



Nyamweya (suing as the legal representative of the estate of Tabitha Moige Nyamweya (Deceased) v Ratemo (sued as the legal representative of the estate of Charles Ratemo Nyamweya) & 9 others (Environment & Land Case 37 of 2015) [2022] KEELC 14720 (KLR) (7 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14720 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 37 OF 2015
JM ONYANGO, J
NOVEMBER 7, 2022

BETWEEN

JOYCE BOCHERE NYAMWEYA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF TABITHA
MOIGE NYAMWEYA (DECEASED)

AND

DORCAS MABERA RATEMO (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF CHARLES RATEMO NYAMWEYA 1ST DEFENDANT
JEMIMAH NYABOKE NYAMWEYA (SUED AS THE LEGAL REPRESENTATIVE
OF HON. JAMES NYAMWEYA (DECEASED) AND ALSO) IN HER PERSONAL
CAPACITY 2ND DEFENDANT
PAUL NYAMWEYA 3RD DEFENDANT
JAMESPARK HOLDINGS LTD 4TH DEFENDANT
GEORGE OMARI NYAMWEYA 5TH DEFENDANT
JAMES OGENDI NYAMWEYA 6TH DEFENDANT
CHRISTOPHER NYAMBANE NYAMWEYA 7TH DEFENDANT
MOIGE GARDENS LTD 8TH DEFENDANT
TANYA HOLDINGS LTD 9TH DEFENDANT
HOTEL PHOENIX LTD 10TH DEFENDANT



RULING

INTRODUCTION

1. This ruling is in respect of two applications filed by the plaintiff against the defendants on the 31st dated March, 2022 and June 3, 2022
2. In the first application dated March 31, 2022, the plaintiff sought the following orders;
 - i. The plaintiff be granted leave to rely on the following documents in support of her case;
 - a. The 1st and 2nd defendant's executor's administration file in respect of Kisii High Court Succession Cause No. 482 of 1995; in the matter of the estate of James Nyamweya (deceased).
 - b. The 1st and 2nd defendant's executor's administration file in respect of Kisii High Court Succession Cause No. 451 of 1996; in the matter of the estate of James Nyamweya (deceased).
 - c. The 1st defendants supplementary Documents filed on November 28, 2021.
 - ii. That if prayer (i) above is granted the exhibits "JBN2" and 3 annexed to her supporting Affidavit be deemed to be filed and served on the Defendants.
 - iii. The costs of this application be in the cause.
3. In support of this application the plaintiff through her supporting affidavit sworn on March 31, 2022 averred that she filed the application seeking this court's leave to refer to pleadings and proceedings in Kisii HC. SUCC. No. 482 of 1995 and N0. 451 of 1996.
4. The plaintiff further averred that she had through an application dated October 19, 2020 in Kisii HC. SUCC. No. 482 No. 451 of 1996 sought to be supplied with her late father's estate file from the 2nd defendant who is the sole administrator of the said estate. The court allowed the application and through its order dated March 23, 2021 directed the 2nd defendant to supply the beneficiaries of the estate including the Plaintiff with all documents relating to it. She attached a copy of the said order and marked the same as "JBN1".
5. It was her averment that the 2nd defendant complied with the court order and supplied her with all the documents through an email attachment. The said documents were attached to the application and were marked "JBN2".
6. The plaintiff averred that she was on March 23, 2021 also supplied with the mother title in respect of L.R No. 4380 and copies of certificates of the title in respect of subdivisions by the Chief Land Registrar. She added that she had filed the same as supplementary documents to this suit on November 28, 2021.
7. It was her averment that the hearing of this suit commenced on June 10, 2021 before she acquired the above-mentioned documents. She contended that the said documents were necessary for the determination of all matters in controversy in this suit.
8. She contended that the court had power to grant leave to a party to rely on documents which were not available during the pre-trial conference as was held in the case of *Thomas Ngarachu Ngugi v John Wilfred Wanyoike & 6 others* [2019] eKLR.



9. Regarding the application dated June 3, 2022, the plaintiff sought the following orders;
 - i. This court be pleased to grant her leave to amend her plaint dated February 6, 2015.
 - ii. If prayer (i) is granted, the annexed proposed amended plaint be deemed to be duly filed and served upon the defendants.
 - iii. The costs of this Application be in the cause.
10. The application was anchored on the plaintiff's supporting affidavit sworn on June 3, 2022 in which she deponed that she is a beneficiary of the estates of both her parents whose estates are the subject matter of this suit. She further averred that she is the legal representative of her late mother's estate. She stated that her parents died on 18th July and September 25, 1995 respectively but their estates have never been distributed because the two have not been separated and the heirs of her mother's estate are different from those of her father's estate. She averred that as a beneficiary, she is entitled to all the estate documents including certificates of title and title deeds in respect of her parents' estates.
11. It was her deposition that when she filed the plaint in 2015, she did not have copies of certificates of the 18 sub-divisions of her parents' Kitale farm known as L.R No. 4380. She averred that at that time she had erroneously believed that all the 18 subdivisions of Parcel 4380 were registered in her father's name (James Nyamweya).
12. She explained that she had obtained the certificates of title relating to all the 18 subdivisions of parcel 4380 from the Chief Land Registrar on March 23, 2021 after which she filed a Supplementary List and bundles of documents on November 23, 2021. She added that upon perusing all the documents, she obtained from the Chief Land Registrar, she discovered that only 7 were currently registered in the name of her late father and these are; LR No 4380/2, LR No 4380/3, LR No 4380/4, LR No 4380/6, LR No 4380/9, LR No 4380/10 and LR No 4380/18 which cumulatively amount to 800 acres of agricultural land.
13. It was her contention that it was only those seven parcels that were available for division between the two parents and not the entire estate. She contended that upon such realization it had become necessary for her to seek leave to amend paragraphs 22 and 59 of the Plaint to reflect the correct position.
14. She averred that by the time she obtained the said documents on November 23, 2021, the hearing of the suit had already commenced. She also averred that she obtained all documents relating to the estate of her father from the 2nd defendant who had been compelled by the High court to avail them after the hearing of this suit had commenced. She averred that it was against this background that she had been compelled seek the leave of the court to amend her plaint.
15. She complained that the 2nd defendant who was an administrator of her late father's estate had elected to administer her father estate in an opaque manner such that she had omitted the aforementioned 7 properties from distribution but instead sought to distribute non-existent properties.
16. She was of the opinion that none of the defendants would be prejudiced by the proposed amendment as they had not given evidence and they would be at liberty to amend their pleadings accordingly.
17. In response to the application dated June 3, 2022 the 1st defendant filed Grounds of Opposition dated June 10, 2022 wherein she contended that the said application was misconceived and bad in law as well as an abuse of the court process.
18. She contended that the application did not raise any triable issues to warrant the orders sought therein. It was her further contention that the application did not meet the requirements for amendment of



pleadings and was thus fatally defective. The same response was raised by the 7th defendant in his Grounds of Opposition dated June 13, 2022.

19. In response to the application dated March 31, 2022, the 3rd and 4th defendants filed Grounds of Opposition dated June 13, 2022. In the said Grounds of Opposition, they claimed that the application was a disguised belated attempt to fish for evidence and was bereft of merit and ought to be dismissed with costs.
20. They further averred that the court's jurisdiction is limited to hearing and determining disputes relating to the environment, use, occupation of and title to land. They contended therefore that an executor's administration file in respect of succession proceedings before the High Court have no bearing in this matter and that the said application was therefore intended to delay the expeditious determination of this suit.
21. They argued that the proceedings in the Kisii Succession 451 of 1996 are active and ongoing and thus this court has no supervisory jurisdiction over proceedings in the said court.
22. It was their further contention that the proceedings in respect of Kisii Succession Cause No. 482 of 1995 were extraneous to the matters in issue before this court and that this court cannot review the orders issued in the said proceedings nor are such orders binding on this Honourable court.
23. It was his contention that in 1986 the plaintiffs revived the claims over the land occupied by their family. He went on to explain that the claims were taken to the Land Disputes Tribunal and an award was delivered in favour of the applicant vide Kisii Resident Magistrate's Court No. 21 of 1987.
24. On June 14, 2022, the two application came up for hearing and the counsel for the parties highlighted their oral submissions on various issues arising from the applications and the responses.

PARTIES' SUBMISSIONS

25. Learned counsel for the plaintiff submitted that in the application dated March 31, 2022 the applicant sought to rely on documents in Kisii Succession causes 482 of 1995 and 451 of 1996 which documents he stated were annexed to the said application as "JNB1" and "JNB2". He submitted on the other hand that the application dated June 3, 2022 was meant to amend Paragraph 22 and 59 in order to clarify the properties that had been listed therein belong to her late father.
26. He argued that the succession court had through an order dated March 23, 2021 compelled the 2nd defendant to supply her with the administration file. However, when the hearing of the suit commenced on June 10, 2021, the plaintiff was yet to obtain the estate file from the 2nd defendant. He argued that the Plaintiff had in her plaint listed all the 18 subdivisions of the parcel of land known as Kitale LR No. 4380 as belonging to the estate of her late father. He contended that the plaintiff had however, upon obtaining the said documents from the 2nd defendant on June 26, 2021 discovered that only 7 parcels were still registered in his name.
27. He submitted that after receiving the succession file, the Plaintiff applied for Summons to be issued to the Chief Land Registrar to avail details of the 18 subdivisions. The said details regarding the 18 subdivisions had since been filed by the Chief Land Registrar and the same confirmed that only 7 of the 18 the subdivisions were registered in the plaintiff's late father's name. Counsel argued that the Plaintiff in her proposed amended plaint had listed all the 18 subdivisions and the ones that were not registered in her late father's name and thus the said amendment did not amount to raising a new claim.
28. He further submitted that the defendants opposition was intended to prevent the court from investigating whether the late James Nyamweya held 18 parcels of land in Kitale at the time of his death.



- He submitted that the opposition was intended to stop the court from exercising its jurisdiction in respect of Justice Sitati's judgement that the late Tabitha Moige Nyamweya's estate was separate from that of the late James Nyamweya.
29. In urging the court to allow the application dated March 31, 2022, counsel relied in the case of *Thomas Ngarachu Ngugi v John Wilfred Wanyoike & 6 others* [2019] eKLR at paragraph 17 thereof where the court allowed the plaintiff to rely on additional evidence. He argued that in as much as counsel for the 1st defendant had referred the court to the case of *Julius Njiraini v Henry Mburu & 8 others* (2021) eKLR where the court refused to grant an application for leave to amend the plaint, the same was distinguishable from this instant suit since the plaintiff does not seek to introduce a new cause of action. He contended that the plaintiff merely sought to clarify the properties registered in the name of the deceased.
 30. In urging the court to allow the application dated June 3, 2022 for amendment of the plaint, counsel relied on the case of *Josbi JC Patel* 1952 EACA 42 where the Court of Appeal held that amendments should be allowed regardless of how negligent or late the application is made. He argued that the plaintiff had to apply to the succession court for an order that the certificates of titles to be released to her as the executors had refused to release the same to her. He contended that the 1st and 2nd defendants having been compelled to release the documents to the plaintiff, should not be allowed to stop her from using them.
 31. Counsel urged the court to allow the application as the defendants would be free to cross examine the plaintiff on the documents. He also argued that they were free to amend their defence and that they would not suffer any prejudice if the court allowed the application.
 32. The 5th respondent who appears in person submitted in support of the applications filed by the plaintiff. He argued that the application was merely intended to provide clarity on the properties that belonged to the late James Nyamweya's estate. He wondered why the 1st and 2nd defendants were opposed to the said applications.
 33. Learned counsel for the 1st defendant submitted that he associated himself with the Grounds of Opposition filed by the 3rd and 4th defendants with regards to the application dated March 31, 2022.
 34. Regarding the application dated June 3, 2021, counsel submitted that the 1st defendant was opposed to the same because it intended to introduce a new cause of action. He argued that the plaintiff was aware that the late James Nyamweya had sold off 11 of the 18 subdivisions of the land parcel in Kitale and ignored to include the same in her initial claim.
 35. He submitted that the application dated March 31, 2022, had not been filed in a timely manner. He contended that the plaintiff had in paragraph 15(b) of the supporting affidavit shown that she obtained the Succession file on June 25, 2021 but failed to explain to the court why she did not deem it necessary to seek to amend the plaint soon thereafter. He argued that the plaintiff had been aware of the Succession proceedings and having realized gaps in her case she had decided to go on a fishing expedition in order to fill those gaps and conceal her main objective.
 36. Holding brief for counsel for the 2nd defendant, counsel for the 3rd and 4th defendants indicated that the 2nd defendant associated himself with the Grounds of Oppositions filed by the 3rd and 4th respondents with respect to the application dated March 31, 2022 as well as the Grounds of Opposition filed by the 1st defendant in relation to the application dated June 3, 2022. He also indicated that he associated himself with the submissions of the 3rd and 4th Defendants.



37. He submitted that the 2nd defendant was not opposed to the application dated June 3, 2022 but they were however opposed to the application dated March 31, 2022 against which they had filed Grounds of Opposition. It was his contention that this court need not call for proceedings in Kisii High Court Civil Case No.451 of 1996 in order to resolve the dispute herein.
38. He contended that the proceedings in the High court were incomplete and could therefore not be relied on to determine this matter. It was his further contention that the proceedings in the said matter were not admissible as per section 34 of the *Evidence Act*. He was of the view that calling for incomplete proceedings would only serve to delay the matter with regard to the proceeding relating to KISII HC SUCC. Cause No. 482 of 1995. It was his submission that the court had not been told the relevance of the incomplete proceedings. He argued that even if there was a judgement in respect of the said case the same was not binding on this court.
39. He argued that this matter was part heard given that the Plaintiff has partly testified and allowing her to amend the Plaint at this stage would merely delay the conclusion of this old case.
40. The 7th defendant who is acting in person on his part submitted that since there are several Affidavits in High Court Succession Cause No. 451 of 1996, it was important that the Succession cause be dealt with first. He contended that once he succession cause was concluded, the parties could come to this court to resolve any disputes relating to title occupation of the suit property.

Issues for determination

41. Having considered the application, the responses thereto and the oral submissions made by counsel on behalf the parties as well as those made by the parties acting in person, I deduce that the issues for determination are:
 - i. whether Plaintiff should be granted leave to rely on the proceedings in respect of Kisii High Court Succession Causes No. 482 of 1995 and No. 451 of 1996.
 - ii. Whether the Plaintiff should be granted leave to amend her Plaint dated 6th February, 2015.

Analysis and determination

Whether the plaintiff should be granted leave to rely on the proceedings in respect of Kisii High Court Succession Causes No. 482 of 1995 and No. 451 of 1996.

42. In his application dated March 31, 2021, the applicant has sought leave of the court to rely on the files/proceedings in the two succession matters which are 451 of 1995 and 482 of 1995. HCC Succession Cause No. 451 of 1996 is active and still pending hearing and determination while HCCC No. 482 of 1995 has been concluded and judgment rendered in 1995.
43. It is important to note at the earliest opportunity that the plaintiff has not explained the relevance of Succession Cause No. 482 of 1996 to this case and as correctly submitted by counsel for the 3rd and 4th defendant, the same is not necessary for the determination of this matter. Consequently, the court declines to grant leave to the plaintiff to rely on the said file.
44. With Regards to Succession Cause No 451 Of 1996, the plaintiff explained that the High Court vide its order dated April 13, 2021 ordered the applicant to supply her with the Administration file. She further averred that the same was supplied to her by email on June 25, 2021 after the hearing of the matter had commenced hence the need to seek leave of the court to rely on the same. From the said documents which she has attached to her application, the plaintiff claims that she discovered that out of 18 parcels of land she had listed under paragraph 22 and 59 of her plaint only 7 belong to the estate



of her late father. She thus claims relying of the said file would provide clarity on the properties that belong to the estate of her late father.

45. However, the question that arises is why the applicant did not deem it necessary to seek leave of the court to rely on the same soon after she made such discovery. The 9-months delay which has not been explained satisfactorily can only be termed as inordinate as the same is calculated to delay the finalization of this matter which has been pending in court for more than seven years.
46. In an attempt to explain the delay, the plaintiff deponed that after making the said discovery she applied for summons to be issued to the Chief Land Registrar to provide certificates for the 18 subdivisions in respect of the Kitale land which has been exhaustively discussed hereinabove. She did obtain all certificates of title in respect of the 18 subdivisions on November 23, 2021, which is exactly 4 months after she filed the application dated March 31, 2022. The lapse of 4 months after making that discovery has not been explained.
47. The plaintiff deponed that she had filed the said documents as supplementary documents on November 28, 2021 without seeking the leave of the court. This application is therefore intended to sanitize the irregular filing of the said documents.
48. In as much as this court has the discretion to grant leave to a party who wishes to rely on additional documents before closure of his or her case, such leave must have been sought without inordinate delay. In this case, the plaintiff is seeking leave to rely on documents she has had in her custody for more than 9 months without a concrete reasons why she did not seek leave to rely on them early enough.
49. Considering that this case has been pending in court for 7 years, it would be unfair to allow parties to file documents as this would result in further delay which is contrary to article 159 2(b) of the [Constitution](#) 2010 and the overriding objective of the [Environment and Land Court Act](#).
50. In the case of [Kimani & another v Gichui & another](#) (Environment & Land Case 1081 of 2016) [2022] KEELC 3233 (KLR) (28 July 2022) the court had this to say regarding the timely filing of applications;

“...78. On the other hand, it is incumbent upon litigants, in this case, the plaintiffs/applicants to ensure that every action and/or application before the court is taken and/or made in a timely manner and not otherwise.

79. Suffice is to point out, that the requirement to act and/or approach the court in a timely manner, without undue delay, has since crystalized and attained a Constitutional backing vide article 159 2(b) of the [Constitution](#) 2010.

80. On the other hand, the significance of taking the requisite action timeously and with due promptitude, has since received judicial pronouncement in various court decisions. Consequently, due diligence is therefore significant, essential and critical in the discharge and performance of any action in the course of the due process of the law.

81. To underscore the foregoing observation, it is appropriate to take cognizance of the dictum of the Court of Appeal in the case of [Said Sweilem Gheitban Saanum v Commissioner of Lands \(being sued through Attorney General\) & 5 others](#) [2015] eKLR, where the Court of Appeal observed 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 appellant's 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."

51. Apart from the inordinate delay; the administration file documents that the applicant has shared are so enormous. She has not made any attempt to explain the relevance each of them in as far as the determination of this case is concerned so that this court does not delve into issues that the succession court will deal with given that the jurisdiction of this court is limited to issues of title to land, land use and occupation. I am of the considered view that this court does not need the Succession files in respect of this matter in order to determine issues in dispute which fall within its jurisdiction as the certificates of title relating to the sub-divisions in respect of parcel number Kitale L.R No. 4380 in the name of Hon. James Nyamweya Deceased would suffice.
52. From the foregoing therefore this court declines to grant the Applicant leave to rely on the administrator's files in Kisii High Succession files no. 482 of 1996 and 451 of 1996. However, the Applicant is at liberty to rely on the relevant Certificates of title arising from the sub-division of Kitale LR No. 4380.

Whether the Plaintiff should be granted leave to amend her Complaint dated 6th February, 2015.

53. Order 8 Rule 3 of the Civil Procedure Rules 2010 provides as follows:

“Subject to order 1 Rules 9 and 10, Order 24 rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
54. In the case of *Kassam v Bank of Baroda (Kenya) Limited* [2002] 1 KLR, the factors which a court ought to consider when deciding whether or not to allow an application to amend pleadings were set out as follows: -
 - “(a) Whether the Amendment sought embodies a legal valid claim or defense.
 - (b) The reasons why the subject matter of the amendment was not included in the original pleading or offered sooner.
 - (c) Delay or disruption of judicial administration.
 - (d) The extent to which the amendment departs from the original claim or tends to complicate issues; and
 - (e) Whether the amendment is offered by the Plaintiff or the Defendant.”
55. The applicant herein vide her application dated June 3, 2022 seeks to amend the complaint especially paragraph 22 and 59 of her complaint where she intends to strike out 11 parcels out of 18 parcels which she states she has since learned do not form part of the estate of the late James Nyamweya through the file/



proceedings in HC Succession Cause No 451 of 1996. She claims she obtained the estate file on June 26, 2021 after the matter had partly been heard on June 10, 2021.

56. However, the plaintiff has not explained why it took her 9 months after obtaining the said documents to seek leave to amend the Plaintiff and she is therefore guilty of laches.

57. To buttress this observation I draw guidance from the Court of Appeal in the case of *Central Bank of Kenya v 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 may be 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.

58. On the issue as to whether the amendment is necessary in resolving the real question in controversy, it is important to state that the main issue in conflict between the parties is to separate properties of the two estates which are the estate of the late James Nyamweya and that of the late Tabitha Moige Nyamweya. It remains to be seen whether the incomplete proceedings in HC Succession Cause No. 451 of 1996 would resolve this dispute. As pointed out earlier in this ruling the jurisdiction of this Honourable court is limited to determining issues touching on use, occupation and title to land and not who should inherit what property as this falls squarely within the jurisdiction of the High Court which is handling the Succession cases relating to the estates of the late Hon. James Nyamweya and the late Tabitha Moige Nyamweya.

59. Furthermore, from the record it is clear that the Chief Land Registrar from whom the plaintiff claims to have obtained documents in support of her amendment has filed his report providing the clarity that the plaintiff intends provide, albeit one year later. The plaintiff shall be at liberty to summon the Chief Land Registrar if any further clarity shall be required.

60. In view of the foregoing, I find no merit in the applications dated March 31, 2022 and June 3, 2022 and the same are dismissed with costs to the defendants.

DATED AND SIGNED AT ELDORET THIS 7TH DAY OF NOVEMBER, 2022.

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J.M ONYANGO

JUDGE

