



Muthoni (Suing as the legal representative of the Estate of Benjamin M’Mailutha Kailibi – Deceased) v Liungia & 2 others (Environment & Land Case E002 of 2021) [2023] KEELC 18770 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E002 OF 2021**

**CK YANO, J
JULY 12, 2023**

BETWEEN

CONSOLATA MUTHONI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN M’MAILUTHA KAILIBI – DECEASED) PLAINTIFF

AND

**CHARLES LIUNGIA 1ST DEFENDANT
JUSTUS BENJAMIN IBUI 2ND DEFENDANT
ATANASIO M’EKANDI M’MUKIRI 3RD DEFENDANT**

RULING

1. Before me is a notice of motion dated November 18, 2022 and expressed to be brought under section 1A, 1B 3A and 95 of the [Civil Procedure Act](#), Order 18 Rule 10, Order 51 Rule 1 of the [Civil Procedure Rules](#) and all enabling statutes.
2. By the said motion, the plaintiff/applicant seeks that she be allowed to adduce additional evidence in the suit limited to production of a Limited Grant of Letters of Administration Ad Litem and to be granted leave to file a further list of documents. The main grounds for seeking these orders are that the additional evidence is directly relevant in the matter before the court and is in the interest of justice. That the respondent will not be prejudiced in any way if the application is allowed and that the new evidence/document was not within the reach of the plaintiff hence warranting the filing of this application.
3. The application is supported by the affidavit of Consolata Muthoni, the applicant sworn on November 18, 2022. According to the applicant, the suit raises issues of law that can only be rebutted by adducing additional evidence in the form of the Limited Grant of Letters of administration Ad Litem failure to which the suit will be determined unjustly. The applicant has annexed a copy of the Limited Grant



of Letters of Administration Ad Litem issued on August 5, 2021 in Tigania PMC Misc succ cause No E026 of 2021. It is the applicant's position that the additional evidence she seeks to introduce addresses the respondent's claim that the applicant is not a legal representative of the estate of Benjamin M'Mailutah Kailibi (deceased). That the additional evidence is directly relevant to the matter before court and is not utilized for the purpose of removing lacunae and filling gaps in evidence and that the respondent will not be prejudiced in anyway if the application is allowed.

4. In their response, the respondents relied on the replying affidavits sworn by Gatari Ringera advocate for the 3rd respondent, and by Charles Luingia and Justus Benjamin Ibui the 1st and 2nd respondents on November 25, 2022. It is averred that there is absolutely no reason why the applicant did not file a list of documents including the documents sought to be introduced within the time granted by the court to do so. That the introduction of the said document will only serve to delay the hearing and determination of this matter.
5. It is the respondents' contention that the application as presented to court is not only strange but outrightly incompetent. That since January 11, 2021 when this originating summons was filed in court, the applicant represented herself as the legal representative of the estate of the late Benjamin M'Mailutha Kailibi (deceased) and in her affidavit in support had annexed a copy of a Limited Grant marked 'CMI 1' issued by the High Court in Meru on June 26, 2015 in succession cause No 196 of 2015.
6. The respondents pointed out that the matter came up for hearing on October 25, 2022 and the plaintiff produced the grant aforesaid as an exhibit and was cross examined after which she closed her case.
7. The respondents pointed out that the matter is due for defence hearing and the additional evidence is intended to remove lacunae and to fill gaps in the evidence by the plaintiff
8. The court heard the application on June 7, 2023 during which learned counsel Mr Wambua appeared for the applicant while learned counsel Mr Basilio Gitonga appeared for the 1st and 2nd respondents while learned counsel Mr Ringera appeared for the 3rd respondent. They basically relied entirely on the affidavits filed which they highlighted before court.
9. I have considered the application, the responses and the rival submissions. The issue for determination is whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-open a case and receive additional evidence.
10. It is not in dispute that the plaintiff testified on October 25, 2022 and closed her case. What is pending is the hearing of the defendants' case. The present application was brought before the hearing of the defendants' case commenced. Basically the plaintiff seeks to re-open her case and adduce additional evidence.
11. Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined and to receive additional evidence. It provides as follows-;

' 10. The court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit.'
12. The jurisdiction to re-open a case and receive additional evidence in a trial is a discretionary one and is to be exercised judiciously. In the case of *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo [2019] eKLR*, Ebose J. expressed himself persuasively as follows -;



‘Over the years, courts in the commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea of re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, 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 be decisive. Lastly the evidence must be apparently credible, though it need not be incontrovertible.’

13. These principles apply disjunctively as opposed to conjunctively depending on the facts and circumstances of each case. It is also clear that a party is not allowed to introduce new evidence to patch up weak points in his case and fill up gaps and omissions in the case, otherwise there would be no end in litigation if the rule were used for the purpose of allowing parties to make out a fresh case or improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.
14. In the present case, the plaintiff filed her originating summons on January 13, 2021 in which she stated that she was suing as a legal representative of the estate of Benjamin M’Mailutha Kailibi (deceased). In her affidavit in support of the originating summons, the plaintiff annexed a copy of Limited Grant issued in the High Court at Meru Probate and Administration cause No 196 of 2015. At the hearing, the plaintiff relied on and produced the said grant as an exhibit and was cross-examined on it. Thereafter, the plaintiff closed her case.
15. The plaintiff now seeks to re-open her case and introduce another Limited Grant of Letters of Administration Ad Litem issued on August 5, 2021 in PMC at Tigania Misc succession cause No E 026 of 2021. The applicant has not given any explanation as to why the document sought to be introduced was not filed earlier, particularly before the hearing date. In my view, there was inordinate and unexplained delay on part of the applicant. Further, the applicant has not demonstrated that the evidence she seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of her case. Moreover, the evidence which the applicant seeks to reintroduce is already a contested issue in the case and its introduction will greatly prejudice the respondents’ case. In my view, the application is intended to fill gaps in the evidence of the applicant. In addition, it is my opinion that the evidence is not such that, if admitted, it would probably have an important influence on the result of the case. This is so because the suit herein was filed on January 13, 2021 while the document sought to be introduced was allegedly issued on August 5, 2021 which is a period of about eight (8) months after the filing of the suit.
16. In view of the foregoing, I am inclined to refuse to exercise my discretion in favour of the applicant. Consequently, I find that the notice of motion dated November 18, 2022 is devoid of merit and the same is dismissed with costs to the respondents.
17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY, 2023

In the presence of

Court Assistant – V. Kiragu

Mwendwa for plaintiff/applicant



Ringera for 3rd defendant & holding brief for Basilio Gitonga for 1st and 2nd defendant

C.K YANO

JUDGE

