



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyungu (Suing on behalf of Danie Kyungu Muasya) v Kivuva & another (Environment & Land Case 217 of 2010) [2022] KEELC 14971 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14971 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE 217 OF 2010**  
**A NYUKURI, J**  
**NOVEMBER 24, 2022**

**BETWEEN**

**REUBEN KAVITHI KYUNGU (SUING ON BEHALF OF DANIE KYUNGU MUASYA) ..... PLAINTIFF**

**AND**

**JEREMIAH WAMBUA KIVUVA ..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK MUINDE KIIO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 28<sup>th</sup> April 2022, filed by the defendants/applicants seeking the following orders;
  - a. Spent.
  - b. That the 1<sup>st</sup> defendant be granted leave to amend its defence in terms of the draft Amended defence attached hereto.
  - c. That costs of this application be in the cause.
2. The application is anchored on the affidavit sworn by the 1<sup>st</sup> defendant/applicant on April 28, 2022. The Applicants' case is that it is necessary to amend the Defence to fully address the issues in dispute and that upon filing defence, additional issues have come to light which are relevant to the just determination of this suit. They also state that the Defence is tainted with inadvertent defects, erroneous and typographical errors which need to be corrected for clarity.



3. Further, it was their case they had come across additional documents that have further evidence which is relevant to the just determination of this suit and that if the application is not allowed, the 1<sup>st</sup> defendant will suffer substantial loss and grave injustice.
4. No response was filed in opposition to the application.

### **Analysis and Determination**

5. I have considered the application together with the affidavit in support. In my considered view, the sole issue for determination is whether the defendants ought to be granted leave to amend their Defence.
6. Order 8 Rule 5 (1) of the [Civil Procedure Rules](#) grants the court unfettered discretion to allow amendment of any document for purposes of determining the real issues in controversy.
7. The general principle is that amendment should be allowed, unless it will result in an injustice against the other party, that may not be compensated in costs. In the case of [Institute for Social Accountability & Another v Parliament of Kenya and 3 others](#) [2014] KLR paragraph 18, the court stated as follows;

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the true state of facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

8. Similarly, in the case of [Central Kenya Limited v Trust Bank Limited](#) (2000) eKLR the Court of Appeal stated as follows;

The settled rule with regard to amendment of pleadings has been concisely stated in Vol 2, 6<sup>th</sup> Ed At p 2245, of the *AIR Commentaries on the Indian Civil Procedure Code* by Chittaley and Rao, in which the learned authors state;

A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided (i) there has been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side.

9. In the instant application, the defendants have stated that they have noted that the defence has defects and typographical errors and that additional issues have come up. Whether or not to allow amendment is within the discretionary power of the court. The whole purpose of the court's adjudication over a matter, is to ensure parties have argued their entire respective cases in court without any hindrance so that the court can pronounce itself over all the issues in controversy in the matter. Therefore, courts will not stand in the way of a party who seeks for an opportunity to state their case in its entirety with clarity, unless it is demonstrated that the application for amendment shall result in an injustice which cannot be restituted by an award of costs. In this case, there is no evidence that the amendment sought shall result in an injustice on the opposite party, that is beyond the award of costs.
10. In the premises, I find and hold that the application dated April 28, 2022, is merited and direct the applicant to file their Amended Defence within 14 days of this Ruling. The costs of the application shall be in the cause.



11. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms. Wanjiku holding brief for Mr. Koyyoko for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

No appearance for Plaintiff.

Court Assistant - Josephine

