



Kiragu v Commissioner of Lands & 5 others (Environment & Land Case 102 of 2019) [2022] KEELC 13374 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 102 OF 2019
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

TITUS KIRAGU APPLICANT

AND

COMMISSIONER OF LANDS 1ST RESPONDENT

LAWRENCE MAINAMWANGI 2ND RESPONDENT

KINARU KIMAIGA NDUBI 3RD RESPONDENT

SALIM GULAM HUSSEIN GILANI 4TH RESPONDENT

JOHNSON GACAU KIBERA 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. By a Notice of motion application dated December 17, 2021 and filed in court on the same day brought under Article 50(1) and 159 of the [Constitution](#), Section 1a, 1b and 3a and Order 8 Rule 3 of the [Civil Procedure Rules, 2010](#) the Applicant sought the following orders:
 - a. That this honourable court be pleased to extend the time in which the Applicant shall file a witness statement from the Lands office and/or the office of the Permanent Secretary of Lands once it is procured.
 - b. That this honourable court be pleased to grant the Applicant leave to file his Supplementary Witness Statement.
 - c. That the costs of this application be costs in the cause.



2. The application is supported by the sworn affidavit of Titus Kiragu the Applicant herein sworn on December 17, 2021. The grounds on the face of the application and the supporting affidavit can be summarized as follows: that the Applicant had hoped to get a written statement from the wife of the late Hon Obwocha who had succumbed to illness on or about December 10, 2021; that he had reached out to the office of the Permanent Secretary Lands and requested that an investigation is conducted on what he believed were fraudulent dealings with his land Nakuru Municipality Block 18/59; that he has been hopeful to receive a report that would shed more light on the matter but he is not certain on the length of time investigations would take; that this court had given him 21 days from November 30, 2021 to make an application to include witness statements but he has been unable to receive the report from the PS Lands before the lapse of the days given to him; that he requests for more time and that he would file the witness statement and report the moment he receives it; that it would be in the interest of justice that he be allowed to file and serve the witness statements in order to assist the court appreciate the full merits of the case as presented by all parties.

The Response

3. The 2nd Defendant/Respondent filed his Replying Affidavit dated June 13, 2022 on the same day where he deposed that the application is fatally defective, misconceived, devoid of merit and an abuse of the court process. He averred that it is merely an afterthought meant to scuttle and delay the hearing of the main suit. He further averred that the suit had been instituted in the year 2010 and it is now over a decade and as such any further delay of the matter must be dismissed.
4. He deposed that the Applicant had been accorded more than enough time to put his house in order and that door had been closed upon the lapse of 21 days from November 30, 2021 as the court had ordered. He averred that the court must take cognizance that it had closed pleadings several years ago and that the Applicant had been given ample time to comply with Order 11 of the [Civil Procedure Rules](#) before the matter had been fixed for hearing. He also averred that any pleadings filed this late will potentially and inevitably derail the hearing of this matter, will greatly prejudice his rights to fair trial and ought to be declined. He further averred that the proposed further witness statement and documents are introducing new issues thus prejudicial to the other parties as they have already done discovery, exchanged documents and filed the agreed issues.
5. The 2nd Defendant/respondent deposed as advised by his advocate that court orders should not be issued in vain and the Applicant herein seeks to use and abuse the court process and that the ends of justice will not be met by the Application as filed; that the jurisdiction of the court to grant leave to allow filing of documents after pleadings have closed is discretionary and cannot be invoked by a party intending to scuttle determination of a suit and circumvent the earlier orders issued on November 30, 2021.
6. The 1st, 3rd and 5th Defendants/Respondents did not oppose the application.

Submissions

7. The Plaintiff/Applicant and the 2nd Defendant/Respondent filed their submissions dated June 13, 2022 and June 14, 2022 respectively.
8. The Applicant in his submissions gave a brief history of the matter and raised one issue for determination which is whether this honourable court should extend the time in which the Applicant shall file a list of witness and their witness statement as well as a bundle of documents and supplementary witness statement. He contends that in compliance with the courts directions given on November 30, 2021, he filed the instant application within the 21 days given by this court. He



requested the court to extend the time of filing a witness statement from lands office and leave to file his supplementary witness statement. He further submits that having received the report from lands office, he immediately filed his supplementary affidavit dated May 12, 2022 annexing his list of witnesses as well as their statements, bundle of documents he wishes to rely on during hearing and his supplementary witness statement.

9. The Applicant submits that it would be in the interest of justice for this court to allow for extension of time in order to allow him file his supplementary witness statement, witness statement from lands office by one R.J Simiyu and a list of witnesses. He further submits that the above documents contain crucial evidence that will enable this court make a reasonable determination during hearing and therefore prevent miscarriage of justice. He submits that no prejudice will be occasioned to the Defendants/ Respondents as they will have an opportunity to cross-examine the witnesses on the contents of their statements. He cited the Supreme Court case Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others App No 16 of 2014 [2014] eKLR that dealt with the principles for extension of time. He also relied on Article 50(1) of the Constitution on fair hearing and urged the court to allow the application.
10. The 2nd Defendant on the other hand identified three issues for determination. One, whether the application is meant to circumvent the orders of this honourable court issued on November 30, 2021 he submits that the Applicant around May 13, 2022 filed some three witness statements and also introduced 62 documents in a list of documents and a bundle which is over 150 pages without the leave of this court as had been ordered on November 30, 2021. He further argues that no leave had been sought by the Applicant in filing the instant application and thus urges the court to expunge the said list of documents dated May 12, 2022. He also submits that this matter has been delayed long enough and that the application had never served upon the affected parties within 21 days as had been ordered by court hence an abuse of the court process.
11. The second issue is whether there are any valid grounds to allow filing of further witness statement this late after close of pleadings and yet the Applicant was given ample time to comply. He contends that the fact that the orders of November 30, 2021 were not complied with, this court must keenly evaluate the reasons given by the Applicant for non-compliance in determining the instant application. He submits that no plausible explanation has been given by the Applicant to warrant the court's indulgence. He relied on the case of Alois Oceano D'sumba V Rajnikant Narshi Shah & Another [2017] eKLR where the learned Judge expunged documents filed after close of pleadings. He submits that the Applicant had been given ample time to file all his pleadings and as a matter of law he ought to have done so within the set timelines. He further submits that allowing the Applicant to file the said documents would greatly prejudice him as the Applicant's goal is seeking to introduce new issues. He submits that the costs of the application should be awarded to the 1st Defendant/Respondent as the application is devoid of merit.
12. The Applicant filed a supplementary submission dated June 15, 2022 on the same day where he reiterated his earlier submissions and added that he did not seek to reopen the case as it was yet to be heard. He submits that he indeed complied with the court order issued on November 30, 2021 which had ordered him to file and serve his application seeking leave to file further witness statement and documents within 21 days; that he filed his application on December 17, 2021 four days before the lapse of the 21-day period granted.

Opinion

13. It is this court's opinion that the main issue for determination is whether the Plaintiff/Applicant ought to be granted the orders as sought in his application dated December 17, 2021.



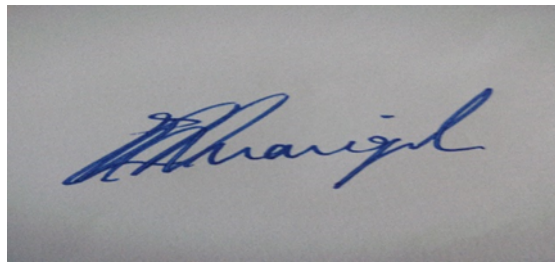
14. In the instant case, it is a fact that this court on November 30, 2021 made orders under paragraphs 2 and 3 stating as follows:
 2. “The Plaintiff shall within 21 days from today if he is inclined to do so, file and serve an application seeking leave to file and serve the additional documents he had wished to file.”
 3. “No application shall be filed outside the 21 days without prior leave of court.”
15. This court notes that the Plaintiff/Applicant filed the present application seeking leave to file supplementary witness statement on December 17, 2021. It is also a fact that 21 days from the date the order was made on November 30, 2021 were yet to lapse as the Applicant was 3 days shy of the 21 days provided when he filed the application. This court is therefore of the view that the Applicant was still well within the stipulated timelines to file the present application.
16. This court having established that the Plaintiff/Applicant filed the instant application within the required timeline, I am only inclined to determine whether he should or should not be granted leave to file his additional documents.
17. After pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of Order 18 rule 10 of the Civil Procedure Rules and section 146 of the *Evidence Act*. It is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the *Constitution*. However, a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2)(b) of the *Constitution* provides that justice shall be administered without undue regard to technicalities.
18. In the case of *Raila Odinga & 5 Others vs IEBC & 3 Others*, SCK Presidential Petitions Nos 3, 4 and 5 of 2013 [2013] eKLR, the Court had to consider whether to allow additional evidence filed outside the contemplation of the rules in a Presidential election petition. It adverted to the principles applicable 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.”
19. It is evident that the hearing of this case is yet to commence, furthermore, the Plaintiff/Applicant explained to the court the additional documents he had intended to produce which would enable the court make a proper determination being a supplementary witness statement, witness statement from lands office by one R.J Simiyu and list of witnesses. The Applicant contends that the said documents contain crucial evidence for the determination of the case.
20. The 2nd Defendant/Respondent argues that by allowing the Applicant to file the said documents, it will greatly prejudice him as the Applicants seeks to introduce new issues.
21. The main contestation of the suit is on ownership of the suit property and it is this court’s view that the additional documents have a direct bearing on the main issue of contention thus relevant in assisting the court ultimately determine the case on merit.



22. In addition, the said additional documents have already been served upon the Defendants/ Respondents and they will have an opportunity to interrogate and challenge them in court. This court therefore sees no prejudice that will be occasioned to the 2nd Defendant/Respondent in admitting the additional documents as sought since he can challenge them. In the case of Attorney General Versus Torino Enterprises Limited the court on whether the additional evidence would impact on the result of the case held that the same is a matter to be determined on merit upon the evaluation of the additional evidence with all other evidence on record. This court also notes that the 1st, 3rd and 5th Defendants/ Respondents did not oppose the present application.
23. In view of the foregoing, I find that the Notice of Motion dated December 17, 2021 is merited and will allow it. I further proceed to make the following final orders:
- a. The Plaintiff/Applicant's supplementary witness statement and additional documents on record are deemed to be properly filed and served.
 - b. The parties shall all attend a mention on October 25, 2022 for the purposes of fixing a hearing date for the main suit;
 - c. The costs of this application be borne by the 2nd Defendant/Respondent.

Dated, signed and delivered at Nakuru via electronic mail on this 4th day of October, 2022.

A photograph of a handwritten signature in blue ink on a light-colored background. The signature is cursive and appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, NAKURU**

