Gidjoy Investments Limited v Zero Point Construction Company Ltd & 63 others (Environment & Land Case 301 of 2018) [2024] KEELC 13819 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13819 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 301 OF 2018

JO MBOYA, J

NOVEMBER 12, 2024

BETWEEN

GIDJOY INVESTMENTS LIMITED ..... PLAINTIFF

AND

ZERO POINT CONSTRUCTION COMPANY LTD ..... 1ST DEFENDANT

JOSHUA NGURE NJOROGE ..... 2ND DEFENDANT

RONALD MWERESA KERIND ..... 3RD DEFENDANT

MARAGA MAKORO SAMSON ..... 4TH DEFENDANT

KENNEDY ONDITI ..... 5TH DEFENDANT

ESTHER NYABOKE NYAMACHE ..... 6TH DEFENDANT

MAKORO OMBIVU JOB ..... 7TH DEFENDANT

JAMES MUSHI EBAYA ..... 8TH DEFENDANT

SHADRACK CHAHASI EBAYI ..... 9TH DEFENDANT

JANE WANGUI KAIRU ..... 10TH DEFENDANT

CATHERINE NYANDA WERU ..... 11TH DEFENDANT

EDWARD MUNGAI KANGETHE ..... 12TH DEFENDANT

MARIANA KHITIEYI SETH ..... 13TH DEFENDANT

KASALE LEPARAKUO ..... 14TH DEFENDANT

ALICE NYAMBURA MWANGI ..... 15TH DEFENDANT

RICHARD MACHARIA THONGO ..... 16TH DEFENDANT

EDWARD MACHARIA TAMA ..... 17TH DEFENDANT

NAHASHON WANJALA BARASA ..... 18TH DEFENDANT

FLORENCE MEDZA PENDA ..... 19TH DEFENDANT

JOSEPH WANDABI ..... 20TH DEFENDANT

JANE WAMAITHA MAINA ..... 21ST DEFENDANT

SAMUEL MAINA KAMAU ..... 22ND DEFENDANT

JOSEPH MUCHEKE KAMUA ..... 23RD DEFENDANT

PETER NOROGE KANIKA ..... 24TH DEFENDANT

TOBIKO KALAINE ..... 25TH DEFENDANT

KIKANAI OLE KALAINE ..... 26TH DEFENDANT

ZENTLINE KERUBO SIRIBA ..... 27TH DEFENDANT

PETER GITAU MUIRURI ..... 28TH DEFENDANT

ABDRAHIM CHERUIYOT HUSSEIN ..... 29TH DEFENDANT

SAMUEL PETER MBOGO NJUGUNA ..... 30TH DEFENDANT

VICTOR GEORGE GITAU MUIRUR ..... 31ST DEFENDANT

MESHACK ODIPO ..... 32ND DEFENDANT

SAMUEL EBAYI CHAHASI ..... 33RD DEFENDANT

JOEL NGECHA NJUGUNA ..... 34TH DEFENDANT

JAMES NGUNYU KABIRU ..... 35TH DEFENDANT

GRACE WANJA KAHUTO ..... 36TH DEFENDANT

GABRFIEL KARIUKI RUNO ..... 37TH DEFENDANT

PAUL MAINA ..... 38TH DEFENDANT

LILIAM WAMBUI MWANGI ..... 39TH DEFENDANT

SAMUEL KAMAU GITHENDU ..... 40TH DEFENDANT

FRANK TAWA MVAYA ..... 41ST DEFENDANT

FATUMA MWAKA NYASI ..... 42ND DEFENDANT

JOYCE WANJUGU KAMUNYA ..... 43RD DEFENDANT

CHARLES NZIOKI NZUKI ..... 44TH DEFENDANT

ERIC NGALA KAHINDI ..... 45TH DEFENDANT

ZIPPORAH NEKESA WAMALWA ..... 46TH DEFENDANT

EVERLYN ALIVIDZA KIBUSU ..... 47TH DEFENDANT

ALBERT MURIUKI MUOHE ..... 48TH DEFENDANT

EVAN MANYARA NJOGU ..... 49TH DEFENDANT

FELIX AYUYA MIDIKIRA ..... 50TH DEFENDANT

MARY WAITHERERO NJOROGE ..... 51ST DEFENDANT

MICHAEL KABIRU MWAI ..... 52ND DEFENDANT

BELONCE WANGUI KARIUKI ..... 53RD DEFENDANT

SAMUEL MBOGO NJUGUNA ..... 54TH DEFENDANT

GRACE WANJA KAHUTHU ..... 55TH DEFENDANT

GITAU MUIRURI ..... 56TH DEFENDANT

THE CHIEF LAND REGISTRAR ..... 57TH DEFENDANT

THE DIRECTOR OF SURVEY ..... 58TH DEFENDANT

THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 59TH DEFENDANT

THE HON ATTORNEY GENERAL ..... 60TH DEFENDANT

THE COUNTY GOVERNMENT OF NAIROBI ..... 61ST DEFENDANT

ALEXANDER HOOPS ANDREW MUGAMBI PATROBAS AWINO (AS OFFICIALS OF SOWESAVA SELF HELP GROUP) ..... 62ND DEFENDANT

ANNA KHASOA (CHAIRPERSON OF SAVANNAH JUA KALI ASSOCIATION) ..... 63RD DEFENDANT

NATIONAL LAND COMMISSIO ..... 64TH DEFENDANT

RULING

Introduction And Background:

1. The 67th Defendant/Applicant has approached the court vide Notice of Motion Application dated the 4th day of November 2024, brought pursuant to the provisions of Order 8 Rule 2 of the Civil Procedure Rules; and wherein the Applicant seeks for the following reliefs;

    i. That the Application be certified urgent and heard Ex parte in the first instance.

    ii. That this honorable court do issue an order allowing the 67th Defendant to re-amend the amended defense as per the annexed re-amended defense herein.

2. The subject application is anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the application is supported by the affidavit of one W. S Ogola sworn on the 4th November 2024 and to which the deponent has annexed a copy of the draft re-amended statement of defense.

3. Upon being served with the subject application, the Plaintiff/Respondent filed a replying affidavit sworn by one Mark Munge on the 11th November 2024 as well as grounds of opposition dated the 11th November 2024. Instructively, the Plaintiff/Respondent has contended inter-alia that the instant application has been filed with unreasonable and inordinate delay, which delay has neither been

accounted for nor explained. In addition, it has been contended that the instant application is a ploy to defeat the scheduled hearing of the main suit.

4. Other than the Plaintiff/Respondent, the rest of the Defendants and the interested parties did not file any response to the application. Furthermore, the rest of the Defendant and the interested parties, save for the honorable attorney general, intimated that same were not opposed to the application.

5. Suffice it to point out that the application came up for hearing on the 11th November 2024, whereupon it transpired that the application had not been served on various parties, including the Plaintiff/Respondent. In this regard, the court ordered and directed that the application be served. Furthermore, the court re-scheduled the hearing of the application to the 12th November 2024.

6. On the 12th November 2024, the application came up for hearing and the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. In this regard, the court allowed the application to proceed for hearing;

Parties' Submissions:

A. Applicant's Submissions:

7. The Applicant herein adopted the grounds contained in the body of the application and also reiterated the contents of the supporting affidavit. Furthermore, the Applicant thereafter raised and canvased three [3] salient issues for consideration by the court.

8. Firstly, learned counsel for the Applicant has submitted that the instant matter has not proceeded for hearing. In particular, learned counsel for the Applicant posited that no hearing has since been taken. Instructively, learned counsel highlighted that the matter is still fresh and hence the court should adopt and apply the general rule pertaining to amendment of pleadings. To this end, learned counsel for the Applicant invited the court to take cognizance of the provisions of Order 8 Rule 5 of the Civil Procedure Rules and Section 100 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

9. Secondly, learned counsel for the Applicant has submitted that the grant of leave to file and serve an amended pleading falls within the discretion of the court. In this regard, it was posited that the court ought to exercise its discretion towards the amendment sought. In any event, learned counsel for the Applicant highlighted that the application for amendment should be freely allowed, so long as same is filed before judgment has been delivered.

10. Finally, learned counsel for the Applicant has submitted that the intended amendment of the 67th Defendant's Statement of defense shall not prejudice the Plaintiff/Respondent or any other party. In this regard, learned counsel for the Applicant has therefore implored the court to find and hold that the application beforehand is merited.

B. 2nd, 10th, 12th, 16th, 21st, 24th, 28th, 31, 34th, 39th, 42nd, 49th, 50th, 54th, 55th, 57th and 62nd Defendants' Submissions.

11. Learned counsel for the named Defendants submitted that the application before the court is meritorious and therefore same ought to be allowed. In particular, it was submitted that the issues intended to be raised and canvassed at the foot of the intended amendment are consistent with the statement of defense filed by and on behalf of the other Defendants.

12. Secondly, it was submitted that the question before the court touches on and concerns the allotment of land in dispute. In this regard, learned counsel posited that there does arise a question of public interests as pertains to the manner in which the suit property was allocated/alienated.

13. Thirdly, learned counsel for the named Respondents has submitted that a party, the 67th Defendant not excepted, is at liberty to seek leave to file and serve an amended pleading. In this regard, it was contended that the application by the 67th Defendant is one geared towards the realization of the 67th Defendant's constitutional right to be heard.

14. Learned counsel for the named Respondents has submitted that the Plaintiff/Respondent has neither demonstrated nor established any prejudice or otherwise that is likely to arise and/or accrue, if the amendment is allowed. Instructively, learned counsel posited that it was incumbent upon the Plaintiff/Respondent to demonstrate the prejudice, if any, to be suffered.

C. Plaintiff's/respondent's Submissions:

15. The Plaintiff/Respondent herein adopted and relied on the replying affidavit sworn on the 11th November 2024 and the grounds of opposition of even date. Furthermore, the Plaintiff/Respondent thereafter highlighted and canvassed three [3] salient issues for consideration by the court.

16. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that the intended amendment is bound to cause and/or occasion substantial injury to the Plaintiff/Respondent. In this regard, it was contended that the kind of amendment proposed is geared towards altering/changing the character of the 67th Defendant's defense. In particular, it has been contended that the 67th Defendant is keen and intent to bring to the fore a completely new set of facts and case scenario.

17. Additionally, learned counsel for the Plaintiff/Respondent has submitted that the intended amendment will precipitate a situation where the Plaintiff/Respondent shall be called upon to dig deeper and procure documents/evidence in respect to the instant matter. Furthermore, it has been posited that the intended amendment will also have a ripple effect including forcing the parties to revert back to undertake interrogatories and discovery of documents.

18. Secondly, it was submitted that the application for amendment has been made/mounted with unreasonable and inordinate delay, which delay has neither been accounted for nor explained. In this respect, it has been contended that in the absence of any explanation by and on behalf of the 67th Defendant, the subject application is not merited.

19. Thirdly, it has been submitted that the issues that the 67th Defendant seeks to highlight and agitate before the court vide the intended amended defense are issues that were dealt with and disposed of vide the Judicial review proceedings number ELC No. 20 of 2018. In this regard, it has been contended that the intended amendment is merely calculated to conflate the issues and thus to delay the hearing of the suit.

20. Fourthly, it has been submitted that the parties herein participated in the pretrial conference and thereafter same [parties] confirmed to the court that the instant suit was ready for hearing. Furthermore, it has been submitted that the parties thereafter took various hearing dates, including the 12th November 2024.

21. Be that as it may, learned counsel for the Plaintiff/Respondent has submitted that the 67th Defendant waited until the eve of the scheduled hearing and thereafter filed the subject application. To this end, learned counsel for the Plaintiff/Respondent has submitted that the application beforehand therefore smacks of mala fides.

22. Arising from the foregoing, learned counsel for the Plaintiff/Respondent has therefore implored the court to find and hold that the application beforehand is not only misconceived but same constitutes an abuse of the due process of the court. In short, the court has been invited to dismiss the application.

D. Submissions by 63rd to 66th Defendants'/respondents'

23. The said Defendants/Respondents raised and highlighted four [4] salient issues for consideration by the court. Firstly, learned counsel Mr. Allan Kamau [Principal Litigation Counsel] submitted that the instant application has been filed with unreasonable and inordinate delay. Furthermore, it has been contended that despite the length of delay attendant to the application beforehand, the applicant herein has neither found it fit nor expedient to account for the delay.

24. Owing to the extent and length of delay, learned counsel for the said Defendants has posited that the application is therefore defeated by the doctrine of latches. In any event, learned counsel has submitted that the discretion of the court cannot be granted in vacuum.

25. To underscore the submissions that an application for leave to emend ought and should be filed timeously and without unreasonable delay, learned counsel for the said Defendants has cited and referenced the decision in Central Bank of Kenya v Trust Bank Ltd & 3 Others [2002]eKLR and Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018]eKLR, respectively.

26. Secondly, learned counsel for the said Defendant/Respondents has submitted that the nature of the application and the intended amendment is likely to cause and/or occasion substantial prejudice to the Plaintiff and the 63rd to 66th Defendants/Respondents. In this regard, it has been contended that the intended amendment is bound to whittle down all the process and progress that have been undertaken in the matter.

27. In addition, learned counsel has submitted that the scope and extent of prejudice to be suffered if the proposed amendment is allowed, is enormous. In this regard, the court was invited to ensure that one party does not litigate in such a manner as to prejudice the adverse party.

28. Thirdly, learned counsel for the said Defendants has submitted that it was incumbent upon the 67th Defendant/Applicant to place before the court plausible and cogent explanation as to why the application for amendment was not filed timeously. However, it has been posited that the Applicant herein has failed to supply any reason or at all.

29. To buttress the submissions pertaining to the necessity to file the application for amendment timeously and with due promptitude, learned counsel for the said Defendants/Respondents has cited and referenced the decision in Joseph Ochieng & 2 Others v First National Bank of Chicago [1999]eKLR.

30. Finally, learned counsel for the said Defendants has submitted that the intended amendment is calculated to alter and change the character of the defense that was raised and canvassed by the 67th Defendant. In this regard, it has been contended that where the intended amendment is calculated to alter the character of the suit/defense, then the court ought to decline the amendment.

31. To amplify the foregoing submissions, learned counsel for the said Defendants has cited and referenced the decision in the case of Elijah Kipngéno Bii v Kenya Commercial bank Ltd [2013]eKLR, where the court of appeal reiterated the need to ensure that an amendment does not culminate into the change of character of the suit.

32. Finally, learned counsel for the said Defendants has submitted that the subject application is a ploy to defeat and/or delay the expeditious hearing of the matter. In particular, it has been submitted that the timing of the application speaks to an ulterior motive by and on behalf of the 67th Defendant/Applicant.

33. Arising from the foregoing, learned counsel for the 63rd to the 66th Defendants has implored the court to find and hold that the instant application is premature and misconceived. Consequently, the court has been invited to proceed and dismiss the application.

Issues For Determination:

34. Having reviewed the application beforehand and the response thereto and having taken into consideration of the oral submissions canvassed before the court, the following issues do crystalize [emerge] and are therefore worthy of determination;

    i. Whether the instant application has been mounted timeously and without undue/inordinate delay or otherwise.

    ii. Whether the intended amendment is calculated to alter the character of the statement of defense and thereby prejudice the Plaintiff/Respondent or otherwise.

    iii. Whether the Plaintiff shall suffer prejudice or grave injustice, if the intended amendment is allowed.

Analysis And Determination:

Issue Number 1 Whether the instant Application has been mounted timeously and without undue/ inordinate delay or otherwise.

35. The instant suit was filed sometime in the year 2018. Subsequently, the parties herein proceeded to file their respective statement of their defenses, list and bundle of documents and witness statements. Furthermore, the matter herein thereafter came up for pretrial directions on the 13th July 2020 whereupon the advocates for the parties intimated to the court that same had filed and exchanged all the requisite pleadings and documents.

36. Additionally, the advocates for the parties also intimated to the court that there was no pending interlocutory application. In this regard, the court proceeded to and set down the matter for hearing on the 7th December 2020. However, the scheduled hearing aborted because of Covid- 19 pandemic.

37. First forward, the matter herein was subsequently set down for hearing on the 21st and 22nd March 2022, respectively.

38. However, before the hearing could be taken, the 68th and 69th filed various applications seeking to strike out the suit on various grounds. Similarly, the named parties also filed a notice of preliminary objection.

39. Arising from the foregoing, the court was called upon to calibrate on the two [2] applications and the notice of preliminary objection culminating into the delivery of a ruling rendered on the 3rd August 2022. Instructively, the court found and held that the applications beforehand were devoid of merits.

40. Following the delivery of the ruling, the instant matter was scheduled down for hearing. However, before the hearing could be taken an application was filed for stay of proceedings pending appeal. In this respect, the court was obligated to hear and determine the application for stay of proceedings.

41. Suffice it to point out that the application for stay of proceedings was thereafter canvassed and disposed of. For good measure, the application was dismissed.

42. Following the dismissal of the application for stay, the matter herein reverted back to case conference and whereupon the court granted the parties liberty to file and exchange the requisite pleadings,

documents and witness statement. In this regard, it is apposite to take cognizance of the proceedings of 27th November 2023.

43. Notably, on the 27th November 2023, learned counsel for the 67th Defendant attended court and intimated that the 67th Defendant had filed the requisite pleadings and documents. Consequently, the court was called upon to set down the matter for hearing. In this regard, the court proceeded to and issued three [3] sets of hearing dates, namely, 15th April 2024; 16th April 2024 and 17th April 2024.

44. Nevertheless, the scheduled hearing failed to start. In this respect, the matter was thereafter taken out and fresh dates issued. For good measure, the matter herein currently has three dates for hearing, namely the 12th November 2024; the 13th November 2024 and the 14th November 2024.

45. It has become important to reproduce the foregoing background to demonstrate that the parties herein have been actively involved in the proceedings. Furthermore, that the parties have had all the latitude and opportunity to file whatever pleadings that same [parties] were keen to file.

46. Despite the latitude that the parties have had, the 67th Defendant herein did not find it appropriate to file the application for leave to amend her statement of defense. Indeed, there was not even a whimp of any such intended application.

47. Be that as it may, on the eve of the scheduled hearing, namely, on the 7th November 2024, the 67th Defendant proceeded to and filed the instant application. Suffice it to point out that the application was being filed after a whopping six [6]-year duration from the date of filing the suit.

48. Taking into account, the length of time that have lapsed between the time when this matter was confirmed ready for hearing, it was incumbent upon the 67th Defendant to place before the court some plausible and cogent reason, why the application could not have been made earlier.

49. Nevertheless, there is no gainsaying that the 67th Defendant/Applicant herein has neither tendered nor placed before the court any scintilla of explanation. Indeed, the supporting affidavit is deficient and devoid of any explanation. For good measure, no explanation has been proffered.

50. It is not lost on this court that whosoever seeks to partake of the equitable discretion of the court, is called upon to approach the seat of justice with due diligence and dispatch. At any rate, where there is iota of delay, it is incumbent upon the Applicant to account for the delay. Furthermore, the reasons and/or explanation for the delay must be plausible and cogent.

51. To this end, it suffices to cite and reference, the holding in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)where the court of appeal stated thus;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
>
> 13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being

put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

52. The need for an Applicant to approach the court without undue/inordinate delay and where there is delay to account for same, was also highlighted [espoused] by the Court of Appeal in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (Civil Application 91 of 2017*) [2018] KECA 701 (KLR) (22 March 2018) (Ruling), where the court stated and held thus;

> (12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

53. Additionally, the necessity to file an application for leave to amend timeously and with due promptitude was also underscored by the court of appeal in the case of Central Kenya Ltd Vs Trust Bank Ltd,trust Finance Ltd,floriculture International Ltd,first National Finance Ltd & Registrar Of Titles (Civil Appeal 222 of 1998) [2000] KECA 367 (KLR) (Civ) (18 February 2000), where the court held thus;

> The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:
>
> "that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.
>
> And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed. This is an interlocutory appeal in which the appellant challenges the exercise of discretionary jurisdiction of the trial court. It is trite law that an appellate court will not lightly interfere with the exercise of a court's discretion unless it is satisfied that the discretion was wrongly exercised or there is an error in principle.

54. In respect of the instant matter, there is no gainsaying that the application for leave to amend the statement of defense by the 67th Defendant has been filed and mounted with unreasonable and inordinate delay. Furthermore, the delay attendant to the filing of the instant application has not been accounted for or explained.

55. Suffice it to point out, that a party who seeks to partake of and benefit from the Equitable discretion of the court is enjoined to proffer plausible and cogent reasons. Instructively, the equitable discretion of the court cannot be granted on the basis of sympathy or empathy. Similarly, discretion can also not be granted in vacuum.

56. Finally, I beg to cite and reference the doctrine of Latches. The doctrine of latches calls upon litigants to act with due diligence. Where litigant does not act with due diligence, the doctrine of latches deprives same [litigant] of the right to partake of or and benefit from equitable discretion.

57. To this end, it is instructive to take cognizance of the holding of the Court of Appeal in the case of *Chief Land Registrar, Registrar of Titles, Ministry of Lands, Director of Survey & Attorney General v Nathan Tirop Koech,Zacharia Kimutai Kosgei, Ezekiel Kiptoo,Ernest Kibet & National Land Commission*

(Civil Appeal 51 & 58 of 2016) [2018] KECA 27 (KLR) (6 December 2018) (Judgment), where the court stated and held as hereunder;

> 55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).

58. My answer to issue number one [1] is threefold. Firstly, the application by and on behalf of the 67th Defendant/Applicant has been mounted and/or filed with unreasonable and inordinate delay, which delay has neither been accounted for nor explained.

59. Secondly, it is the explanation, if any, given by the Applicant that would enable a court of law to consider whether or not equitable discretion should be exercised in favor of the Applicant. Instructively, discretion must be exercised on the basis of some plausible and cogent reasons and not in vacuum.

60. Thirdly, that the length of delay attendant to the instant application warrants the invocation and application of the doctrine of latches. Pertinently, the plea by the 67th Defendant/Applicant is defeated by latches.

Issue Number 2 Whether the intended amendment is calculated to alter the character of the statement of defense and thereby prejudice the Plaintiff/Respondent or otherwise.

61. The intended amended statement of defense has highlighted a plethora of new issues. Notably, the 67th Defendant has canceled/crossed all the averments that were hitherto contained and/or highlighted at the foot of the statement of defense.

62. Having cancelled all the averments that were hitherto contained, the 67th Defendant has thereafter sought to introduce completely new averments, which are distinct from the position hitherto taken. Instructively, the position being adverted to at the foot of the intended amendment constitutes a complete change of the character and texture of the 67th Defendant's case.

63. The question that does arise is whether such a complete overhaul of the pleading, which brings into the fore a change of cause of action/defense is acceptable. In this regard, it suffices to underscore, that each and every party is called upon to plead the whole of her/his case, with sufficient particularity and specificity.

64. At any rate, it is imperative to recall that amendment of pleadings is geared towards clarifying the issues in controversy. However, amendment of pleadings cannot be deployed with a view to altering and/or changing the character and texture of the cause of action//defense that had hitherto been canvassed.

65. To my mind, any disguised amendment that is calculated to change the cause of action/defense, constitutes an endeavor to litigate by instalment and ambush.

66. In any event, there is no gainsaying that the information being relied upon to underpin the intended amendment, is information that has been within the knowledge of the 67th Defendant from the onset of the suit. Furthermore, it is also worth recalling that the issues which are sought to be adverted to by

the 67th Defendant are issues that were canvassed before the environment and land court vide ELC JR No. 20 of 2018 between Gidjoy Investment Ltd v The National Land Commission & Others.

67. In my humble view, the law on amendment does not allow a situation where a party takes a complete about- turn and thereafter seeks to change the character/texture of the suit/defense. In any event, the position of the law is intended to ensure that no party litigates by installments or ambush. Furthermore, the position of the law is also calculated to even out the playing field for all the parties.

68. To buttress the foregoing legal exposition, it is apposite to take cognizance of the holding of the court of appeal in the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited (Civil Appeal 81 of 2004) [2013] KECA 345 (KLR) (Civ) (12 April 2013) (Judgment), where the court stated as hereunder;

> The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others *vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:-
>
> "The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."

69. Flowing form the foregoing exposition of the law, my answer to issue number two [2] is to the effect that the intended amendment shall bring forth a completely new set of defenses and thus same [intended amendment] shall alter the defense by the 67th Defendant/Applicant.

70. Such an endeavor is legally unacceptable.

Issue Number 3 Whether the Plaintiff shall suffer prejudice or grave injustice, if the intended amendment is allowed.

71. The last issue that merits discussion touches on and relates to the question of prejudice, if any, that the Plaintiff/Respondent shall be disposed to suffer. To start with, there is no gainsaying that the intended amendment by the 67th Defendant shall call upon the Plaintiff/Respondent and the rest of the adverse parties to file further amended pleadings and replies.

72. To this end, it is not lost on the court that the ripple effect of the proposed amendment would to return the matter back to the pre-conference stage. Suffice it to underscore that the affected parties would be called upon to file amended pleadings and replies and thereafter discern whether to file further list and bundle of documents.

73. Additionally, there is also no gainsaying that the Plaintiff/Respondent and the adverse parties would also be obligated to file further/additional witness statement. Quite clearly, the endeavor spoken to at the foot of the preceding paragraph would be counter-productive to the Overriding objectives of the Court. For coherence, such an endeavor will also defeat the import and tenor of Section 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

74. Secondly, it is important to recall that the instant matter has been pending before the honorable court for six years. During the six [6] years of its pendency, the court has made various albeit concerted efforts to have the matter heard, but it appears that some parties, the 67th Defendant not excepted, are not keen to have the matter heard.

75. Without belaboring the point, it is apposite to underscore that any endeavors that are calculated to obstruct, delay and/or defeat the scheduled hearing shall be contrary to and in contravention of the provisions of Article 159[2][b] of *the Constitution* 2010. Notably, the said provisions underscore the rights of the parties to access and partake of justice without undue delay.

76. Finally, it is apposite and expedient to recall that the doctrine of justice delayed is justice denied; is no longer merely a legal maxim. For good measure, the maxim under reference has since been constitutionalized and thus same is now a constitutional imperative.

77. The Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (Being Sued Through The Attorney General), Municipal Council of Mombasa, Norman Taherali Dawoodbhai, Hassan Taherali Dawoodbhai, Ali Ramandhan Mwatsau & Mohamed Naman Mohamed (Civil Appeal 16 of 2015) [2015] KECA 284 (KLR) (30 October 2015) (Judgment), considered the import of the Doctrine and juxtaposed same against the Constitutional requirements and stated thus:

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. The warning of Madan JA in Belinda Murai & others v Amos Wainaina (1978) LLR 2784, reigns true today.

78. There is no gainsaying that the grant of the instant application shall cause and occasion substantial prejudice to the Plaintiff/Respondent. Furthermore, the Plaintiff/Respondent shall also be exposed to grave injustice, including being forced to revert back to the pretrial conference stage, which was undertaken more than four [4] years ago.

Final Disposition:

79. Having considered the various issues [details enumerated in the body of the ruling herein] there is no gainsaying that the application for leave to amend, which has been filed more than six [6] years from

the date of the commencement of the suit, is not only misconceived but smacks of mala fide. For good measure, it is not lost on the court that the application was filed on the eve of the scheduled hearing in an endeavor to achieve an ulterior motive.

80. Consequently and in the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Application dated the 4th November 2024, be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiff/ Respondent; and 63rd to 66th Defendants/Respondents only.

81. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH_____ DAY OF NOVEMBER 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. George Sichangi for the Plaintiff/Respondent

Mr. George Gilbert for the 68th Defendant/Respondent

Mr. George Gilbert h/b for Ms. Herine Kabita for the 69th Defendant/Respondent

Mr. Allan Kamau for the 63rd, 64th, 65th and 66th Defendants/Respondent

Mr. Seth Ojienda for the 67th Defendant/Applicant.

Mr. S Mbuthia for the 70th Defendant/Respondent

Mr. Korir for the 1st Interested Party

Ms. Susan Nyang for the 2nd Interested Party