



Kahuki (Deceased) & 3 others v Ng’ati (Environmental and Land Originating Summons 62B of 2020) [2024] KEELC 1529 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1529 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 62B OF 2020
JG KEMEI, J
MARCH 20, 2024
IN THE MATTER OF THE CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION OVER TITLE NUMBER LIMURU/RIRONI/265

BETWEEN

ELIZABETH WANGUI KAHUKI (DECEASED) 1ST PLAINTIFF
JOSIAH KAMAU NG’ATI 2ND PLAINTIFF
WINNIE MUTHONI KAHUKI 3RD PLAINTIFF
VICTORIA WANGARE KAHUKI 4TH PLAINTIFF

AND

HENRY KAHUKI NG’ATI DEFENDANT

RULING

1. The Plaintiffs/Applicants filed the instant Motion dated the 12/2/24 and expressed under Order 8 and Order 50 Rule 6 [Civil Procedure Rules](#) and Sections 1A, 1B, 3A, 95 and 100 of the [Civil Procedure Act](#) craving for Orders that;
 - a. Spent.
 - b. The Honorable Court do extend the time and thereafter grant leave for filing the annexed Originating Summons amended on 15th September 2023, out of time.
 - c. The Originating Summons amended on 15th September and filed on 19th September 2023 be admitted as duly filed and thus properly on record.
 - d. In the alternative to prayers 2 and 3 above, leave be granted to the Plaintiff to amend the Originating Summons dated the 8/7/2020 in the manner set put in the draft Originating



Summons amended on 15/9/23 and to file and serve the same upon the Defendant/ Respondent, within one day from the date of grant of leave.

- e. The costs of this Application be in the cause.
2. The Application is based on the grounds that the Originating Summons were amended out of time due to an inadvertent mistake on the part of Counsel. That the mistake should not be visited upon the innocent client and it is in the interest of justice that the Application be allowed.
 3. The motion is supported by the Affidavit of even date of Clare Nyabuti, the Plaintiffs' Advocate. She deponed that this Court had granted them leave to amend their Originating Summons within 60 days however the amended Originating Summons, annexed as CN1, was filed out of time on 15/9/2023. That the amendments were done without seeking extension of time and that it was an inadvertent mistake on the part of Counsel. That the Respondent will not suffer prejudice having filed witness statements annexed as CN1 in response to the amendments.
 4. Opposing the Application, the Defendant/Respondent Henry Kahuki Ngati filed his Replying Affidavit sworn on 11/3/2024. Conceding the earlier Court Order allowing the Plaintiff to file their amended Originating Summons pursuant to leave granted on 15/6/2023, he deposed that the Plaintiffs' amended Originating Summons were filed out of time and seek to introduce new causes of action including cancellation of Title deed for Limuru/Rironi/265, order for sale of the suit land, Defendant to supply accounts for the rent proceeds to 2nd to 4th Plaintiffs and an inquiry into the process of compulsory acquisition by the National Land Commission. That the new amendments are prejudicial to him as he had already responded to the Plaintiffs' earlier claim. That the pendency of the suit has caused him and his family immense anxiety since they occupy the suit land and have extensively developed it. He urged the Court to dismiss the Application with costs.
 5. The Application was argued orally before me on 12/3/2024.
 6. Learned counsel Claire Nyabuti for the Plaintiffs submitted that the new amendments have been necessitated by new facts that have arisen from the actions of the parties and the Plaintiffs have just become aware. That the amendments are not prejudicial to the Defendant.
 7. On behalf of the Defendant Learned Counsel Mr Nderitu reiterated that the said amendments seek introduce a new cause of action. He submitted that should the Court be inclined to allow the Application; the Defendant be granted time to respond accordingly.
 8. The sole issue for determination is whether the Application is merited.
 9. Section 95 of the *Civil Procedure Act* provides as follows;

“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”
 10. Similarly Order 50 rule 6 *Civil Procedure Rules* provide as follows;

“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.”

11. The extension of time is a discretionary remedy. The principles for the Court to consider in such an Application were settled by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
6. Whether the Application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

12. The Plaintiffs contend that the failure to comply to the timelines for amendments as directed by this Court on 15/6/2023 within 60 days was due to inadvertent mistake on the part of counsel. The Court has not been told what the mistake actually entails. The period of 60 days lapsed around 14/8/2023 and it was not until the 13/2/2024 that the instant motion was filed. There is no plausible explanation for the inordinate delay of over 7 months to persuade this Court to extend the time as prayed.

13. That said the Court finds that in the circumstances of this case the parties are yet to fully comply with Order 11 of the *Civil Procedure Rules* and the hearing has not begun and in the spirit of freely allowing amendments so that parties may have their whole case before the Court, I find that purely in the interest of justice, the Court allows the Application dated 12/2/24 as prayed and in the following terms;

- a. The Applicant is ordered to pay throw away costs of Kshs 30,000/- in favour of the Respondent within fifteen (15) days.
- b. In default of (a) above the Application dated the 12/2/24 shall stand dismissed.
- c. The Respondent shall have corresponding leave of fifteen (15) days to amend pleadings if need be.



d. Costs of the Application shall be in favour of the Respondent.

17. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Claire Nyabuti for the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants

Ms. Maina for Defendant/Respondent

Court Assistants – Phyllis/Oliver

