



Naki Investments Company Limited & another v Vekaria & another; Vekaria & another (Plaintiffs to the Counterclaim); Naki Investments Company Limited & 8 others (Defendant to the Counterclaim) (Environment & Land Case E172 of 2023) [2025] KEELC 4528 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E172 OF 2023**

**CA OCHIENG, J
JUNE 16, 2025**

BETWEEN

**NAKI INVESTMENTS COMPANY LIMITED 1ST PLAINTIFF
LT GEN (RTD) LAZURUS SUMBEIYWO (SUING AS THE EXECUTOR
OF THE ESTATE OF THE LATE DR. WALTER KIPRONO KILELE
(DECEASED)) 2ND PLAINTIFF**

AND

**HARISH RAMJI VEKARIA 1ST DEFENDANT
VISHVA PROPERTIES LIMITED 2ND DEFENDANT**

AND

**HARISH RAMJI VEKARIA PLAINTIFF TO THE COUNTERCLAIM
VISHVA PROPERTIES LIMITED PLAINTIFF TO THE COUNTERCLAIM**

AND

**NAKI INVESTMENTS COMPANY LIMITED DEFENDANT TO THE
COUNTERCLAIM
LT GEN (RTD) LAZARUS SUMBEIYWO (SUING AS THE
EXECUTOR OF THE ESTATE OF DR. WALTER KIPRONO KILELE
(DECEASED)) DEFENDANT TO THE COUNTERCLAIM
M/S HOTEL SISTERS AND SPA LIMITED DEFENDANT TO THE
COUNTERCLAIM
SEBASTIAN KYENGO KIVUVO DEFENDANT TO THE COUNTERCLAIM
JENNIPHER MUTHEU MUANGE DEFENDANT TO THE COUNTERCLAIM**



**THE LAND REGISTRAR, NAIROBI LANDS REGISTRY DEFENDANT TO
THE
COUNTERCLAIM**
THE DIRECTOR OF SURVEYS DEFENDANT TO THE COUNTERCLAIM
THE ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM
**THE KENYA REVENUE AUTHORITY DEFENDANT TO THE
COUNTERCLAIM**

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 11th March 2025 where they seek the following Orders:
 - a. Spent.
 - b. That this Honourable court be pleased to grant the Plaintiff leave to file and serve additional witness statements and list of witnesses.
 - c. That upon granting of the said leave, the draft witness statements be deemed as duly filed and proper on record.
 - d. That this Honourable court be pleased to grant any other orders that it may deem fit.
2. The application is premised on grounds on its face and on the 2nd Plaintiff's supporting affidavit. He avers that pleadings have closed and the matter has been fixed for hearing but the Plaintiffs intend to call three more witnesses being; Bernard Kiplagat Kilele, Janet Okanga and a document examiner to testify and give evidence. Further, that at the time the matter came up for pre-trial directions, the said intended witnesses had not executed their statements thus the same could not be filed in time. He claims that the aforementioned witnesses are necessary to enable the court evaluate their testimony and evidence to enable it determine the matter on its merit. Further, that the Defendants will not be prejudiced in any way as they will have an opportunity to cross-examine the witnesses.
3. The application is opposed by the 1st and 2nd Defendants' vide the replying affidavit of the 1st Defendant, who is also a director of the 2nd Defendant in the main suit. He avers that pleadings closed in July 2024 and the Plaintiffs have taken inordinately long to seek leave without any explanation on the delay. He contends that two of the witnesses sought to be introduced have always been available to the Plaintiffs as early as June, 2023, but the Plaintiffs have never bothered to have them sign witness statements. He points out that Mr. Bernard Kilele had executed an affidavit dated the 26th June 2023. And he also swore a Statutory Declaration on 4th October 2023, in which he consented to the sale transaction of the suit property between the 1st and 3rd Defendants in the Counterclaim. He argues that the documents filed by other parties specifically the 6th to 8th Defendants in the Counterclaim confirm that Mr. Bernard Kiplagat Kilele has always featured in the matter as his statement is part of the 6th to 8th Defendants' documents.
4. He avers that Janet Okanga who was an alleged director of the Plaintiff was within the Plaintiff's knowledge. Further, that the intended calling of a document examiner is without merit as the alleged expert report sought to be produced has not been served and details of the intended expert have not been disclosed.



5. The 3rd, 4th and 5th Defendants in the Counterclaim filed Grounds of objection to the application. They contend that the application is only meant at re-opening pleadings and frustrating the expeditious disposal of the matter and that the intended introduction of a document examiner whose report is not part of the court record amounts to a trial by ambush. Further, that there is no justification for the deliberate breach of established rules of procedure.

Submissions

6. In their submissions, the Plaintiffs relied on grounds on the face of the application together with the supporting affidavit to their application. They argued that the instant application ought to be allowed since the court is enjoined under Article 159 (2) (b) to dispense justice without undue technicality and the Defendants will not be prejudiced in any way as they will have a chance to cross-examine the witnesses. To support their averments, they relied on the following decisions: Too v Tum (Environment & Land Case 975 of 2012) [2014] KEELC 512 (KLR) (27 January 2024) (Ruling) and Raindrops Limited v County Government of Kilifi [2020] eKLR.
7. On their part, the 1st and 2nd Defendants reiterated the averments in their replying affidavit and submitted that in considering whether to allow additional witnesses, the court should address its mind to the questions such as reasons for late availability of the witnesses, the discovery of new documents and the stage of the proceedings at which the additional evidence is sought to be introduced. They insisted that Article 159 (2) (b) of *the Constitution* does not in any way do away with timelines imposed by the rules and by this court. To support their arguments, they relied on following decision: Preview Property Agency & another v Terrie Wanjiku Miano [2021] eKLR.

Analysis and Determination

8. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaintiffs should be granted leave to file and serve additional witness statements and list of witnesses.
9. The Plaintiffs have sought to file additional witness statements and list of witnesses, which application is vehemently opposed by the 1st and 2nd Defendants in the main suit and the 3rd, 4th and 5th Defendants in the Counterclaim, who contend that witnesses sought to be introduced were available to the Plaintiffs. Further, that there is delay in filing the instant application and they urge the court to assess the reasons advanced by the Plaintiffs for the late introduction of witnesses.
10. On filing of list of witnesses and statements, Order 3 Rule 2 of the Civil Procedure Rules provides that:

“ All suits filed under rule 1 (1) including suits against the government, except small claims, shall be accompanied by—

 - (a) The affidavit referred to under Order 4 rule1(2);
 - (b) A list of witnesses to be called at the trial;
 - (c) Written statements signed by the witnesses excluding expert witnesses; and
 - (d) Copies of documents to be relied on at the trial including a demand letter before action: Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”



11. Where the period provided by the rules passes, leave to file witness statements out of time, can be granted provided it is furnished fifteen (15) days prior to the pretrial conference. This is as per Order 3 Rule (2) (d) above. Where the pre-trial conference has passed, then extension of time can be sought.

12. On extension of time, Order 50 rule 6 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR set out the principles for extension of time and stated as follows:

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

14. In *Kanyarkwat Group Ranch & 4 Others v Joseph & 3 Others* (Environment & Land Case 38 of 2021) [2022] KEELC 15037 (KLR) (22 November 2022) (Ruling), it was held as follows:

“A party then must demonstrate that the proposed evidence he seeks to bring in later than the one sealed in the pre-trial process would not, with all due diligence be available when the preparation of the case was underway. This he has to do to the satisfaction of the Court. It is not automatic that the leave be granted. It would be a mockery of the procedure and justice for a party to inform the Court for the sake of it or lie to or mislead it that the matter is ready only for him/her to come to the trial and change his mind to introduce more evidence which with due diligence he/she would have had and put in the Court file and turned over to the adverse party before the trial conference or fixing the matter for hearing. Also, it would be prejudicial for a party who has prepared for his case upon reliance of the others’ disclosed information to be ambushed with further information about the case...”



15. In this instance, the Plaintiffs are seeking to file list of witnesses and witness statements, after close of pleadings and pretrial conference but before the suit is set down for hearing. From a reading of the aforementioned legal provisions, it provides the period for filing the List of Witnesses and witness statements. The Plaintiffs have explained that the reason for delay in filing the documents including witness statements was due to the delay in the witnesses signing the said statements, which explanation I find plausible.
16. Despite the fact that the Defendants have opposed granting of leave to file list of witnesses and witness statements, I opine that they have failed to demonstrate what prejudice they stand to suffer if list of witnesses and witness statements were filed since the suit has not been down for hearing and they will have a chance to cross examine the witnesses. Further, Order 50 of the Civil Procedure Rules allows for enlargement of time, while Article 159 (2) (d) of *the Constitution* expects courts to administer justice without undue regard to procedural technicality.
17. In the circumstances, I find the instant Notice of Motion application merited and will allow it. I direct the Plaintiffs to file a serve the Further list of witnesses including witness statements within seven (7) days, from the date hereof, after which the Defendants can file further witness statements and documents if need be in fourteen (14) days.
18. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mugo for Plaintiffs

Cheruiyot for Defendants/Plaintiffs in Counter Claim

Odunga for 3rd, 4th, 5th Defendants in the Counter Claim

Court Assistant: Joan

