



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali & 24 others v Said & another (Environment & Land Case  
92 of 2022) [2023] KEELC 16402 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16402 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 92 OF 2022**  
**NA MATHEKA, J**  
**MARCH 23, 2023**

**BETWEEN**

**SALIM ALI ..... 1<sup>ST</sup> PLAINTIFF**  
**SALIM MOHAMED ..... 2<sup>ND</sup> PLAINTIFF**  
**AKRIM TWAHIR ..... 3<sup>RD</sup> PLAINTIFF**  
**ASAD TWAHIR ..... 4<sup>TH</sup> PLAINTIFF**  
**HAMIDA TWAHIR ..... 5<sup>TH</sup> PLAINTIFF**  
**HAMIS TWAHIR ..... 6<sup>TH</sup> PLAINTIFF**  
**MOHAMED TWAHIR ..... 7<sup>TH</sup> PLAINTIFF**  
**SEIF AHMED SAID ..... 8<sup>TH</sup> PLAINTIFF**  
**ALI AHMED ALI ..... 9<sup>TH</sup> PLAINTIFF**  
**AHMED AHMED SAID ..... 10<sup>TH</sup> PLAINTIFF**  
**SHEIKHA KHAMISI SALIMU ..... 11<sup>TH</sup> PLAINTIFF**  
**HASSAN ABDALLA SAID ..... 12<sup>TH</sup> PLAINTIFF**  
**KHAMIS ABDALLA SAID ..... 13<sup>TH</sup> PLAINTIFF**  
**NAFISA ALI TWAHER ..... 14<sup>TH</sup> PLAINTIFF**  
**AMINA ABDALLA SAID ..... 15<sup>TH</sup> PLAINTIFF**  
**AHMED ALI TWAHIR ..... 16<sup>TH</sup> PLAINTIFF**  
**SWALEH ABDALLA MBARAK ..... 17<sup>TH</sup> PLAINTIFF**  
**SALIM ALI TWAHIRI ..... 18<sup>TH</sup> PLAINTIFF**  
**SAID AHMED SAID ..... 19<sup>TH</sup> PLAINTIFF**



AISHA A. TWAHIR ..... 20<sup>TH</sup> PLAINTIFF  
ABDULLATIF A. TWAHIR ..... 21<sup>ST</sup> PLAINTIFF  
ESHA ALI RASHID ..... 22<sup>ND</sup> PLAINTIFF  
NASRA AHMED SAID ..... 23<sup>RD</sup> PLAINTIFF  
SAID ABDALLA BADARUBU ..... 24<sup>TH</sup> PLAINTIFF  
AWADH MOHAMED ..... 25<sup>TH</sup> PLAINTIFF

AND

AHMED ALI SAID ..... 1<sup>ST</sup> DEFENDANT  
SALWA ALI SAID ..... 2<sup>ND</sup> DEFENDANT

### RULING

- 1 The plaintiffs raised a preliminary objection on the following grounds:
  1. The counterclaim dated the November 21, 2022 is in contravention of order 7 rule 7 of the [Civil Procedure Rules](#).
  2. The counterclaim dated the November 21, 2022 is in contravention of order 7 rule 17 of the [Civil Procedure Rules](#).
- 2 The plaintiff stated that the counterclaim dated the November 21, 2022 is in contravention of order 7 rule 17 of the [Civil Procedure Rules 2010](#). That in accordance with order 7 rule 17 (1), the defendants having filed their replying affidavit which is the equivalent of a defence on the September 1, 2022, pleadings accordingly closed after fourteen days. Taking into consideration order 7 rule 17 (2), any pleadings to be filed past the September 30, 2022 (upon lapse of Fourteen Days), could only be filed with leave of the Court. The defendants never filed an application seeking to amend their replying affidavit so as to include a counterclaim therein. They instead went on and filed a counter-claim without any leave. This is in direct transgression of the said provision. That the preliminary objection dated the October 25, 2022 is merited and should be allowed.
- 3 The defendants submitted that the replying affidavit and counterclaim are curable by virtue of the overriding objectives as under Sections IA, 1B and 34 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and articles 50 and 159 of the [Constitution, 2010](#) which enjoins courts to dispense substantive justice without undue regard to procedural technicalities. They relied on Lady Justice Mulwa's decision in [Trimborn Agricultural Engineering Ltd -versus- Kenya Power & Lighting Co Ltd](#) (20161 eKLR).
- 4 This court has considered the preliminary objection and the submissions therein. All the provisions related to pleadings under the [Civil Procedure Rules](#) must be read together. Order 2 rule 13 of the [Civil Procedure Rules](#) provides;

The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim after service of the reply or defence or counterclaim or if neither is served fourteen days after service of the defence notwithstanding that any order or request for particulars has been made but not complied with.



5 Order 7 Rule 17(2) of the [Civil Procedure Rules](#) provides that;

No pleading subsequent to the reply shall be pleaded without leave of the court, and then shall be pleaded only upon such terms as the court thinks fit”.

6 Order 8 Rule 1(1) of the [Civil Procedure Rules](#) provides;

A party may, without the leave of the court amend any of his pleadings once at any time before the pleadings are closed”.

7 There is no dispute that the counterclaim was filed and served without the leave of the court. The issue then is whether such leave ought to have been sought? The law is that pleadings may be amended once before the close of the pleadings, without leave as long as pleadings have not been closed. when then are pleadings closed? order 2 rule 13 of the [Civil Procedure Rules](#) provides that pleadings are closed fourteen days after service of the reply or defence to counterclaim. However, even with this wide window in order 2 rule 13 of the [Civil Procedure Rules](#), its clearly indicated under order 7 rule 17(2) of the [Civil Procedure Rules](#) that no pleading subsequent to the reply shall be pleaded without leave of the court. It clearly means that in spite of how many days may still have been left of the fourteen days, once a reply has been filed then any subsequent pleading can only be made with the leave of the court. The filing of the reply affidavit on the September 16, 2022 sealed his fate and he had to comply with order 7 rule 17(2) of the [Civil Procedure Rules](#). The counterclaim could have been acceptable if he had filed it instead of the reply. That being the case, I strike out the counterclaim filed herein on November 22, 2022 with costs.

8 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**N.A. MATHEKA**

**JUDGE**

