



**Kiondo (Suing as the administrator of the Estate of John Kiondo Kuhuhu)
v Kambaa Tea Factory Limited & 2 others (Environment & Land Case
7 of 2020) [2024] KEELC 6812 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 7 OF 2020
BM EBOSO, J
OCTOBER 9, 2024**

BETWEEN

**MARY NJOKI KIONDO (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF JOHN KIONDO KUHUUHU) PLAINTIFF**

AND

KAMBAA TEA FACTORY LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU 2ND DEFENDANT

LAND REGISTRAR, KIAMBU 3RD DEFENDANT

RULING

1. Falling for determination in this ruling is the notice of motion dated 15/7/2024, brought by the County Government of Kiambu [the applicant]. Through the motion, the applicant seeks leave of the court to file and serve a supplementary list of documents containing the following documents to be relied on during further defence hearing of this case:
 - (i) Greencard for parcel number Githunguri/ Gathangari/T465;
 - (ii) Eviction Letter [Notice] dated 9/7/2024 by the County Executive Committee Member for Lands, Housing, Physical Planning, Municipal Administration and Urban Development [CECM - Lands];
 - (iii) Extract of the Minutes of the defunct County Council of Kiambu held on 26/5/1972; and
 - (iv) Map of Githunguri/ Gathangari/Sheet 6 [sic]. The application is premised on the grounds outlined in the motion, in the supporting affidavit, and in the further affidavit sworn by the applicant's advocate, David Mararo, on 15/6/2024 and 24/7/2024 respectively. The



application was canvassed through oral submissions tendered in the virtual open court on 25/7/2024.

2. The applicant's case is that the plaintiff's counsel raised pertinent issues in cross-examination during defence hearing, which issues can only be addressed by the applicant in re-examination and upon availing crucial documents contained in the proposed supplementary bundle. The applicant contends that the documents contained in the supplementary bundle became available to them recently. The applicant adds that no prejudice will be occasioned to the parties if leave is granted. The applicant states that it is in the interest of justice that the orders sought in the application be granted.
3. The plaintiff opposes the application through a replying affidavit sworn by her advocate, Mr Scott Sala, on 22/7/2024 and through oral submissions tendered in open court on 25/7/2024. The plaintiff's case is that the application is misconceived; has been made in bad faith and; is an abuse of the court process. The plaintiff further contends that she has already closed her case; the trial has already proceeded to defence hearing; and the 1st defendant has already closed its case. It is the plaintiff's case that when the matter came up for hearing on 4/7/2024, the applicant's witness, Mr. Patrick Mbari, testified and was cross-examined and what remained was the re-examination of the witness. The plaintiff adds that on 4/7/2024, she raised an objection to the admission of the applicant's list and bundle of documents on the ground that they were unprocedurally filed outside the stipulated timelines. It is the plaintiff's case that despite her objection, the Court exercised discretion and admitted the list and bundle of documents. The plaintiff adds that the applicant seeks to irregularly file additional list and bundle of documents at the stage of re-examination of its witness. The plaintiff's position is that the applicant's actions are mischievous, hence the application should not be allowed.
4. The plaintiff argues that the documents contained in the supplementary list of documents are questionable and involve a different property, Land Parcel No. Githunguri/ Gathangari/T.465. The plaintiff further argues that the applicant is under the mistaken belief that the estate of the late Kahuhu is interested in the aforementioned property. The plaintiff adds that even if the Court were to award her the said property, she would not enjoy quiet possession of the land because there would be a lot of community animosity against her and that the community would consider it theft of Land Parcel No. Githunguri/Gathangari/T.465 by her.
5. The plaintiff adds that the eviction notice by the CECM Lands dated 9/7/2024 is only intended to perpetuate fraud, adding that it seeks eviction of the family in possession of Land Parcel No. Githunguri/Gathangari/1084 to give way for compensation. The plaintiff further contends that the applicant was the one who moved the occupant of parcel number 1084 from parcel number 1082 to enable them utilize parcel number 1082 for compensation purposes. The plaintiff adds that the applicant admitted through their documents that there was double allocation of Land Parcel No. Githunguri/ Gathangari/1084. The plaintiff urges the court to reject the application.
6. The court has considered the application, the response to the application, and the parties' rival submissions. The single question to be determined in this ruling is whether the application satisfies the criteria upon which trial courts exercise jurisdiction to allow the filing of additional evidence after trial has commenced.
7. The relevant guiding principles on the above question were outlined by the Supreme Court of Kenya in *Raila Odinga & others vs IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR as follows:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or



the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

8. The application under consideration was brought after both the plaintiff and the 1st defendant had tendered their evidence and had closed their respective cases. Secondly, the application was brought after the applicant’s only witness had tendered his evidence-in-chief and had been cross-examined. All that remains is re-examination of the applicant’s only witness.
9. The applicant argues that through the documents contained in the supplementary list of documents it seeks to address the issues that were brought out during cross-examination. Clearly, this is intended to fill gaps created during cross-examination. This cannot be said to be a proper ground to warrant exercise of the jurisdiction to admit additional evidence at the tail–end of a trial.
10. The plaintiff pointed out that the applicant’s initial list and bundle of documents had been irregularly filed outside the stipulated timelines, noting that this Court exercised its discretion in favour of the applicant and admitted the applicant’s documents as evidence. It is also noted by the court that the letter dated 9/7/2024 which the applicant seeks to introduce was authored after the applicant’s witness had been cross-examined. Put differently, it is evidence that was authored after cross examination, deliberately to deal with issues that were raised in cross-examination. This kind of evidence cannot be admitted at this stage the trial.
11. Lastly, it is noted that the applicant has not satisfactorily explained why they were unable to file and serve the other documents contained in the supplementary list and bundle of documents, earlier.
12. Order 7 rule 5 of the *Civil Procedure Rules* provides as follows:

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

 - a. an affidavit under order 4 rule 1(2) where there is a counterclaim;
 - b. a list of witnesses to be called at the trial;
 - c. written statements signed by the witnesses except expert witnesses; and
 - d. copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.
13. The provisions of Order 7 of the *Civil Procedure Rules* are meant to prevent trial by ambush. The objective is to make clear to the opposing party the nature of evidence that he/she will face at trial.
14. Taking into account the above legal framework and circumstances, the court agrees with the plaintiff that she will be greatly prejudiced if the court were to admit a new list and bundle of documents at this stage. The plaintiff and the 1st defendant have already closed their respective cases and will not have



the opportunity to rebut the new evidence. It will be unfair to the plaintiff if this Court allowed the applicant to introduce new evidence at this stage.

15. For the above reasons, the court finds that the criteria for leave to file additional evidence after the commencement of trial has not been met by the applicant. The Court finds that the application dated 15/7/2024 lacks merit. Consequently, the application is rejected and dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF OCTOBER 2024

B M EBOSO

JUDGE

In the presence of:

Mr Sala for the Plaintiff

Court Assistant: Hinga

