



Lee & another (Suing as the legal representatives of the Estate of Richard Sednaoui - Deceased) v Mulwa (Civil Case E040, E039 & E041 of 2021 (Consolidated)) [2025] KEHC 3180 (KLR) (Civ) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3180 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE E040, E039 & E041 OF 2021 (CONSOLIDATED)
TW CHERERE, J
FEBRUARY 20, 2025

BETWEEN

DAVID S LEE 1ST PLAINTIFF

CAROLE SEDNAOUI 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RICHARD SEDNAOUI - DECEASED

AND

DAVID MUTAVA MULWA DEFENDANT

RULING

1. The Notice of Motion dated 15th November 2024 is brought under Order 7 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B, and 3A of the *Civil Procedure Act*. The application seeks two substantive orders:
 - a. An extension of time to file and serve a supplementary list and bundle of documents.
 - b. Leave to substitute the witness statement of David S. Lee in Civil Case No. E041 of 2021 with that of Carole Sednaoui
2. The application is grounded on the assertion that it has come to the knowledge of the advocate on record that crucial police abstracts and grants were not filed. Additionally, a witness, David S. Lee, is unavailable due to his current work schedule, necessitating his substitution with Carole Sednaoui.
3. In support of the application, Cornelius Sikuku, advocate for the Plaintiffs, swore an affidavit on 15th November, 2024, in which he reiterates these grounds and adds that he has recently obtained



police abstracts related to the accident in question and has secured foreign grants and wills which are awaiting resealing. Annexed to the affidavit are copies of three police abstracts and three receipts for the gazetting of the application for resealing the said foreign grants.

4. The deponent contends that the delay was not deliberate and urges the court to grant the orders in the interest of justice. The Plaintiffs cite *Lucy Momanyi t/a L. N. Momanyi & Company Advocates v. Joel Ombati Nyamweya & Kenya Power and Lighting Company Limited* [2021] KEHC 13248 (KLR) and *Meera Umoja Kenya Ltd v. David Gikaria & Another* [2020] eKLR in support of their application.
5. The Respondent filed a replying affidavit sworn on 06th December 2024. While expressing concern that the delay in filing crucial documents prejudices his case, the Respondent does not oppose the application for an extension of time for the Plaintiffs to file and serve a supplementary list and bundle of documents.
6. The Respondent however opposes the substitution of the witness David S. Lee, arguing that the statement of Carole Sednaoui has been filed for the court to consider its appropriateness.
7. In response to the Replying affidavit, Cornelius Sikuku, advocate for the Plaintiffs filed a further affidavit sworn on 09th December 2024 annexing a statement by Carole Sednaoui.

Analysis and Determination

8. I have considered the application in the light of the affidavits on record and annexures thereto. I have similarly considered the submissions filed on behalf of the Plaintiffs, the Defendant not having filed any at the time of writing this ruling.
9. From the record, I have identified the issues for determination to be:
 - a. Whether the court should grant the Plaintiffs an extension of time to file and serve a supplementary list and bundle of documents.
 - b. Whether leave should be granted to substitute the witness statement of David S. Lee with that of Carole Sednaoui.
10. On the first limb of the application, Order 7 Rule 5 of the Civil Procedure Rules outlines the documents to accompany pleadings, including witness statements and documentary evidence. Sections 1A and 1B of the *Civil Procedure Act* emphasize the overriding objective of facilitating the just, expeditious, proportionate, and affordable resolution of civil disputes.
11. The Supreme Court in the case of *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR stated as follows;

“... we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right...”
12. The Respondent does not oppose the extension of time, and the Plaintiffs have provided a reasonable and plausible explanation for the delay. The court is guided by the principle of substantive justice under Article 159(2)(d) of the *Constitution*, which mandates that justice should be administered without undue regard to procedural technicalities. Accordingly, the extension of time is warranted.
13. On the second limb of the application, the Plaintiffs seek leave to substitute a witness David S. Lee with Carole Sednaoui due to Mr. Lee's unavailability. The Respondent opposed this request, noting



- that the statement of Carole Sednaoui has not been filed, making it impossible to assess its relevance or appropriateness. However, the Applicants subsequently rectified this anomaly by filing the statement.
14. Order 18 Rule 3 of the Civil Procedure Rules grants the court a wide discretion in the presentation of evidence. Additionally, under Section 3A of the *Civil Procedure Act*, the court has inherent powers to make any orders necessary to meet the ends of justice.
 15. In *Lucy Momanyi t/a L. N. Momanyi & Company Advocates v. Joel Ombati Nyamweya & Kenya Power and Lighting Company Limited* [2021] KEHC 13248 (KLR) and *Meera Umoja Kenya Ltd v. David Gikaria & Another* [2020] eKLR, the court allowed witness substitution, recognizing that unforeseen circumstances may necessitate such changes.
 16. The overriding objectives principle, as emphasized in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* [2014] eKLR, dictates that procedural rules should facilitate, rather than hinder, the administration of justice.
 17. The Respondent has not demonstrated any substantial prejudice that would arise from the substitution, particularly since he retains the right to cross-examine Carole Sednaoui. Conversely, denying the substitution would unfairly hinder the Plaintiffs' ability to present crucial evidence.
 18. Courts have consistently held that the interests of justice must prevail over procedural technicalities, as reaffirmed in *Hunker Trading Company Limited v. Elf Oil Kenya Limited* [2010] eKLR, where the Court underscored that procedural rules should not be used to obstruct substantive justice. In the present case, allowing the substitution ensures a fair hearing while maintaining the Respondent's right to due process.
 19. In the end, the Notice of Motion dated 15th November 2024 is allowed on the following terms:
 - a. Leave is granted for the substitution of the witness statement of David S. Lee with that of Carole Sednaoui. The Plaintiffs shall file and serve the substituted statement within seven (7) days from today.
 - b. An extension of time is granted to the Plaintiffs to file and serve a supplementary list and bundle of documents.
 - c. Mention before Hon. Justice Mulwa on 27th March, 2025 to confirm compliance with orders (1) and (2) above and for purposes of setting a hearing date.
 - d. Costs shall be in the cause

DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Plaintiffs - Mr. Sikuku for J.K.Kibicho & Co. Advocates

For Defendant - Ms. Muriithi for Muthoga & Omari Advocates

