



Kinyanjui v Joreth Limited & 2 others (Environment & Land Case 1189 of 2014) [2022] KEELC 3184 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1189 OF 2014**

JO MBOYA, J

JUNE 2, 2022

BETWEEN

JOHN HARRISON KINYANJUI PLAINTIFF

AND

JORETH LIMITED 1ST DEFENDANT

FERDINAND MUNYIRI KAHARUKA 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

Introduction

1. Vide a Notice of Motion dated 4th March 2022, the 2nd Defendant/ Applicant approached the court seeking the following Reliefs:
 - a. Spent
 - b. That the Honourable Court be pleased to extend time within which the 2nd Defendant is to seek Leave to file his Further List and Bundle of Documents and Further List of Witnesses and Witness Statement out of time.
 - c. That subsequently the Honourable Court be pleased to grant the 2nd Defendant Leave to File a Further List and Bundle of Documents and a Further List of Witnesses and Witness Statements out of time.
 - d. That the Plaintiff be at liberty to recall PW1 who is the Plaintiff, to respond to any raised in the further Bundles of Documents and or by the Further Witnesses.
 - e. That the Costs of the Application be in the cause.



2. The subject Application is premised on the Grounds contained in the body thereof and same is further supported by the affidavit of the 2nd Defendant, namely, Ferdinand Munyiri Kaharuka sworn on the 4th March 2022.
3. Upon being served with the subject Application, the Plaintiff/Respondent filed a Replying Affidavit sworn on the 23rd March 2022 wherein same has opposed the application, based on various grounds.
4. On the other hand, the 1st and 3rd Defendants/Respondents herein have not filed any responses to the application. For clarity, the 1st Defendant/Respondent signified that same was indeed not opposed to the Application.

Deposition by the parties:

The Applicant's case:

5. Vide Supporting Affidavit sworn on the 4th March 2022, the 2nd Defendant/Applicant has averred that same was hitherto represented by a different advocate, who however failed to advise same on the filing of certain documents, as well as Witness Statements of additional witnesses.
6. Further, the deponent has averred that upon the appointment of his current advocate, same interrogated the Applicant's Defense as well as the various documentations that had been filed and thereafter the current advocate advised him that there was need to file further documents as well as additional witness statements.
7. On the other hand, the deponent has averred that following the advise by his current advocates, same proceeded to and filed various documents, including further list of documents and additional witness statements on the 16th February 2022.
8. Nevertheless, the deponent has further averred that the issue of the further documents and the additional witness statement, which were filed on the 16th February, albeit without leave, was the subject of deliberations before the court on the 24th February 2022, when counsel for the Plaintiff applied for same to be expunged.
9. It has further been averred that following the application by counsel for the Plaintiff/Respondent, the documents which had been hitherto been filed, albeit without Leave were thereafter struck out and/or expunged.
10. Be that as it may, the Applicant herein has further averred that following the striking out of the further documents and additional witness statements, which were filed without leave, same has therefore filed the current Application and is desirous to be granted leave so as to file and serve the further documents and additional witness statements.
11. Besides, the deponent has averred that given the nature of the Plaintiff's claim, the Further documents and additional witness statements, shall be of great assistance to court in the determination of the issues beforehand.
12. Other than the foregoing, the deponent has averred that the Plaintiff/Respondent shall not suffer any prejudice and in any event, the Plaintiff is at liberty to re-testify as well as to file further documents and additional witness statements, where appropriate.
13. Based on the foregoing, the 2nd Defendant/Applicant has therefore implored the Court to grant the subject application.



Response by the plaintiff/respondent:

14. Vide Replying Affidavit sworn on the 23rd March 2022, the Plaintiff/Respondent herein has opposed the subject application and same invites the court to dismiss the application.
15. For coherence, the Plaintiff has averred that following the filing of the subject suit and after prolonged delay, the matter finally took of and same was able to testify and thereafter same was cross examined and re-examined.
16. Further, the Plaintiff has averred that owing to the fact that same has since testified, the filling of further documents and additional witness statements, by and/or on behalf of the 2nd Defendant/Applicant shall therefore prejudice his case and occasion injustice unto to him.
17. On the other hand, the Plaintiff/Respondent has also averred that the 2nd Defendant/Applicant herein had hitherto filed the impugned documents and witness statements, albeit without leave and that when the said documents were served on him, same raised an objection on the 24th February 2022, seeking to have the impugned documents and witness statements to be struck out.
18. It is the Plaintiff's/Respondent's further averment that premised on the objection to the impugned documents, the court proceeded to and rendered a ruling whereupon the impugned documents and witness statements, which had been filed without leave were expunged and/or struck out from the court records.
19. In the premises, the Plaintiff has averred that the Ruling rendered by the court dealt with and determined the issue of the filing of the further documents and additional witness Statements.
20. In this regard, the Plaintiff has thus averred that the current Application is therefore Res-Judicata and thus barred by the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.
21. Finally, the Plaintiff has also averred that the grant of the subject application shall be prejudicial, insofar as the Plaintiff would not be able to amend his pleadings, in any manner or at all. In this regard, the Plaintiff has underscored the importance of timeliness in the mounting of applications and taking appropriate steps.

Submissions by the parties:

22. The subject Application came up for hearing on the 4th April 2022 when the Parties herein agreed to canvass and dispose of the Application by way of written submission. Consequently, directions were given relating to the timelines for the filing and exchange of the written submissions.
23. Pursuant to the foregoing, the Defendant/Applicant proceeded to and filed his written submissions on the 14th April 2022, while on the other hand, the Plaintiff/Respondent filed his written submissions on the 11th May 2022. For clarity, the two sets of written submissions are on record.
24. Briefly, the 2nd Defendant/Applicant has submitted that though the previous documents and additional witness statements, (which were filed without leave) were struck out, the court still has jurisdiction and discretion to entertain the subject Application and where appropriate to grant the leave sought.
25. Secondly, the Applicant has further submitted that what transpired before the court on the 24th February 2022, was the striking out of documents and witness statements which had been filed without leave. For clarity, the Applicant has contended that the court did not deal with and/or address a formal application for Leave to file further documents and additional witness statements.



26. In the premises, the Applicant has further submitted that the Doctrine of Res-judicata does not apply to the subject Application insofar as no previous application seeking similar orders had ever been filed and/or determined by a Court of Competent Jurisdiction.
27. Thirdly, the Applicant has also submitted that the filing of the Further documents and additional witness statements, which are meant to help the court to arrive at a just outcome, shall not prejudice the Plaintiff/Respondent herein.
28. For completeness, the Applicant has submitted that the Plaintiff/Respondent herein shall have the liberty to file further documents, additional witness statement and to re-testify, so as to respond to the new documents which have been filed.
29. Finally, the Applicant has submitted that the failure to file the further documents and additional witness statements occurred and/or arose because of the mistake of counsel, who had hitherto been retained and/or engaged by the Applicant. In this regard, the Applicant has contended that the mistake of counsel, namely, failure to file the said documents, ought not to be visited upon the Applicant.
30. In support of the foregoing submissions, the Applicant has relied on various decisions inter alia, *Barclays Bank of Kenya v Macktosh Nyaticha Nyamache t/a Westpark & Felisters Bochaberi Onkwari* Nairobi HCC E017 of 2019 and *Penuckle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR.
31. On his part, the Plaintiff has submitted that the issue of filing further Documents and additional witness statements was deliberated upon and/or dealt with by the Court on the 24th February 2022. In this regard, the Plaintiff has submitted that the court rendered a ruling whereby the documents and additional witness statements that had been filed Out of time without leave, were struck out and expunged from the court records.
32. Based on the proceedings and the ruling rendered on the 24th February 2022, the Plaintiff/Respondent has submitted that the current application is therefore Res-Judicata.
33. In support of the foregoing submissions, the Plaintiff has relied on the decision in the case of *Auto Springs Manufacturers Ltd v Damisha Buildings Contractors Ltd* (2017) eKLR and *John Florence Maritime Services Ltd & Another v cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR.
34. On the other hand, the Plaintiff has further submitted that the subject Application is bound to occasion and to subject him to undue prejudice and thereby violates his rights to Fair Trial as stipulated and/ or envisioned vide Article 25 (c) of *the Constitution* of Kenya 2010.
35. Thirdly, the Plaintiff has further submitted that previous documents filed by the applicant having been struck out and/or expunged vide ruling of this court, the Applicants only recourse was to pursue Review or an Appeal.
36. In support of the foregoing submissions, the Plaintiff has relied in the decision in the case of *Philemon Donny Opar v Orange Democratic Movement & 2 Others* (2013) eKLR and *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR.
37. Finally, the Plaintiff has submitted that the Applicant has not availed and/or supplied to the Court any credible explanation as to why the impugned documents and additional witness Statements were not filed in time or at all.



38. In this regard, the Plaintiff has thus implored the court to find and hold that no basis has been laid to warrant the grant of the leave sought and that the Application be Dismissed with Costs.

Issues for determination:

39. Having considered the Application dated the 4th March 2022, the Supporting Affidavit thereto and the Replying Affidavit by the Plaintiff and having similarly taken into account the written submissions filed by and/or on behalf of the Parties, the following issues are germane for determination;
- a. Whether the subject Application for Leave to file Further Documents and Additional Witness Statements out of time is Res-Judicata and thus barred vide Section 7 of the *Civil Procedure Act*.
 - b. Whether the Court has a Discretion to grant the Leave sought and/or extend time for filing of the Impugned documents by the Applicant.
 - c. Whether the Plaintiff/Respondent is disposed to suffer prejudice and/or Injustice, if the subject Application is allowed.

Analysis and determination:

Issue Number 1:

Whether the subject Application for Leave to file Further Documents and Additional witness statements out of time is Res-Judicata and barred vide Section 7 of the *Civil Procedure Act*.

40. The Plaintiff/Respondent has contended that the subject application by and/or at the instance of the 2nd Defendant/Applicant is Res-Judicata and thus barred by Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
41. Based on the foregoing contention, the Plaintiff/Respondent has thus sought that the Application be struck out.
42. Before venturing to consider and address the issue as to whether the current Application is Res-Judicata, it is imperative to understand and appreciate the import and tenor of the Doctrine of Res-judicata.
43. In the premises, the starting point is therefore a reproduction of the provisions Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, which provides as hereunder;

Res judicata:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation.

1. The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.



- (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation.

- (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.

- (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation.

- (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation.

- (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

44. Other than the provisions of Section 7 of the *Civil Procedure Act* (supra), is imperative to take note of the holding in the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd* (2017) eKLR, where the Court of Appeal held as herein;

‘Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in *Henderson v Henderson* (supra) stated:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

45. Besides, the tenets and scope of the Doctrine of Res-Judicata was also underscored by the Court of Appeal in the case *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR, where the court observed as hereunder;

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded



by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

46. Flowing from the observations in the foregoing decisions, it is imperative to note that prior to and before the invocation and reliance on the Doctrine of Res-judicata, it is incumbent upon the person raising and/or impleading the doctrine to show that a similar suit and/or application has hitherto been filed by the same Party and has been heard and determined by a Court of Competent Jurisdiction.
47. In respect of the subject matter, it therefore behooved the Plaintiff/Respondent to pin point and advert to a previous Application which had been filed by the 2nd Defendant/Applicant seeking leave to file further documents and additional witness statements and which had been heard and determined.
48. To my mind, what transpired on the 24th February 2022, was that an Objection and/or informal application was made by the Plaintiff herein, whereby same sought to strike out and/or expunge the further documents and additional witness statements, which had been filed, albeit without leave.
49. Upon hearing the objection by and/or at the instance of the Plaintiff/Respondent, the court found and held that the further documents and additional witness statements had been filed without leave and were thus a nullity.
50. Consequently, the court proceeded to and struck out and thereafter expunged the impugned documents and additional witness statements. However, it is imperative to recall that the Applicant herein did not mount any Application for granting of leave to file further documents and additional witness statements.
51. At any rate, while adjourning the subject matter on the 24th February 2022, the Court granted several orders, inter-alia liberty to the Applicant to file whatever application that same may deem appropriate and/or expedient.
52. In the circumstances, it is my finding and holding that no previous Application for leave to file further documents and additional witness statements had been filed and disposed of by a Court of competent jurisdiction, to warrant a verdict of Res-Judicata.
53. In a nutshell, it is my finding and holding that the plea of Res-Judicata does not avail in the instant situation.

Issue Number 2

Whether the Court has a Discretion to grant the Leave sought and/or extend time for filing of the Impugned Documents by the Applicant.

54. It is established that a Defendant who has been served with pleadings and summons to enter appearance is enjoined to enter appearance and thereafter to file the Statement of Defense and the attendant documents, if any, in line with Order 7 Rule 5 of the Civil Procedure Rules 2010.
55. Suffice it to note that part of the documents that a Defendant is obliged to file alongside the Statement of defense include the list of documents, bundle of documents, list of witness and witness statements, where appropriate.



56. However, where a Defendant or generally speaking a Party to the proceedings does not file any of the stipulated documents alongside the relevant pleadings, such a Party is at liberty to file and serve the omitted documents prior to and/or before the Case conference. See order 11 of the *Civil Procedure Rules, 2010*.
57. Nevertheless, time and again there are instances where Parties have discovered certain documents well beyond the Case Conference and after lapse of time for filing such documents and in such situations, Applications have been made for extension of time to file and serve the impugned documents.
58. Where such an Application is made, the Court is obligated to consider the Application and to determine whether same is just and ought to be allowed.
59. Suffice it to observe, that while considering an Application for extension of time within which to file lists of documents and additional witness statements or better still leave to do so, the court is called upon to taking into account various circumstances, inter-alia the stage where the hearing has reached and whether the adverse Party would be disposed to suffer prejudice or Injustice.
60. It is important to note that the power of the court to extent time is well stipulated under the law. In this regard, it is appropriate to refer to the provisions of Section 95 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides as hereunder;

95. Enlargement of time:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

61. Discernable from the provisions of Section 95 (supra), is the fact that the court has a discretion, albeit which ought to be exercised judiciously.
62. In respect of the subject matter, it is evident that the 2nd Defendant/ Applicant has since discovered further documents, which same deems important for the determination of the issue in dispute.
63. Besides, the same 2nd Defendant/Applicant has also come to the conclusion that there are additional witnesses, whose presence and testimony, would go along way in helping the Court to reach a just conclusion and determination.
64. Based on the foregoing, the 2nd Defendant/Applicant is therefore pleading with the court to exercise discretion and to grant the leave sought. In any event, it has been explained that the failure to file the impugned documents was a mistake on the part of the previous counsel.
65. In my humble view, the reasons availed and/or ventilated by the 2nd Defendant/Applicant constitute a Sufficient cause and/or basis, to warrant the grant and/ or exercise of Discretion.
66. In respect of the foregoing, I adopt and endorse the holding of the Court in the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, where the court pronounced itself thus:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.” (Emphasis added)



67. As concerns the factors and/or circumstances that an Applicant seeking leave and/or extension of time is called upon to establish, it is imperative to take cognizance of the decision of the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, where the Court underscored the following considerations as hereunder;
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 the 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.
68. In my humble view, the subject application was filed and/or lodged within seven days of the striking out of the previous documents and additional witness statements, which had hitherto been filed without leave. Consequently, there is no delay in the filing of the Application.

Issue Number 3

Whether the Plaintiff/Respondent is disposed to suffer prejudice and/or Injustice, if the subject Application is allowed.

69. Though the subject suit was filed in the year 2014, it is imperative to note that the formal hearing in respect of the subject matter only commenced on the 5th October 2021, when the Plaintiff/Respondent herein formally testified, was cross examined and thereafter re-examined.
70. Subsequently, the matter was adjourned at the request and/or instance of the Plaintiff, on various grounds including indisposition of some of the Plaintiff's witness.
71. However, what is important in respect of the subject matter is that the Plaintiff/Respondent has since testified and that there is an indication that four more witnesses are to be called by the Plaintiff. Clearly, the Plaintiff's/Respondent's case is far from being closed.
72. On the other hand, there is also the perspective of the Application which seeks that liberty be granted to the Plaintiff to file further documents and/or additional witness statements, if and where appropriate.
73. Besides, there is also the obvious choice, where the Plaintiff can choose to be recalled so as to answer to any new issue(s) arising from the further documents and/or witness statements.
74. Based on avenues available for the Plaintiff herein and taking into account the fact that the hearing of this matter has just commenced, coupled with the fact that only one witness has since testified, it is difficult to discern the nature of prejudice and/ or Injustice, if any, that the Plaintiff is disposed to suffer.



75. Nevertheless, if there be any prejudice that the Plaintiff is disposed to suffer, such prejudice is compensable by granting corresponding liberty for the Plaintiff to file further documents and additional witness statements.
76. Other than the foregoing, the other perspective of the prejudice that may arise may relate to the costs incurred in defending the application and in this case, such prejudice by the Plaintiff can be atoned for by way of costs.
77. In a nutshell, it is my finding and holding that no prejudice and/ or Injustice shall be occasioned to the Plaintiff herein, if liberty is granted to the 2nd Defendant/Applicant to file the Further documents and the additional witness statements.

Final Disposition :

78. In conclusion and having dealt with the issues outlined hereinbefore, the Order that commend itself to me is that the subject application be and is hereby allowed.
79. Consequently and in the premises, I now make the following Orders;
- i. Leave be and is hereby granted to the 2nd Defendant/Applicant to file and serve the Further Documents and Additional Witness Statements and same to be filed and served within 2 days from the date herein.
 - ii. The Plaintiff/Respondent be and is hereby granted liberty to file and serve Further Documents and Additional Witness Statements, if any, within 3 days from the date of service by the 2nd Defendants/Applicant.
 - iii. Costs of the Application assessed and certified in the sum of Kshs.15, 000/= Only, to be paid to the Plaintiff/Respondent and same be paid within 7 days.
 - iv. The Substantive hearing of the matter herein shall proceed on the 8th June 2022 as hitherto scheduled vide the proceedings of 24th February 2022.
80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Maina Makome for the Plaintiff /Respondent.

Mr. Gachuhi for the 2ndDefendant/ Applicant.

Mrs Wangui Koech for the 1stDefendant.

