27. In the case of *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*, the court set out the principles for extension of time as follows: -

' This being the first case in which this court is called upon to consider the principles for extension of time. We derive the following as the under-lying principles that a court should consider in exercise of such discretion:



1. 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.
  2. A party who seeks for extension of time has the burden of laying a basis to be satisfaction of the court.
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'
28. The defendants gave explanation as to why they did not file the defence and documents within the stipulated time. Order 8 rule 1 (1) and (2) of the *Civil Procedure Rules* provide as follows: -
1. A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.
  2. Where an amended plaint is served on a defendant
    - a. if he has already filed a defence, the defendant may amend his defence; and
    - b. the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.
29. Further, order 8 rules 3(1), 3 (5) and 5(1) of the Civil Procedure Rules stipulate as follows: -
- (3)(1) Subject to order 1, rules 9 and 10, order 24, rules 3, 4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.'
- 3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.'
- General power to amend
- 5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
30. The power of the court to allow amendments is intended to determine the substantive merits of the suit as was held in the case of *Ochieng & Others v First National Bank of Chicago Civil Appeal No 147 of 1991 (unreported)* as cited with approval in *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd*



[2018] eKLR. The court further stated that as a general rule however late the amendment is sought to be made should be allowed if made in good faith provided costs can compensate the other side.

31. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were expected to file their amended defences within 14 days from May 28, 2021 which they do not dispute but urges the court to allow the admission of the defence and documents to be deemed as properly filed.
32. I have considered the reasons given for the delay in filing the defence, list of documents and witness statements and find that the reasons are sufficient to benefit from the discretion of the court. There will be no prejudice caused to the plaintiff if the documents are admitted and deemed as properly filed. Not allowing the application will prolong the hearing of this case as parties may want to try their luck by filing numerous applications.
33. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants case is slightly different in that they had neither entered appearance nor filed any defence and or documents until January 13, 2022 when they filed their present application. Their reasons were that they only became aware of the suit in December 2021. The plaintiff contention is that the said defendants were duly served via email, mobile phone and by gazette notice on October 29, 2021.
34. Order 6 rule 1 of the Civil Procedure Rules prescribes the rules for entering appearance, while order 7 rule 1 provides for the time within which a defence should be filed. Order 6 rule 1 provides as follows: -  
Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.
35. Order 7 rule 1 reads: -  
Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.
36. It is on record that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants were properly served, but this court has the discretion to either allow or reject the applicant's application for leave to file the defence out of time, however the discretion must be exercised judiciously.
37. It is the duty of the court to do justice for both parties and such lapses in respect of time within which certain things are supposed to be done are not cast in stone as the court is also empowered to extend time if sufficient cause is established.
38. Order 5 rule 6 on enlargement of time provides as follows: -  
Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:  
Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.  
Having said that, I find that the two applications dated February 7, 2022 and January 13, 2022 have merit and they are allowed in the following terms: -
  1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' amended statement of defence, witness statement, list and bundle of documents dated January 17, 2022 and filed on February 7, 2022 are hereby deemed as properly filed.



2. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants' defence, list of witnesses and list and bundle of documents all dated December 15, 2012 and the witness statement dated December 9, 2021 are hereby deemed as duly filed, served and properly on record.
3. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants to pay the plaintiff thrown away costs of Kshs 20,000/ within the next 30 days from the date of this ruling failure to which the order lapses.
4. The plaintiff is hereby granted corresponding leave to file and serve a reply to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' amended defence and counterclaim and the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants' defence within 14 days from the date of this ruling.
5. Costs of both applications in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving order 21 [1] of the Civil Procedure Rules.

