



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Maina & another (Environment & Land Case 10 of 2022)  
[2022] KEELC 13328 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13328 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 10 OF 2022**

**MD MWANGI, J**

**OCTOBER 6, 2022**

**BETWEEN**

**JOHN MUKUHA MAINA ..... PLAINTIFF**

**AND**

**PENINAH NYAMBURA MAINA ..... 1<sup>ST</sup> DEFENDANT**

**PETSUN LIMITED ..... 2<sup>ND</sup> DEFENDANT**

*(In respect of Notice of Motion Application dated 12th October, 2021 by the 2nd Defendant seeking leave of the court to amend the statement of Defence and include a counter-claim)*

**RULING**

**Background**

1. What is before the court for determination is the application dated October 12, 2021 by the 2nd defendant/application praying for orders that;
  - a. The 2nd defendant be granted leave to amend the defence to include a counterclaim in the manner shown in red in the draft annexed hereto.
  - b. The costs of this application be in the cause.
2. The application is based on the grounds that it is necessary to amend the defence to include a counterclaim and the proposed new parties to the suit. The applicant further states that some issues had arisen after the close of pleadings and it was necessary to incorporate the same. Finally that is necessary to amend the pleadings so as to rectify the errors and bring out the actual issues between the parties in order to bring the matter to a close and address matters that have arisen.
3. The application is supported by the ‘supporting’ affidavit of Edward Madete Ndanyi sworn on the October 12, 2021. The deponent avers that he is the property manager of the 2nd defendant/applicant



company. He states that the 2nd defendant purchased the suit property from a company known as Vumira Enterprises Limited which is not a party to this suit. It is therefore necessary to bring it into the suit as a party together with the registrar of titles to canvas all issues arising which are pertinent to the conclusive determination of this suit.

4. It is further alleged that there are other causes which have arisen hence the need to include them in the counter-claim including the collection of rent from the premises, and the issue of the registration of transfer of the suit property.
5. The application is opposed by the plaintiff, by way of a replying affidavit sworn by the plaintiff John Mukuha Maina on the January 18, 2022. The plaintiff contends that the application by the 2<sup>nd</sup> defendant is grossly misconceived, scandalous and a total abuse of the court process. The plaintiff contends that the matter has been ready for hearing save that the former advocates for the 2nd defendant ceased acting and the subsequent advocates derailed the hearing of the suit with various excuses.
6. The plaintiff states that the 2nd defendant is seeking to introduce matters not related to this suit that ought to be raised in a new suit all together. He expresses the view that the supporting affidavit in support of the 2<sup>nd</sup> defendant's application contains broad statements that do not disclose the basis or justify the grant of the prayers sought.
7. The plaintiff further asserts that the annexed draft amended defence and counter-claim has no bearing whatsoever to the current suit. On the face of it, it discloses a disjointed cause of action whose facts can best be determined in a criminal court. That the application should therefore be dismissed as it is intended to delay the prosecution of the suit having been filed late in the day since the pleadings were closed over two (2) years ago.

### **Court's Directions**

8. The court directed that the application be canvassed by way of submissions. The advocates for plaintiff and the 2<sup>nd</sup> defendant submitted orally in open court on the September 21, 2022. The 1<sup>st</sup> defendant did not participate in the proceedings before the court on the material date. Though the plaintiff alleges that he had withdrawn his claim against the 1<sup>st</sup> defendant, the record of the court does not show when that withdrawal was effected. So, as far as the court is concerned the 1<sup>st</sup> defendant is still a party in this suit. The plaintiff is at liberty to move the court appropriately if he is keen on withdrawing the suit against the 1<sup>st</sup> defendant.

### **Issues For Determination**

9. Having considered the 2nd defendant's application herein, the affidavit tendered in rebuttal as well as the rival submissions by the parties before the court, the only issue for determination is whether the 2nd defendant's notice of motion application seeking amendment of its defence to include a counter-claim is meritorious.

### **Analysis and Determination**

10. The law as regards the grant of leave to amend, I should say is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See *Eastern Bakery v Castelino* (1958) EA 461).



11. Amendment of pleadings is provided for under order 8 rule 5 of the [Civil Procedure Rules](#) which provides that; -

“For the purpose of determining the real question in controversy between the parties, or for correcting any defect or error in proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

12. Odunga J (as he then was) in the case of [Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi](#) (2022) eKLR summarized the principles governing the granting of orders to amend pleadings as follows; -

- i. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide or that, by his blunder, he has done some injury to his opponent which could not be compensated by courts or otherwise.
- ii. The Court of Appeal will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or wrong principle.
- iii. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However, there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject-matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments e.g depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs.

13. In its proposed amendments, the 2nd defendant/applicant too seeks to introduce a counter-claim. Order 7 rule 3 of the [Civil Procedure Rules](#) allows a defendant(s) in a suit to bring a counter-claim against a plaintiff(s). So, it is allowable in law for a defendant, as the 2nd defendant in this case, to bring a counter-claim.

14. The [Black's Law Dictionary](#), 11<sup>th</sup> Edition defines a counter-claim as “a claim for relief asserted against an opposing party after an original claim has been made; especially a defendant’s claim in opposition to or as a set off against the plaintiff’s claim.”

15. [Halsbury's Laws of England](#), 4th Edition, vol 42 on its part explains a counter-claim by giving a case scenario as follows: -

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”

16. It goes further to elaborate that,

“any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by a counter-claim subject only to the limitation that it must



be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money but also other claims such as a claim for injunction or for specific performance or for declaration may be the subject of a counter-claim.”

17. From the foregoing, I see nothing that would dissuade me from allowing the 2nd defendant's application to amend its statement of defence and include a counter-claim against the plaintiff.
18. I am persuaded by the holding of Odunga J in the above cited case of *Gladys Nduku v Letshego Kenya Limited* (supra). The general rule is that amendments to pleadings sought before the hearing should be freely allowed. I see no injustice that would result to the plaintiff. For the purposes of determining the real question in controversy between the parties, it is necessary that the proposed amendment by the 2nd defendant be allowed.
19. As my brother Justice Majanja observed in his brief ruling of April 28, 2022 in this matter, 'the common thread running through the plaint and the proposed amended defence and counter-claim, is the suit property. The plaintiff contends that the suit property should not have been sold to the 2nd defendant whereupon he seeks to annul the sale. On the other hand, the 2nd defendant claims ownership of the suit property and seeks registration in its favour. Both call for the determination of ownership of the suit property'.
20. The proposed counter-claim by the 2nd defendant/ applicant however, goes beyond the definition of a counter-claim in the sense that it seeks to introduce two new parties who are presently not parties in this suit. Apparently, the 2nd defendant has a claim against the two it proposes to introduce as defendants in its counterclaim.
21. Can a defendant introduce new parties into the suit by way of a counter-claim?
22. My answer to the above question is a firm No! Strictly speaking, a counter-claim can only be filed by a defendant(s) as against a plaintiff(s). It is a 'cross-suit' by the defendant against the plaintiff. It is a 'counter-action' or a 'counter-suit'.
23. A defendant who has a claim against any person who is not already a party to the suit should instead follow the procedure provided for under order 1 rule 15 of the [Civil Procedure Rules](#). Order 1 rule 15 provides as follows;

“where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party);-

- a. That he is entitled to contribution or indemnity; or
- b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or relief or remedy claimed by the plaintiff, or
- c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them shall apply to court within 14 days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.



24. The rule is self-explanatory. the 2nd defendant/ applicant has not therefore followed the right procedure in as far as introducing the two proposed new parties is concerned.
25. Accordingly, I partially allow the 2nd defendant/applicant's application to amend its statement of defence and introduce a counter-claim as against the plaintiff only.
26. As against the two proposed new parties, that is, Vumira Enterprises Ltd and the registrar of titles, the 2nd defendant is at liberty to commence third party proceedings against them in accordance with the provisions of order 1 rule 15 of the *Civil Procedure Rules*. The introduction of an amendment to the pleadings means that the pleadings have been re-opened. The 2nd defendant should take advantage of that window to take out third party proceedings.

### **Conclusion**

27. Accordingly,
  - a. The 2nd defendant's application dated October 12, 2021 is partially allowed. The 2nd defendant/ applicant is granted leave to amend its statement of defence including a counter-claim as against the plaintiff in this suit only in the next 14 days from today's date.
  - b. The plaintiff and the 1st defendant shall have leave to amend their pleadings (if need be) and or file a statement of defence against the counter-claim within 14 days after service of the 2nd defendant's statement of defence and counter-claim.
  - c. The costs of this application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROBİ THIS 6<sup>TH</sup> DAY OF OCTOBER 2022**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Mogeni for the 2<sup>nd</sup> Defendant/Applicant.

No appearance for the Plaintiff/Respondent.

No appearance for the 2<sup>nd</sup> Defendant.

Court Assistant- Hilda

M.D. MWANGI

JUDGE

