



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 108 OF 2016

ESTHER NJERI CHEGE

(Suing as the personal representative of the Estate of

JULIUS CHEGE KIONGO (Deceased).....PLAINTIFF

VERSUS

JAMEN KIYAGI AMAINGU.....DEFENDANT

CONSOLIDATED WITH

ELC NO. 34 OF 2019

ESTHER NJERI CHEGE

(Suing as the Administrator of the Estate of

JAMES WAIHARO KIONGO (Deceased).....PLAINTIFF

VERSUS

BENJAMIN KARANGATHI

(Suing as the Administrator of the Estate of

JAMES WAIHARO KIONGO (Deceased)....1ST DEFENDANT

JAMIN KIYAGI.....2ND DEFENDANT

THE DIRECTOR OF LAND

ADJUDICATION & SETTLEMENT.....3RD DEFENDANT

THE LAND REGISTRAR

TRANS-NZOIA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. This matter came up for further hearing today morning after it had been given special consideration to be heard on a date the court is supposed to be writing Rulings and Judgments. This is not the first time the matter has been given special consideration for hearing, for the reasons that it's an old matter and the court wishes to dispose of it as soon as possible.
2. On **13/10/2021** the matter was heard in part and for the reasons I have alluded to, it was fixed for further hearing on **29/10/2021**. On the

29/10/2021 counsel for the plaintiff sought an adjournment on account of the fact that his counsel was unwell. The application for adjournment was fiercely fought. Nevertheless, the court granted it for reasons stated in the Ruling of that date. Then the matter was fixed for further hearing today.

3. When this matter came up for the said purpose this morning, counsel for the 1st defendant in the matter stated that he had filed a further list of documents and some documents the previous day although he had sent them to court via email earlier but the court email was not working. He stated that it was for that reason that he delayed to file them. Counsel for the 3rd and 4th defendants too indicated that on **2/11/2021** he had filed and served a further list of documents on the plaintiff via email. It was upon these revelations that counsel for the plaintiff applied for adjournment.

4. I have considered the application. I will not go into reproducing and commenting or making findings on all the issues that were raised. However, three are more pertinent to the application made herein and go to the root of it than others. These I will consider.

5. First, it was argued by the plaintiff, through counsel, that her counsel had looked at the documents and was of the view that they raise issues which, unless addressed by way of amendment of the Plaintiff, she will be greatly prejudiced. Counsel thus applied for adjournment to amend the Plaintiff. However, at the same time counsel asked this court to expunge the two sets of documents from the record for the reason that they were filed without leave of court. Even so, at the end of the submissions learned counsel indicated that he wanted time to go and study the documents with his clients and make the necessary amendments to his client's pleadings and evidence. He said he too wished to file further documents for his client. The court found that counsel was blowing hot and cold on this issue. He was not decided on what to do, to the extent that he was undecided. I will grant him an adjournment to enable him consider the documents and decide how to proceed with his client's case.

6. That does not end the issue there. The court noted from the record that the plaintiff also filed a further list of witnesses and a witness statement of one **Mr. Cyrus Thairu Kabui** on **9/6/2021**. It was done without leave of the court. It was filed way after this matter had been fixed for hearing. The court is not sure whether or not the list and statement were served on all parties herein and whether they were notified after all. It is for this reason that since all parties herein seem to have taken it upon themselves to file documents without leave of court, and in piecemeal, that this Court exercise its discretion to deem the further lists of documents filed by the defendants duly filed and served rather than expunging them. Equally it will deem the witness statement by the said **Mr. Thairu** duly filed. If it has not been served, the same should be served forthwith.

7. Turning to the second issue that the application for adjournment was grounded, the Plaintiff submitted that she wishes to amend her pleadings to plead fraud and also to add parties, two individuals, she named through counsel, who are likely to be affected by the judgment of the court since the titles they hold are likely to be affected if the court were to order their cancellation.

8. I will not delve into the law regarding amendment of pleadings and addition of parties as was submitted by counsel before me. It's true that amendment to pleadings can be made at any stage of proceedings, subject to the requirement of the law. Also, the court can add necessary parties to suits as provided for under **Order 1 Rule 10** of the **Civil Procedure Rules**. For the reason that the plaintiff wishes to amend her Plaintiff to plead particulars of fraud, I will allow the adjournment. I could not have granted the it on the second limb of prayer to adjourn, that is, in order to add the two individuals likely to be affected by the decision of this court, for reasons that the plaintiff seems not to be serious about it. I say that because this court granted her leave to make an application for that amendment therefor within **seven (7) days** from **15/6/2021**. But it seems that she was not serious to do so. To date she has not moved the court. That notwithstanding, let it be so. The application for amendment, when made, can include the addition of the parties. I therefore direct that the application be filed within the next **14 days** from the date of this order.

9. The last issue relied on for adjournment which I need to comment on is that if the same is not granted, the plaintiff will be prejudiced by the further cross-examination without considering the documents filed. I notice that the Plaintiff shall still be under cross-examination when the matter shall proceed to hearing again. In my view, the adjournment being granted today will give her enough time to prepare her case further after considering those documents. The end result of this application for adjournment is that it's granted.

10. With regard to the issue of costs, I direct that they be in the cause since all parties herein seem not to have been keen to comply with the rules and procedure by filing documents late and without seeking leave of court.

11. This matter shall be mentioned in two months' time to confirm whether all parties shall have complied with the Rules of procedure, after the application for amendment is made, filed and determined. Parties have leave to file further witnesses' statements and documents, if need be, within **seven (7) days** of the determination or compromising of the intended application for amendment.

It's so ordered.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 19TH DAY OF NOVEMBER, 2021.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

Advocates present:

Mr. Teti for the Plaintiff,

Mr. S. Mwenesi for the 1st Defendant

Mr. Odongo for the 3rd and 4th Defendants