



**Gachao (Suing on her own Behalf, and on Behalf of the Estate of Frank P. Kinya Kioni – Deceased) v Mwangi & 3 others (Environmental and Land Originating Summons 11 of 2022) [2024] KEELC 776 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 776 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS 11 OF 2022**

**JG KEMEL, J**

**FEBRUARY 16, 2024**

**IN THE MATTER OF SECTIONS 7, 9, 10, 12(3), 13, 16,  
 17 AND 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND PARCEL THIKA MUNICIPALITY BLOCK 38/247**

**BETWEEN**

**EMMA WAITHIRA GACHAO (SUING ON HER OWN BEHALF, AND  
 ON BEHALF OF THE ESTATE OF FRANK P. KINYA KIONI –  
 DECEASED) ..... PLAINTIFF**

**AND**

**SERAH WANJIRU MAINA ..... 1<sup>ST</sup> RESPONDENT**  
**CECILIA WAMAITHA MWANGI ..... 2<sup>ND</sup> RESPONDENT**  
**LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Vide an Application dated 5/6/2023, the Plaintiff/Applicant seeks in the main the following orders;
  - a. Spent.
  - b. That the orders issued on the 16/8/22 certifying the matter as urgent be set aside.
  - c. That the Applicant be granted leave to file two additional further witness statements in the matter.



- d. Costs be provided for.
2. The Application is based on the grounds on the face of it and Supporting Affidavit of Emma Waithira Gachao, the Applicant. The Applicant deponed that she is the wife of the late Frank P. Kinya on whose behalf she filed the instant suit. That the suit property herein, Thika Municipality Block 38/247, was initially allocated to David Nduati Kigochi according to Letter of Allotment dated 4/9/1998 marked as EWG-2. That in 2009, her late husband purchased the suit land from Patrick Gitonga Njoki and not David Nduati Kigochi as indicated in her pleadings. That on 13/1/2010, the late Frank entered into a lease agreement – see annexure EWG-5 - to lease the suit land to Pastor Gideon Muzyu Muya of the Antioch Grace Fellowship Church. That at the time of filing her suit, Mr. Geoffrey Nyaga Njeru, a crucial witness, was out of the country hence the Application.
  3. The Application is solely opposed by the 2<sup>nd</sup> Defendant/Respondent. She filed her Grounds of Opposition dated 10/7/2023 terming the Application mischievous, frivolous, ill-advised and an afterthought and as such ought to be dismissed with costs.
  4. The Applicant also filed a Further Supporting Affidavit (sic) sworn on 6/6/2023. She annexed the draft witness statements of Geoffrey Nyaga Njeru and Daniel Kibathi Karuita as EWG1 and EWG2 respectively.
  5. On 11/7/2023 directions were taken to canvas the Application by way of written submissions. At the time of writing this Ruling only the Applicant had filed her submissions through the firm of Muiruri, Cheserek & Co. Advocates.
  6. It was submitted that the right to a fair hearing is constitutionally entrenched to enable her adduce evidence before Court. That the omission of the two additional statements was not intentional on her part. On whether the Respondents stand to suffer prejudice if the Application is allowed, the Applicant submitted that they would be free to file additional documents and cross examine the additional witnesses if need be.
  7. The relevant provision relating to the filing of witness statements is traced to Order 3 rule 2 *Civil Procedure Rules* which states that;

“2. Documents to accompany suit [Order 3, rule 2.]

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.”



8. It is apparent from the above that the time frame for filing witness statements is capped to at least 15 days prior to Pre-trial Conference. In the event such timeline lapses the Court may extend the same based on Section 95 Civil Procedure Act which states;

“95. Enlargement of time

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

9. It is trite that extension of time is a discretionary exercise of Court’s powers. Such discretion must be exercised judiciously and not whimsically. The Court as a neutral arbiter and also a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities and strictures. This flows from the provisions of Article 159 (2)(d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the Application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not limited to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced.

10. The Applicant has deponed that one of the proposed witnesses was out of the country at the time filing this suit. However, no evidence was offered in support of this assertion. Be that as it may the Court is further guided by Articles 48, 50, and 159 of the Constitution of Kenya to ensure that justice is administered to all. The 2<sup>nd</sup> Respondent stated that she stands to suffer substantial prejudice if the Application is allowed but no details of the prejudice was proffered if at all.

11. The upshot of the forgoing is that the Application is allowed in terms of prayer No. (c) only.

12. The Defendant will be at liberty to cross examine the Plaintiff’s witness and file statements and call additional witnesses if need be.

13. No orders as to costs as Respondent did not file submissions as directed.

14. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Plaintiff/Applicant – Absent but served

Ms. Muturi HB Kanyi for 1<sup>st</sup> Respondent

2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents – Absent but served

Court Assistants – Phyllis/Oliver

