



Ochieng v Agricultural Development Corporation & 3 others; National Land Commission (Interested Party) (Environment & Land Petition E002 of 2022) [2024] KEELC 5326 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION E002 OF 2022
FO NYAGAKA, J
JULY 18, 2024**

BETWEEN

STEPHEN OCHIENG PETITIONER

AND

**AGRICULTURAL DEVELOPMENT CORPORATION 1ST RESPONDENT
THE HON. ATTORNEY GENERAL 2ND RESPONDENT
THE CHIEF LAND REGISTRAR 3RD RESPONDENT
THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,
FISHERIES AND COOPERATIVES 4TH RESPONDENT**

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. On 07/05/2024, this Petition came for a further hearing when the Petitioner was to tender further evidence. On the material date he took to the witness box. Upon resuming his evidence, it turned out that he had filed a Supplementary List of documents on 25/05/2023, which he wished to rely on. The List was dated the same date and to it were attached three copies of documents. One was a letter dated 24/05/2023, another a Death Certificate (sic) No. 0822788, and the other a letter dated 25/05/2023 issued by the Civil Registration Department.
2. When the Petitioner sought to produce the first document attached to the Supplementary List the Respondents, through learned counsel objected to the production and reliance. The basis of the objection was that the List was filed without leave of the court, and by the time that was done pleadings had closed.



3. Learned counsel for the Interested Party supported the objection, arguing that since the documents were filed without leave of Court they should be struck out.
4. The Petitioner admitted that indeed he was unaware when the leave was granted. But he contended that he be granted permission to rely on them since the matter had earlier proceeded on for hearing and the witness in the dock was stood down merely to call the makers of the other documents which were objected to earlier, and were in copy form. Thus, since the Petitioner had testified and for the reason that he was a purchaser for value without notice he should be permitted to produce the documents. That justice demanded that for reason that the original owner of the parcel of land was deceased the Petitioner decided to fulfil his duty and had to comply with the rules of evidence. That was why he made a formal application to the Registrar of Births and Deaths through the letter dated 24/05/2023 for the latter to confirm that indeed the original owner of the parcel, one Mohammed Ibrahim Abdullah was deceased and the department certified that by issuing the letter attached to the list. He argued that he had issued a Notice to Produce Documents, dated the same date, the 25/05/2023. Pursuant to his application dated 29/05/2023, the documents had been brought to the attention of the Respondents.
5. He relied on the decision of *Lwangu v Ndote* (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling). Further, he relied on Sections 35 and 68 of the *Evidence Act* and argued that there was no evidence to show that the formal request made to the Ministry of Interior were forgeries. Further, Article 159 of the *Constitution* obligated courts to dispense justice rather than relying on technicalities. Also, he relied on Section 3A of the *Civil Procedure Act* and prayed that the Court admit the documents as part of the Record.
6. Learned counsel for the 1st Respondent replied stating that the documents had been filed without leave of Court, and a week later the Petitioner sought to have them admitted but the Court did not grant the prayer: The Petitioner was given time to serve them so that counsel would seek instructions thereon. Learned counsel for the 4th Respondent associated himself with the sentiments of the other Respondents. He argued that the issue of admission of documents after the closure of pleadings was a matter of the exercise of discretion by the court. He urged the court to exercise that discretion judiciously regarding the Notice to Produce since it was a matter of law and Section 69 of the *Evidence Act* provided for it.
7. Learned counsel for the Petitioner responded that all that he was required to do was to show he had in his possession the originals and they were now available. He invoked Sections 35 and 68 of the *Evidence Act*.

Issue, Analysis and Determination

8. I have perused the court record, particularly the proceedings of 29/05/2023. It shows that on the material date the Petitioner moved the court that he had filed a Supplementary List of Documents dated 25/05/2023 and issued a Notice to Produce Documents, which notice was directed to the 1st Respondent. He prayed that the Supplementary List of Documents be allowed as part of the record.
9. The prayer was objected by the 1st Respondent on the basis that the said party had not been served with the Supplementary List hence it needed to be served and learned counsel seeks further instructions thereon. Regarding the 2nd and 3rd Respondents they admitted that they had been served with the documents. On their part they did object to the Notice to Produce Documents since it was directed to the 1st Respondent and not their clients.



10. On that date the Court directed that the 1st Respondent be served with both the List and Notice to Produce. It was given seven days to respond to the Notice to Produce upon being served, and to seek further instructions in regard to the Supplementary List of Documents.
11. The court record bears further that the Notice to Produce, dated 25/05/2023, required the 1st Respondent to produce a number of letters whose copies were specified. They were five, and were purportedly issued by the said Respondent. They were dated the 15/04/1994, 11/04/1995, 15/04/1997, 06/04/1997 and 30/04/1998. The other was a copy of a receipt dated 28/03/1998 purportedly issued by Lands Limited. It is clear from the two sets of documents filed on 25/05/2023 being the Notice to Produce Documents and the Supplementary List that they do not refer to similar documents each is in regard to documents said to be authored on different dates.
12. With this background this Court now proceeds to determine the instant oral Application. Before delving into the analysis of the facts, it is worthy of note that the issue before me in this application is not in relation to the Notice to Produce Documents. Rather, it is about the validity of the Supplementary List on the record and whether or not this Court should deem them as properly filed and served and allow the Petitioner to rely on them in his evidence. To date the Notice to Produce Documents has not been addressed, and directions thereon shall be issued at the tail end of this Ruling.
13. In the courts of this level and the subordinate ones, the law regarding the filing and reliance on documents that accompany a Petition, just as in relation to those that accompany a Complaint or Claim, is governed by Order 3 Rule 2 of the Civil Procedure Rules. The cardinal rule is that any party who institutes a suit or petition should file the pleadings together with or simultaneously as the List of Documents, and the copies of thereof he relies on. It is the same requirement, under Order 7 Rule 5 of the Civil Procedure Rules, for a Defendant or Respondent who defends a matter.
14. This Court has carefully read and reflected on the two Rules above which at the relevant parts they provide, respectively, that, “All suits filed under rule 10) including suits against the government, except small claims, shall be accompanied by -(d) copies of documents to be relied on at the trial including a demand letter before Action...”, and “The defence and counterclaim filed under rule 1 and 2 shall be accompanied by- (d) copies of documents to be relied on at the trial.” Both sub-Rules do not provide anywhere for a party to file additional or Supplementary Documents after the party files the pleadings.
15. The finding that I have drawn means that it is left to the discretion of the Court to either grant or refuse the leave to file a List of Documents or indeed any other, for instance, a Supplementary List, depending on the circumstances of each case. In my humble view, since there is no room given for the filing of documents after the filing of pleadings, while exercising discretion judiciously, courts would be extremely cautious and hesitant to permit a party to file any documents after they have either instituted the matter or filed a Defence or Response respectively. The threshold to be met for such a part should be so high that it basically leaves no room for late filing, and there are many good reasons for this. One is that it would wade off the fishing expedition of evidence in order to build claims or cases. The other reason is that by the time a party sets to institute a matter or file a response to one he/she ought to have in his/her possession all the documents that answer to or support the allegation. If he/she does not have them, he should seek time before filing the pleadings to be permitted to obtain the documents and file them, and he/she should indicate which and the nature of the documents he/she seeks time to obtain, while explaining why he does not have them. This is to limit possibilities of making or ‘manufacture’ of documents tailored to suit the case or purporting to panel beat the ‘truth’. Furthermore, the advantage of filing all documents with the pleadings is to bring to the attention of the adverse party the evidence it is to confront and prepare for it. This allays the fear and does away with the possibility of trial by ambush which goes against the right to fair hearing. It also would do away with possibilities of the



adverse parties seeking time to amend pleadings or moving the court for leave to put in or introduce to the record additional evidence or information in answer to the late documents. This directly does away with deliberate and carefully designed backlogs and delays in determination of disputes hence helping courts and parties to achieve the overriding objective of the *Civil Procedure Act* and provided for under Section 1A(1) which is “...to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act,” and for this Court, being, Section 3(1) of the *Environment and Land Court Act*.

16. Only expert information may be adduced later after the filing of pleadings. This is specifically provided for under Order 3 Rule 2(c) and Order 7 Rule 5(c) of the *Civil Procedure Rules*.
17. This Court is of the humble opinion that while it is good practice to leave it to the discretion of courts to exercise discretion whether or not to allow the filing of documents out of time, that is to say, with when parties do not file them with pleadings as explained above, it would be a better practice for the Rules Committee to formulate a clear and precise guideline on when and how, if that has to be, to grant such orders in order to avoid the semblance of arbitrariness and appearance of favoritism. This is because, depending on the school of thought the judge or judicial officer holds, particularly, whether positivist or naturalist, the final result gives the opposite outcome in discretion, yet both believe the same to be just. Meaning, the one who leans towards the positivist school may most likely tend to interpret the law as it is and therefore exercise discretion to deny the grant of the leave while the one who leans more to the naturalist school may easily grant the orders. Others may take advantage of the exercise of discretion and breed favoritism or sympathy. Such divergence then may cause injustice in one way or other.
18. That aside, granted that pleadings are filed and served according to the requirements of the law, they close in terms of Order 2 Rule 13 of the *Civil Procedure Rules*, that is to say after the end of fourteen (14) days from the date of service of the Reply or Defence to Counterclaim or where neither is served, after the service of the Defence. If a party is to file any pleadings after the closure thereof, and and/or documents for that matter, he has to seek leave of Court, or subject to it being in writing, by the consent of the parties as stipulated by Order 50 Rule 6 of the *Civil Procedure Rules*. It means that where such a consent is not forthcoming when a party does not file documents, the party who did not do so must seek the leave of Court. Even where the consent it entered into by the parties, it has to precede the filing of any such document. Otherwise the document filed is illegal, strange and a nullity and cannot by all means or any order or consent be deemed valid or validated. The grant of the order or filing of the consent does not act retrospectively but prospectively.
19. One important point to note is that irrespective of whether pleadings are closed or not, once a party has filed documents, whether by way of annexing them to an affidavit or a List of Documents as provided for by law, the filing of any subsequent ones has to be with express leave of the Court. Filing of additional documents should not be confused with the extension of time for filing a pleading or documents as contemplated in Order 50 Rule 6 of the *Civil Procedure Rules* that is explained above.
20. In *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*, [2014] eKLR, the Supreme Court of Kenya judges held as follows:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing



renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that petition No 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as the document is unknown in-law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

21. In the instant case, the petitioner/Applicant filed the Supplementary List of Documents without first seeking leave of the Court. He argues that he did so in the quest of fulfilling his duty as a litigant to be diligent. This court is of the humble view that diligence along an illegality tangent does not and cannot in any way be the basis to break the law or procedures. Diligence required that as soon as the Petitioner realized that he had in his possession documents he needed to file after he had filed others, he should have sought the leave of the Court for filing them and when and if that was granted he would then file them. Otherwise, for the Petitioner to file the Supplementary List as he did and then seek the leave of the court to deem it duly filed is akin to the actions of the stranger who entered into the wedding banquet of the King’s son, in Mathew 22: 2-14 (for those who believe in the Holy Bible). In the parable, in summary, when the King came in to check on how his guests were dressed he found the stranger, with strange clothes. He ordered him to be bound and thrown out into darkness to gnash his teeth there. This Court has little option, and guided by the *Nicholas Salat case* (*supra*), but to do likewise to this ‘strangely clothed’ Supplementary List of Documents dated and filing on 25/05/2023. They are thus, struck out, with costs to the Respondents.
22. For good order and focus in the proceedings herein, this Court having recalled that the Notice to Produce Documents as was given by the Petitioner on 25/05/2023, has not been addressed by the addressee *suo moto* proceeds to take the step to clear the issue, unless the Notice is expressly withdrawn by the Petitioner. The Court thus directs that the Petitioner does serve the same on the 1st Respondent within seven (7) days and the 1st Respondent responds to it as by law required, within ten (10) days of service, in default the Petitioner to move this Court appropriately, not later than seven (7) days after the expiry of the ten (10) days period. This matter shall be mentioned on 16/09/2024 for confirmation of compliance on the above directions after which it will be fixed for further hearing.
23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF JULY, 2024.

HON. DR. IUR F. NYAGAKA J.

JUDGE, ELC KITALE

