



**Luseno & another (Suing as the Administrators of the Estate of Dorcas A. Luseno) v Wafula
(Suing as the Administrator of the Estate of Julius Wafula) & another (Environment
& Land Case 19B of 2024) [2025] KEELC 1258 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 19B OF 2024
CK NZILI, J
MARCH 12, 2025**

BETWEEN

**FREDRICK AVUGWI LUSENO 1ST PLAINTIFF
GEOFFREY AVUGWI LUSENO 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF DORCAS A.
LUSENO**

AND

**LUKA WEKESA WAFULA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF JULIUS WAFULA) 1ST DEFENDANT
SETTLEMENT FUND TRUSTEE 2ND DEFENDANT**

RULING

1. Before the court is an application dated 14/11/2024 in which the plaintiffs as applicants seek leave to file an amended plaint out of time. The reasons are contained on the face of the application and in a joint supporting affidavit of Fredrick Avugwi and Geoffrey Avugwi Luseno, sworn on 14/11/2024. It is averred that though the court granted leave to file an amended plaint within 30 days on 18/9/2024, unfortunately, the applicants were unable to seek and obtain some vital documents related to a transaction between the initial late plaintiff and the late defendant on time until 6/11/2024, when they filed the same, out of time. The applicants aver that their advocates on record had shared the draft with them for their input sometime in October 2024 and assumed that the lawyers would proceed to effect the filing, but unfortunately, proceeded on leave until 4/11/2024,
2. The applicants aver that they have been keen in prosecuting the suit as evidenced by obtaining Letters of Grant of Administration on 29/8/2018, filing Kakamega Citation Proceedings No. 6015 of 2021 leading to an order dated 23/8/2022; petitioning for grant of Letters of Administration Ad Litem



- in respect of the Estate of Julius Wafula; seeking for tracking of the lost court file, and subsequently making an application for the transfer of the suit leading to an order dated 4/3/2024. The applicants attached annexures FAL-1 - 5 to support the foregoing efforts.
3. Similarly, the applicants aver that the above efforts show that they have been zealous in prosecuting the suit and a mistake of counsel should not be visited upon them. The applicants urge the court to be guided by Article 159 of *the Constitution*, Order 50 Rule 6 of the Civil Procedure Rules; otherwise, justice should be served without undue regard to technicalities; the application was brought promptly and in good faith, and there will be no prejudice to the respondent and it is in the interest of justice to grant the reliefs sought.
 4. From the court record of 9/5/2024, by consent of the parties, the applicants were granted 21 days to file an amended pleadings and also include additional documents and witness statements. Upon service, the respondents were to file an amended defense within 14 days. Trial bundles were also to be filed within 10 days after the close of the pleadings. A mention date to confirm compliance was fixed for 18/9/2024. Come 18/9/2024, there was no compliance on the part of the applicants. More time was sought to comply. The court granted the applicants a last chance to do so within 30 days. A mention date was set for 7/11/2024 to confirm compliance. On 7/11/2024, the court was informed that the pleadings by the applicants had been filed on 6/11/2024, which was outside the time of 30 days issued on 18/9/2024. The respondents sought for the pleadings to be expunged from the court record. The court struck out the amended pleadings guided by the case law of Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 7 Others [2014] eKLR. Subsequently, the applicants were directed to file a formal application seeking leave to file the pleadings out of time. A mention date was fixed for 14/1/2025 to confirm compliance.
 5. Come 14/1/2025, there was no appearance on the part of the applicants. The court was informed by counsel for the respondents that no application had been filed or served upon them. The court was asked to give a date to confirm compliance with Order 11 of the Civil Procedure Rules. A date for 28/1/2025 was fixed. On 28/1/2025, the learned counsel for the applicants told the court that he had filed an application dated 14/11/2024. Learned counsel for the respondents indicated that she would be opposing the same.
 6. To date, no replying affidavit has been filed. It is also not clear if the applicants served the application upon the 2nd respondent.
 7. Extension of time is a discretionary power to be exercised by a court on sound reasons. It is not a right of a party. There must be reasons for the delay to comply. In Nicholas Arap Salat -vs- IEBC & Others (supra), the court set out the guiding principles on extension of time. It held that extension of time is only extended to a deserving party, after laying the basis to the satisfaction of the court, on a case-to-case basis. Further, the court said that there must be reasons for the delay; consideration must be had to the prejudice the opposite party is likely to suffer; the application must be made without undue delay and that public interest must also be considered.
 8. Order 8 Rule 3 of the Civil Procedure Rules provides that a court may, subject to Order 1 Rules 3, 4, 5, and 6 of the Civil Procedure Rules at any stage, and on such terms as the court may order or otherwise; as may be just and in such a manner as it may allow any party to amend his pleadings. The purpose of amendments is to bring the real question in controversy and to correct any defects or errors for the court to determine the matter effectually. It is trite law that amendment of pleadings should freely be allowed at any stage of the proceedings as long as the amendment does not cause prejudice or is injustice to the opposite party, which cannot be cured by way of costs. See Kassam -vs- Bank of Baroda (K) Ltd [2002] 1 KLR 294, and Daniel Ngetich & Another -vs- K-Rep Bank Ltd [2013] eKLR.



9. Any amendment of pleadings, unless time is set, has to be filed within 14 days of the order. Order 2 Rule 15 of the Civil Procedure Rules grants the court power to strike out any pleading that may prejudice, embarrass, or delay the fair trial of the action. In *D.T. Dobie Co. (K) Ltd -vs.- Joseph Mbaria Muchina & Another* [1980] eKLR, the court observed that courts should be reluctant to strike out suits unless it is plainly apparent that it cannot be cured through an amendment. The court said that if a suit shows a mere semblance of a cause of action, which may be cured through an amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness, without the full facts of the case before it.
10. In this suit, the applicants had more than four months to effect the amendment by 18/9/2024. The court extended the time with 30 days, which were to expire on 18/9/2024. The applicants failed to adhere to the timelines and waited until the eve of 7/11/2024 to file the amended plaint. The application before the court does not seek to review the orders made on 7/11/2024. The application does not seek to have any proposed amended plaint filed out of time. The proposed amended plaint was not attached to the supporting affidavit.
11. The nature of the amendments to be introduced has not been mentioned or explained at all in the body of the application. The court takes judicial notice that the primary plaint in this matter is dated 14/12/1984, for a cause of action pleaded to have occurred in 1972. The 1st and 2nd defendants' defenses are dated 10/5/1985 and 22/4/1985, and the reply to the defense is dated 4/6/1985.
12. The suit was also dismissed for non-prosecution on 28/7/2014. The applicants filed an application dated 9/2/2023 seeking, inter alia; the opening of a skeleton file, reinstatement of the suit, extension of time to substitute the initial plaintiff by the names of the legal administrators, and for the transfer of the suit. The application came up on 4/12/2023 when it was ordered to be served upon the defendants. On 14/3/2024, the same was compromised by granting prayers (1) and (e). Regarding prayer (f), Luka Wekesa Wafula was to substitute the 1st defendant.
13. The suit was thereafter transferred to this court after the consent was adopted as an order of the court. Parties were granted leave to file any supporting documents. The applicants, after the order was made, did not make the necessary amendments to the initial plaint to reflect the new parties to the suit. The record, therefore, shows that the applicants can only blame themselves for not complying with court directions. It cannot be true that the applicants were looking for additional documents and could, therefore, not meet the deadline to file an amended plaint since 14/3/2024, when leave to file additional pleadings and documents was first issued.
14. Strangely, the contents of paragraphs 2 and 7 of the supporting affidavit are not supported by evidence of the additional documents that were being sought, where they were being sought, when they were eventually obtained, and how vital they were, such that the amended plaint could not have been filed for four months until they were obtained.
15. Whereas a party may blame mistakes of counsel, a case belongs to a litigant and not their advocate. In *Savings & Loans Ltd -vs- Susan Wanjiru Muritu Milimani* HCC No. 397 of 2002, the court held that a litigant must pursue his or her case. In *Rajesh Rughani -vs- Fifty Investment Ltd & Another* [2016] eKLR, the court observed that it is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show that he did not condone or collude in the delay. Sufficient reason must, therefore, be given by a litigant for the court to exercise its discretion and reinstate or allow the amendment. It is not every case that a mistake of counsel enable a party to be granted for an extension of time. See *Edney Adaka Ismail -vs- Equity Bank Ltd* [2014] eKLR.



16. Article 159 of *the Constitution* is not a panacea for all ills or non-compliance with court directions and the set timelines. In *Nextgen Office Suites Ltd -vs- Kimani & Others* (Civil Appl. E162 of 2023 [2023]KECA 664 (KLR) (9th June 2023 (Ruling), the court cited *Raila Odinga & Others -vs- IEBC* [2013] eKLR and *Patricia Cherotich Sawe -vs- IEBC & Others* [2015] eKLR, that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural ills.
17. The upshot is that the application before the court must fail. It is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 12TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Laban

Miss Rotich for the plaintiff present

Miss Arunga for the defendant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

