



**Govedi v Chege & 4 others (Environment and Land Case Civil Suit
18 of 2018) [2022] KEELC 3354 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 18 OF 2018**

JO MBOYA, J

JULY 7, 2022

BETWEEN

FRIDAH AFANDI GOVEDI APPLICANT

AND

STANLEY MUREGI CHEGE 1ST RESPONDENT

ELIZABETH AKINYI ALUOCHI 2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

SAVINGS AND LOAN KENYA LIMITED 4TH RESPONDENT

IRENE OKOTH ODUDO 5TH RESPONDENT

RULING

1. Vide the notice of motion application dated the June 3, 2022, the plaintiff/applicant herein has approached the court seeking for the following Reliefs;
 - I.(Spent).
 - II. Pending hearing and determination of this Application, the hearing of the Substantive Suit be and is hereby Stayed.
 - III. That Leave be granted to the Plaintiff/Applicant to amend her Complaint, filed herein dated 8th march 2016, in terms as indicated in red in the Draft Amended Complaint, annexed hereto.
 - IV. That upon Leave to Amend being granted, the Draft Amended Complaint be confirmed as deemed to be the Amended Complaint, duly dated, filed and served upon all the Parties hereto on the date the leave to amend shall be granted; subject, however, upon the Plaintiff/Applicant paying the requisite prescribed court filing fees in respect of the amended complaint.



- V. That the Honourable Court be pleased to issue such further or other orders and or directions as the court may deem fit and necessary to grant, including Leave of the Court for the Plaintiff to re-open her case and testify further by herself and/or Additional Witnesses owing to the Amended Plaint, in the circumstances and in the Interest of Justice and expeditious disposal of this case.
- VI. That costs of this Application be provided for.
2. The subject Application is premised and/or anchored on the various Grounds which are enumerated at the foot thereof and same is further supported by the affidavit of one, Dr. Fridah Afandi Govedi, namely, the Plaintiff/Applicant herein, sworn on the 3rd June 2022 and in respect of which the Plaintiff has made several averments pertaining to and/or concerning the subject Application.
 3. Upon being served with the subject Application, the 3rd, 4th and 5th Defendant/Respondents filed Ground of Opposition dated 20th June 2022. However, the 1st Defendant/Respondent did not file any Response to the Application.
 4. On the other hand, it is also appropriate to state that though the 2nd Defendant herein was a Party to the suit from the onset, same was however removed from the proceedings pursuant to the orders of the court.

Deposition by the Parties:

Plaintiff's/ Applicant's case:

5. Vide Supporting affidavit sworn on the June 3, 2022, the plaintiff/applicant herein, hereinafter referred to as the deponent, has averred that same filed and/or lodged the subject suit vide plaint dated the March 8, 2016.
6. On the other hand, the deponent has further averred that at the inception of the filing of the subject suit, same was represented by a different law firm, who were responsible for the crafting of the plaint dated the March 8, 2016.
7. Nevertheless, the deponent has continued to and averred that in the course of time, same changed advocates and engaged the current advocates, who have since detected some errors and/or omissions in the Plaint dated the 8th March 2016.
8. Other than the foregoing, the deponent has further averred that following the joinder of the 5th Defendant as a Party to the subject suit, certain new facts and/or issues have arisen out of the Pleadings and witness statement filed on behalf of the 5th Defendant/Respondent.
9. Besides, it has also been averred that the 5th Defendant/Respondent herein was aware and/or knowledgeable of the fact that the suit property was the Matrimonial Property belonging to the Plaintiff and the 1st Defendant, respectively, but the 5th Defendant proceeded to and engaged in the sale transaction without cross checking the facts with the Deponent.
10. Nevertheless, the deponent has also averred that though the 2nd Defendant herein was removed from the proceedings, same is however a necessary Party as pertains to the issues in dispute and thus ought to be compelled to testify as a Witness.
11. Further, the deponent has also averred that the 3rd and 4th Defendants/Respondents herein also failed to exercise due diligent prior to and before engaging into a transaction leading to the Charge of the



- Property, subsequent Discharge of same and facilitating the release of the title documents to and in favor of the 1st and 5th Defendants/Respondents.
12. At any rate, the deponent has averred that the suit property, which was illegally sold by the 1st Defendant/Respondent to and in favor of the 5th Defendant/Respondent was and remains a Matrimonial property belonging to the Plaintiff and the 1st Defendant.
 13. Based on the foregoing, the deponent has averred that same has a stake and/or interests in respect of the suit Property, including benefiting from the rental income arising from the suit property.
 14. Consequently, the deponent has averred that it would be appropriate and expedient to allow her to amend the Plaint dated the 8th March 2016 and to introduce further reliefs and/or claims, inter-alia a determination as to whether the suit property was/is a Matrimonial property and whether same is lawfully entitled to the income arising therefrom.
 15. Other than the foregoing, the deponent is also keen to ventilate and/or have the court determine the fact that same is still a Lawful wife by dint of a Marriage solemnized on the 14th April 2012.
 16. In a nutshell, the Plaintiff/Applicant contends that there is sufficient basis, to warrant the grant of the subject Application and essentially to allow the intended amendment, in terms of the Draft amended Plaint.

Response by the 3rd and 4th Defendants'/respondents':

17. The 3rd and 4th Defendants' herein have opposed the subject Application vide Grounds of opposition dated the 20th June 2022. For clarity, the Grounds relied upon are as hereunder;
 - i. The Application dated the 3rd June 2022, lacks merits and is tantamount to an abuse of the Due Process of the court.
 - ii. The Application is a waste of Judicial time with a wave of Further delaying on the matter.
 - iii. The Firm of Munika & Company Advocates have been on record for the Plaintiff since the 5th July 2017 replacing the firm of Wafula Simiyu & Company advocates. The Plaintiff cannot now claim that the new representation has culminated into the Discovery of New Issues and thus the need for amendment, insofar as the the firm of M/S Munikah & Company Advocates have been on record for the Plaintiff for more than 5 years.
 - iv. The Matter came up on the 22nd September 2020 wherein the Plaintiff testified and thereafter the Plaintiff's case was closed. It is thus absurd for the Plaintiff to seek to have the Plaintiff's case to reopen and further call additional witness after the same was closed and the matter is now scheduled on the hearing of the Defence Case.
 - v. The Plaintiff has not demonstrated that it has discovered any New and Important matters and/or Evidence to warrant the amendment of the Plaint.
 - vi. The Plaintiff is abusing the Due Process Of the Court through the filing of Multiplicity of Applications and employing delaying tactics.
 - vii. On the consideration of the facts and the law, the Plaintiff's/ Applicant's Application dated the 3rd June 2022 is vexatious, incompetent and unfounded and an abuse of the Court Process.



Response by the 5th Defendant/respondent:

18. The 5th Defendant/Respondent also filed Ground of opposition dated the 20th June 2022 and which raised similar issues and/or grounds as the ones ventilated by and/ or on behalf of the 3rd and 4th Defendants.
19. In the premises, it is not appropriate to reproduce same, but suffice it to state that the Grounds replicate the ones that have been enumerated in the preceding paragraph.

Submissions by the Parties':

20. The subject Application came up for hearing on the 2nd July 2022, and the same was canvassed vide Oral submissions.
21. On behalf of the Plaintiff/Applicant, Learned counsel submitted that the Court has a wide and unfettered discretion to allow an Application for amendment of pleadings, irrespective of age of the proceedings. For clarity, counsel added that an amendment can be allowed and/or ordered even after the close of the Defense case.
22. Secondly, Learned Counsel for the Plaintiff further submitted that new Issues and/or Evidence have arisen after the filing of the Original Plaintiff, namely, the Plaintiff dated the 8th March 2016. Consequently, there is need for the court to allow the Plaintiff to implead the events arising out of the new evidence.
23. Thirdly, the Counsel for the Plaintiff has further submitted that some of the issues that underline the Application for amendment also came to light after the 2nd Defendant filed an Application seeking for the striking out and/or expunction of her name from the subject Proceedings.
24. Further, counsel for the Plaintiff/Applicant has submitted that the 1st Defendant herein had initially pretended and contended that the 2nd Defendant was his lawful spouse. However, it has been submitted that the position turned out to be erroneous and false, when the 2nd Defendant filed the Application dated 21st April 2021, leading to the striking out of her name from the Proceedings.
25. Based on the foregoing, counsel for the Plaintiff/Applicant has therefore submitted that these new Events and/or Occurrence, including the application which was filed by the 2nd Defendant/Respondent, have generated circumstances, which have necessitated the Application for Leave to amend.
26. In support of the foregoing submissions, Learned counsel for the Plaintiff/Applicant referred the Court to various decisions, inter-alia, *St. Patricks' Hill School & another versus Bank of Africa* (2018)eKLR and *Central Bank of Kenya versus Trust Bank Ltd, In Liquidation* (2000)eKLR.
27. On behalf of the 1st Defendant/Respondent, it was submitted that the subject Application is replete and/or reeks of mala-fides. In any event, it was submitted that the Application is a delaying tactic by and/or on behalf of the Plaintiff/Applicant to delay, obstruct and/or defeat the Cause of justice.
28. Further, it was submitted that the issues which the Plaintiff/Applicant has enumerated and/or alluded to at the foot of the subject Application, inter-alia, the fact that the 2nd Defendant was not a lawful spouse of the 1st Defendant, is an issue that was well within the knowledge of the Plaintiff/Applicant from the onset and/or inception of the suit.
29. On the other hand, it was also submitted that the issue as to whether or not the 2nd Defendant was married to the 1st Defendant, was also exhaustively dealt with and/or canvassed during the plenary



hearing and that the Plaintiff/Applicant duly addressed and/or attended to the said issues while giving her Evidence.

30. On the other hand, it was further submitted that the facts pertaining to the Sale and/or alienation of the suit property were also within the knowledge of the Plaintiff/Applicant from the onset and it is because of the said transactions that the Plaintiff/Applicant was able to sue and/or joined the 3rd and 4th Defendants/Respondents in respect of the subject matter.
31. Notwithstanding the foregoing, Learned Counsel for the 1st Defendant further submitted that the issues that are alleged to have arisen following the filing of pleadings and witness statement by and/or on behalf of the 5th Defendant, were also known to the Plaintiff/Applicant up to and including the 22nd September 2020, when same testified and closed her case.
32. In the premises, counsel has submitted that the current Application by and/or on behalf off the Plaintiff/Applicant is a gimmick, meant to facilitate the filling of gaps and/or loopholes that became apparent in the Plaintiffs'/Applicant's case during Cross examination.
33. Other than the foregoing, Counsel for the 1st Defendant further submitted that the intended amendment is calculated and/or bound to introduce a New cause of action, which is different from and at variance with the cause of action hitherto pleaded and relied upon by the Plaintiff/Applicant.
34. Be that as it may, counsel has also submitted that the intended amendment, which shall introduce a New cause of action, if allowed shall occasion a roll-back of time to the pre-trial stage, whereby Parties shall be compelled to file new/further pleadings and therefore defeat the entire proceedings that have hitherto been taken in respect of the subject matter.
35. In the premises, Learned counsel has submitted that the intended amendment shall therefore occasion grave injustice and prejudice, incapable of being atoned for vide costs.
36. Consequently, counsel for the 1st Defendant has submitted that the subject Application ought not to be allowed.
37. In support of the foregoing submissions, counsel referred the court to the decision in the case of *Samuel Kitilewa versus Housing Finance Company Ltd* (2015)eKLR.
38. On behalf of the 3rd and 4th Defendants/Respondents, it was submitted that the subject Application has been made with unreasonable and in ordinate delay, which has not been explained by the Plaintiff/Applicant.
39. For clarity, Learned Counsel submitted that the issues that are being relied upon and which have been enumerated vide the Grounds at the foot of the Application and the Supporting Affidavit, were issues that were well known to the Plaintiff/Applicant right from the onset and/ or inception of the subject suit.
40. Secondly, it has been submitted that the firm of M/s Munikah & Company Advocates were instructed and/or engaged over and in respect of the subject matter on the 5th July 2017 and hence same became privy to and or aware of the facts and the issues being alluded to, right from the time of his engagement.
41. Consequently, Counsel has submitted that the issue of Change of Advocate, which is one of the reasons being ventilated to necessitate the amendment, does not lie and or is otherwise an afterthought.
42. On the other hand, counsel has also submitted that the entire corpus of issues being raised by the Plaintiff/Applicant are factual issues that were dealt with, spoken to and/or addressed during the hearing of the Plaintiff's case and same are duly contained in the proceedings of the court.



43. On the other hand, counsel has also submitted that the Plaintiff/Applicant had hitherto filed and/or lodged a previous application dated the 19th November 2020, and which application was premised and/or anchored on the introduction of the same set of issues, which are now alluded to, inter-alia, the issue of the Marriage between the Plaintiff/Applicant and the 1st Defendant, as well as the alleged illegal sale of the suit property without the consent of the Plaintiff/Applicant.
44. In the premises, Counsel for the 3rd and 4th Defendants has submitted that the current Application is therefore barred by the Doctrine of Res-Judicata and hence, same ought not to be allowed.
45. Finally, counsel for the 3rd and 4th Defendants has also submitted that the proposed amendments are so massive and that same go to the root of the cause of action. In this regard, it is contended that the proposed amendments shall not only alter the character of the suit, but shall lead to the introduction of a completely new cause of action, part of which shall be beyond the Jurisdictional remit of this Court.
46. On behalf of the 5th Defendant, it was submitted that the grant and/or refusal of an Application for Amendment is an Equitable Discretion and therefore prior to and/or before allowing such an Application, the court is enjoined to take into account the conduct of the Plaintiff/Applicant.
47. In respect of the subject matter, it was submitted that both the Plaintiff/Applicant and her advocates on record, have exhibited a conduct that is geared towards perpetually delaying and/or obstructing the hearing and conclusion of the subject matter.
48. On the other hand, it was submitted that the Plaintiff/Applicant and her advocates have also treated the court to unnecessary theatrics and hence the conduct of the Plaintiff/Applicant militates against the exercise of the Equitable Discretion.
49. Secondly, counsel also repeated and reiterated that the issue being alluded to were known to the Plaintiff/Applicant and indeed same formed part and parcel of the cross examination and the proceedings that took place on the 20th September 2020, when the Plaintiff testified and thereafter closed her case.
50. Finally, counsel also contended that the subject Application has been made with unreasonable and inordinate delay, on the part of the Plaintiff/Applicant. Consequently, Counsel invited the court to find and hold that the subject application is defeated by the Doctrine of Laches.
51. In support of the foregoing submissions, Learned Counsel invited the court to take cognizance of the decision in the case of *Rubina Hamed versus Guardian Bank ltd* (2019)eKLR.

Issues for Determination:

52. Having reviewed the subject Application, the Affidavit in support thereof and the Responses filed in opposition thereto; and having considered the oral submissions that were ventilated by and/or on behalf of the Parties herein, the following issues arise and are thus germane for determination;
 - I. Whether the subject Application has been made and/or mounted with unreasonable and inordinate delay and in any event, whether the delay has been explained.
 - II. Whether the Proposed Amendment shall alter and/or Change the Character of the Proceedings and if so, whether the Defendants shall be Prejudiced.
 - III. Whether the subject Application reeks of and/or is informed by mala fides on the part of the Plaintiff and Counsel.



- IV. Whether the Defendants herein shall be disposed to suffer prejudice and/or grave injustice, not compensable in monetary terms.

Analysis and Determination

Issue Number 1: Whether the subject Application has been made and/or mounted with Unreasonable and Inordinate delay and in any event, whether the delay has been explained.

53. It is common ground that the Plaintiff/Applicant herein had previously engaged and/or retained the firm of m/s Wafula Simiyu and Company Advocates to act for her over and in respect of the subject matter.
54. It is also expedient to note that pursuant to the instructions issued to and in favor of the firm of M/s Wafula Simiyu & Co Advocates, same proceeded to and indeed crafted the Complaint dated the 8th March 2016, which was thereafter filed and/or lodged before the court.
55. Be that as it may, on or about, the 5th July 2017, the Plaintiff/Applicant herein exercised her constitutional right, culminating into the appointment of the current firm of Advocate, namely, M/s Munikah & Co, Advocates who thereafter filed the Notice of Change of Advocates.
56. It has been necessary to trace the foregoing background, because one of the grounds and/or reasons that has been alluded to anchor the application for amendment, is that the Plaintiff's/Applicant's new advocates have discerned certain errors and /or omissions in the Complaint dated the 8th March 2016 and hence the need for amendment.
57. Certainly, if there were any errors and/or omissions in the Complaint dated the 8th March 2016, that would have required correction and/or addition vide amendment, same would have been discernable to the current Advocates right from the point in time when same took over the conduct of the subject matter.
58. In any event, it is worthy to recall, that upon taking over the conduct of the subject matter, the current Advocates on record, prepared the suit and thereafter caused same to be listed for hearing. For clarity, it is imperative to state that the matter herein came up for hearing on the 20th September 2020, when the Plaintiff's case was heard and closed.
59. For coherence, by the time the suit herein, was listed for hearing and indeed proceeded for Hearing of the Plaintiff's case upto and including the Close of same, the current Advocates for the Plaintiff had been on record in the matter for a period of over 3 years and Two Months.
60. At any rate, it is also expedient to recall that the issues that are being alluded at the foot of the current Application, as well as the depositions contained in the Supporting Affidavit, are contained in various Documents, which the Plaintiff/Applicant herein produced and tendered in evidence during her Evidence-in-Chief.
61. Other than the foregoing, the Plaintiff/Applicant herein also filed an Application dated the 19th November 2020, wherein same sought, inter-alia, Leave to tender further Documentary exhibits, which had hitherto been declined by the court.
62. Suffice it to state, that the further Documentary Exhibits, which the Plaintiff/Applicant sought to tender, vide the Application dated 19th November 2020, included the information which is now sought to be introduced vide the current amendment.
63. From the record of the court, it is evident and/or apparent that the application dated the 19th November 2020, which sought for liberty to the Plaintiff/Applicant to produce the further



documentary exhibits, was allowed by consent and the impugned Documentary Exhibits, were duly admitted in evidence and thus forms part of the exhibits tendered by the Plaintiff/Applicant.

64. It is also imperative to note that prior to and/or before recording a consent allowing the admission of the Documentary evidence as exhibits on behalf of the Plaintiff/Applicant, Counsel for the 1st, 3rd, 4th and 5th Defendants/Respondents observed that the issue of Marriage between the Plaintiff/Applicant and the 1st Defendant was not an issue in dispute in respect of this matter.
65. By extension, the Plaintiff/Applicant was herself aware of the factual situation pertaining to and/or concerning whether the 2nd Defendant was married to the 1st Defendant/Respondent.
66. Having made the foregoing observation, the critical question to determine is why the subject application, which revolves around issues that were known to the Plaintiff/Applicant, was not filed timeously and with Due promptitude.
67. Before endeavoring to answer the critical question which has been posed vide the preceding paragraph, it is imperative to interrogate the supporting affidavit sworn by the Plaintiff/Applicant, to ascertain whether any reason and/or explanation has been proffered and/or availed.
68. Unfortunately, the Plaintiff/Applicant herein has neither stated nor ventilated any explanation as to why it has taken her more than six (6) years from the inception of the subject matter, before coming up with the subject application, even though the factual issues raised were within her knowledge from the onset.
69. Nevertheless, even assuming that the reason underlying the filing of the Application for amendment were created vide the pleadings and witness statement filed by and/or on behalf of the 5th Defendant/Respondent, it is evident that the 5th Defendant/Respondent was joined as a Party in respect of the subject matter long before the matter came up for Hearing and/ or before, the Plaintiff testified in the matter.
70. In the premises, it is safe and sound to state that by the time the Plaintiff/Applicant testified and closed her case on the 20th September 2020, same was aware and/or knowledgeable of the Pleadings and Witness Statement by the 5th Defendant.
71. In the circumstances, there is no gainsaying that the subject Application has been made and/or mounted with unreasonable and inordinate delay, which delay has neither been explained nor accounted for, in any manner whatsoever.
72. Consequently, it is my finding and holding that the Plaintiff/Applicant, has not approached the court timeously and with due promptitude. In this regard, the Application by and/or on behalf of the Plaintiff/Applicant is obviously defeated by the Doctrine of Laches.
73. To underscore the necessity that an Application for Amendment ought to be filed and/or lodged timeously and without inordinate delay, it is appropriate to take cognizance of and restate the holding of the Court of Appeal vide the decision in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, where the Court of Appeal stated as hereunder;

The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's



Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.” (underline supplied)

74. Premised on the fact that the issues alluded to at the foot of the current application were well known to the Plaintiff/applicant, even prior to the tendering of her evidence and the close of her case, I come to the conclusion that the subject application has not been made without undue delay.
75. Consequently, the subject Application would have fallen in the first hurdle and without need of venturing to address the remainder issues. However, because of the peculiarity of the subject matter, it is prudent to venture to and address the outstanding issues.

Issue Number 2

Whether the proposed Amendment shall alter and/or change the character of the proceedings and if so, whether the Defendants' shall suffer an Injustice.

76. Vide the Grounds at the foot of the Application as the averments contained in the supporting affidavit, the Plaintiff/Applicant herein is keen to amend the Plaint and introduce the issue pertaining to her Marriage to the 1st Defendant herein, which is stated to have been entered into and/or contracted on the 14th April 2012.
77. Other than the foregoing, the Plaintiff/Applicant is also keen to propagate the claim that the suit property which was sold and/or disposed of by the 1st Defendant, was indeed Matrimonial property and thus same is entitled to benefit from the income derivable from the said property.
78. Other than the foregoing, the Plaintiff/Applicant is also keen to introduced a raft of new causes of action, which are informed by more than 82 proposed additional paragraphs underlining the intended amendment.
79. To my mind, the intended amendment whose particulars are reflected and/or contained in the Body of the proposed amended Plaint, which has been availed to the court, are bound to alter and or completely change the character of the cause of action.
80. In any event, it is also discernable that the proposed amendment is actually intended to annihilate and/or delete the entire of or a substantial segments of the original claim and replace same with a completely new cause of action.



81. Essentially, the Defendants herein would thus be constrained and/or otherwise obliged to take further and/or new instructions with a view to responding to and/or answering the completely new issues contained and/or alluded to at the foot of the proposed amended Plaintiff.
82. In my considered view, the proposed amended Plaintiff, cannot be allowed at this stage, taking into account that the Plaintiff's case is long heard and closed and that a substantial number of issues alluded to, have previously been covered during the cross examination of the Plaintiff herein.
83. In a nutshell, I beg to point out that where the purpose and/or gist of the amendment is to introduce a completely new cause of action and/or a cause of action, which is at variance with the original cause of action, such an amendment ought to be declined and/or refused.
84. Based on the foregoing, it is therefore appropriate to find and hold that the subject Application, is not merited and hence the allowance of the said Application shall be contrary to trite and established principles of laws that governs and/or relates to amendment.
85. To buttress the foregoing position, it is appropriate to adopt and restate the observation of the Court of Appeal vide the case of *Central Kenya Ltd versus Trust Bank Ltd & 5 others* [2000]eKLR, where the court stated as hereunder;

The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

86. To the extent that the proposed amendment is disposed to introduce new claims, anchoring new cause of action, some of which include, inter-alia, the determination as to whether there was marriage between the Plaintiff and the 1st Defendant and whether the suit property was matrimonial property, which allegations raise inconsistent causes of action same cannot be allowed.
87. In any event, it is also appropriate to state that some of the Proposed amendments, underlined in the Draft amended Plaintiff, would fall outside the scope and/or Jurisdictional remit of this Honourable court.
88. For clarity, it is common ground that this Honourable court is not vested with Jurisdiction to determine the existence of Marriages between Parties and determination of a Property was/is a Matrimonial property, or otherwise.
89. In a nutshell, the Intended amendment, shall not only embarrass the Parties, but also place the court in a conundrum and/or Jurisdictional quagmire, which position, ought to be eschewed.



Issue Number 3

Whether the subject Application reeks of and/or is informed by mala fides on the part of the Plaintiff and counsel.

90. From the onset, it is appropriate to state that the Plaintiff/Applicant herein had under her possession and/or custody all the documents and/or information relating to the sale of the suit property to and in favor of the 5th Defendant/Respondent.
91. In any event, the said documents, including the impugned spousal consent, which was used and/or relied upon to charge the suit property to and/or in favor of the 3rd and 4th Defendants/Respondents, were availed by the 3rd and 4th Defendants when same entered appearance and filed Statement of Defense.
92. Other than the foregoing, the entire set of documents, which the Plaintiff/Applicant now contends to raise new issues that underline the intended amendment, were indeed produced by the Plaintiff/Applicant and same were admitted vide consent, duly endorsed on the court record on the 20th May 2021.
93. On the other hand, prior to the commencement of the hearing, the Plaintiff/Applicant herein informed the court that same was keen and/or desirous to summon six (6) witnesses, inclusive of the Plaintiff/Applicant.
94. However, it is sufficient to note that the Plaintiff/Applicant herein had previously signaled and/ or indicated that same would only be one witness testifying on her behalf.
95. Pursuant to the contention by counsel for the Plaintiff/Applicant that same would be calling five (5) more witnesses, other than the Plaintiff/Applicant, the court was called upon to make a determination/ ruling, which was indeed rendered on the 20th September 2020. For clarity, the Court dismissed the request to call and/or summon five (5) more witnesses.
96. Contrary to the foregoing position, the plaintiff/Applicant herein has now chosen to re-visit the same issue, that is, the Plaintiff/ Applicant seeks to also re-open her case and to call additional witnesses, to tender evidence on her behalf.
97. Quite clearly, the Plaintiff/Applicant herein is engaging the court in a back and forth, manner, which connotes Mala-fides, on the part of the Plaintiff/Applicant.
98. Suffice it to point out, that having filed and/or lodged the subject suit, it behooves the Plaintiff/Applicant and her nominated counsel, to exercise due diligence and to assist the Court to realize the Overriding Objectives espoused vide Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
99. Nevertheless, despite the explicit obligation placed upon the Plaintiff/Applicant and her counsel, same appears keen and intent on derailing the expeditious hearing and determination of the subject matter and this conduct is evident even by the timing of the subject Application, which was filed shortly before the commencement of the Defense case.
100. To my mind, the Plaintiff/Applicant and counsel have acted in a manner that suggests Bad faith and a desire to frustrate the hearing and determination of the suit. In this regard, the conduct of the Plaintiff/Applicant does not measure to the expectation underscored by dint of article 159 (2)(b) of *the Constitution* 2010.



101. Be that as it may, I beg to point out that the need and necessity to fast track court proceedings is now a Constitutional requirement and hence the Parties, the Plaintiff/Applicant herein not excepted, are obliged to ensure that all actions are taken without delay.
102. To buttress the foregoing position, it is expedient to restate the observation of the Court of Appeal vide the case of *Said Sweilem Gbeithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the Court stated as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellants’ advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation.

Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

Issue Number 4

Whether the Defendants herein shall be disposed to suffer prejudice and/or grave injustice, not compensable in Monetary terms.

103. Pursuant to the subject application, the Plaintiff/Applicant is not only desirous and/or keen to amend the Plaint, but same is also keen to re-open her case, which was closed on the 20th September 2020.
104. Other than the foregoing, the Plaintiff/Applicant is also desirous to be allowed the opportunity and/or latitude to summon and or call more witnesses, including the 2nd Defendant, who was struck out from the subject proceedings.
105. Suffice it to recall, that prior to her testimony on the 20th September 2020, the Plaintiff/Applicant had intimated that same would want to call five (5) more witness and the issue was subject to deliberation by the court, culminating into the delivery and/or rendition of a Ruling.
106. To my mind, the limb of the subject application, which is seeking to reopen the Plaintiff/Applicants case and to allow same to call more witnesses, including compelling the 2nd Defendant to testify, would be tantamount to defeating the decision of this Court, which was neither appealed against nor reviewed.
107. In any event, the proposed amendment and the consequential Reliefs being sought by the Plaintiff/Applicant, shall also necessitate the filing of amended pleadings and/or further pleadings by the Defendants and in this regard, the subject proceedings shall be rolled back to the Pre-trial stage.
108. Essentially, the clock will be rolled back to the year 2016 when the subject matter was filed.



109. In my considered view, the ripple effect of the proposed and/or intended amendments is such that the entire proceedings that have hitherto been undertaken by the Court, inter-alia, hearing of the Plaintiff's case, shall be rendered useless.
110. Besides, the Judicial time that was expended towards and in undertaking the proceedings, which are likely to be impugned, shall have been wasted. Simply put, the consequences of the subject application, shall work and/or occasion grave prejudice and injustice to the Defendants/Respondents.
111. To my mind, rolling back time for a whooping six (6) years and denying the Defendants the opportunity to have the subject dispute determined without undue delay, shall not be compensable in monetary terms. For coherence, such further delay shall only provoke anxiety and mental anguish, premised on the continued existence of the suit.
112. In a nutshell, prejudice and injustice, constitute a further basis upon which an Application for amendment can be declined.
113. To vindicate the foregoing, it is appropriate to take cognizance of the holding in the case of *Catherine Koriko & 3 others v Evaline Rosa* [2020] eKLR, where the Court of Appeal underscored the position as hereunder;

Comparatively, in the South African case of *Robinson –v- Randfontein Estates Gold Mining Company Limited, 1925 AD 173* Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court's refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.

114. Premised on the forgoing, my answer to issue number four is that the proposed amendment and the consequential implications, attendant thereto shall indeed occasion undue prejudice and injustice to the Defendants herein.

Final Disposition:

115. Having reviewed the issues that were outlined for determination and having considered same, it must have become evident and/or apparent that the subject Application has not only been mounted with undue and inordinate delay, but, shall no doubt, occasion grave Injustice to the Defendants/ Respondents.
116. Consequently and taking into account the provisions of section 1A and 1B of the *Civil Procedure Act*, chapter 21 Laws of Kenya, coupled with the provisions of article 159 2(b) of *the Constitution* 2010, I come to the irresistible conclusion that the subject Application is Devoid of Merits.
117. In the premises, the Application dated the 3rd June 2022, be and is hereby Dismissed with Costs to the Defendants/Respondents.
118. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;



Kevin Court Assistant

Mr. Simiyu h/b for Mr. Munika for the Plaintiff/Applicant

Mr. T G Gichuki for the 1st Defendant/Respondent

Ms. Mudibo h/b for Mr. Akello for the 3rd and 4th Defendant/Respondent

Ms. Otieno h/b for Mr. Wakwaya for the 5th Defendant/Respondent

