



**Waqf Commissioners of Kenya v Koenecke & 10 others (Environment & Land Case E030 of 2024) [2025] KEELC 4077 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4077 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E030 OF 2024**

**FM NJOROGE, J**

**MAY 28, 2025**

**BETWEEN**

**WAQF COMMISSIONERS OF KENYA ..... PLAINTIFF**

**AND**

**PETER GEORGE HEINRICH KOENECKE ..... 1<sup>ST</sup> DEFENDANT**

**FRANCO ZIMMERMAN ..... 2<sup>ND</sup> DEFENDANT**

**ERICH SZWEZUK ..... 3<sup>RD</sup> DEFENDANT**

**BRUNO STADELMANN ..... 4<sup>TH</sup> DEFENDANT**

**IMMO KUCKULIES ..... 5<sup>TH</sup> DEFENDANT**

**VOLKER BECKER ..... 6<sup>TH</sup> DEFENDANT**

**HERMAN DETERING ..... 7<sup>TH</sup> DEFENDANT**

**NICKI KOENECKE NIXION ..... 8<sup>TH</sup> DEFENDANT**

**RUMEO ..... 9<sup>TH</sup> DEFENDANT**

**FRIED KIESWETER ..... 10<sup>TH</sup> DEFENDANT**

**LANDS REGISTRAR MOMBASA ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion application for determination is dated 26/2/2024. The Plaintiffs prays that;
  - a. The amended Plaint dated 2<sup>nd</sup> July 2024 be struck out for want of leave of the court.
  - b. The effect of the amendment is that the suit against the 1<sup>st</sup> Defendant is withdrawn without leave and an order for costs in favour of the 1<sup>st</sup> Defendant be made.



- c. Costs be provided for.
2. The application is based on the following grounds:
  - a. That the Plaintiff herein was filed in Court on 28<sup>th</sup> February, 2024;
  - b. That the 1<sup>st</sup> Defendant with the rest of the Defendants save for the 6<sup>th</sup> and 8<sup>th</sup> Defendants entered appearance on 28<sup>th</sup> March, 2024;
  - c. That a request for further and better particulars was made on 22<sup>nd</sup> April, 2024. No particulars were supplied and none has been supplied to date;
  - d. That a Defense and Counterclaim was filed on 7<sup>th</sup> May, 2024. There is no reply to defense to date;
  - e. That a Request for Judgment was made on 12<sup>th</sup> August, 2024;
  - f. That since there has been no response to the Counterclaim and the matter is thus ready for formal proof on the counterclaim.

### **The Response**

3. Saeed Hamisi Mgupu advocate for the plaintiffs swore the replying affidavit in response to their application. He stated that the request for particulars was responded to vide email; that in the email it was explained to Mr Kibunja that Mr Said was collecting all necessary documents as per Mr Kibunja's request, some of which were to be obtained from the Land Registrar Mombasa, and that the same would be served upon Mr Kibunja before the matter came up for mention to ascertain compliance and for pre-trial directions; that even if the amended plaintiff was struck out, the original plaintiff would still be valid against all the defendant.

### **Defendant's Submissions**

4. The defendant filed submissions dated 15<sup>th</sup> May 2025 in which they submitted as follows: that though litigants have right to amend their pleadings, amendment without leave of Court can only be allowed under Order 8 Rule 1 CPA which states as follows:

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

5. Counsel for the defendant submitted that the initial plaintiff was filed on 28<sup>th</sup> March 2024. The amended plaintiff was filed later well after a defence and counterclaim had been filed on 7<sup>th</sup> May 2024. The filing of defence and counterclaim were not opposed by the plaintiff. Further, the applicants aver that the delay in filing their defence and counterclaim was due to the plaintiff's failure to respond to a request for further and better particulars dated 22<sup>nd</sup> of April 2024. They aver that under 8 rule 3 and 5 CPA the court has power to allow amendment of pleadings. They cite the case of Lewar Ventures Limited Versus Equity Bank Kenya Limited 2022 eKLR and Central Kenya Limited Versus Trust Bank Limited and 5 Others 2,000 eKLR for the proposition that the parameters governing the amendment of pleadings are that: the amendment should not introduce new or inconsistent cause of actions or issues; that the amendment should be made timeously; that it should not affect any vested interest or accrued legal right and finally that it should not regularize or cause injustice to the other party. It is submitted that the plaintiff has not provided any compelling reason for amending their plaintiff outside the prescribed time or for filing it without leave of Court. It is submitted that the 1<sup>st</sup> defendant is entitled to costs due to the withdrawal of the suit against him without leave.



## Plaintiff's Submissions

6. The plaintiffs' submissions are dated 12 May 2025. In the submissions, the plaintiff's counsel submitted that the defendants had filed their defense and counterclaim out of time; that the plaintiff was at liberty to file an application for striking out of the defense and counterclaim but had not done so because they thought it was not necessary to waste the courts' time in filing such an application when it was negligible delay that had been occasioned.
7. At the same time, counsel admitted that the plaintiff had filed amended plaint out of time and without leave; that however though the rules for filing of pleadings are strictly observed counsel had believed that the defendants would extend similar indulgence to the plaintiffs, just like the plaintiffs had done by failing to apply for striking out of the defence and counterclaim.
8. Counsel argued that Section 95 CPA, Order 50 Rule 6 CPR and Section 59 of the Interpretations and General Provisions Act Cap 2 of the Laws of Kenya clothes this court with power to allow pleadings filed out of time and without leave, especially where there is no any prejudice on the part of the applicant; that further, Article 159 2(d) of *the Constitution* provides that courts should administer justice without undue regard to procedural technicalities and that in this case the amended plaint was filed without leave but the court should allow the same. The case of Chairman Secretary and Treasurer Cool Management Committees Are Early Being Salim Primary School and Another Versus Francis Bahati Diwani and Two Others 2014 eKLR and Nicholas Kiptoo Arab Salat Versus Independent Electoral and Boundaries Commission and Another 2013 eKLR were cited in that regard; it was submitted that the defendant would not suffer any prejudice since the matter is still in its infancy. The plaintiff further cited DT Dobie and Company Kenya Limited Versus Joseph Mbaria Muchina & Another 1980 eKLR for the proposition that accord of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Nicholas Kiptoo (supra) was cited for the proposition that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect and justice must not be sacrificed on the altar of strict adherence to provisions of procedural rules which at times creates hardships and unfairness. It was also submitted that the amendment of the plaint by removal of the 1<sup>st</sup> defendant without leave does not entitle the removed defendant to costs.

## Analysis and Determination.

9. The only issue that this has identified for determination in the present application is whether the amended plaint dated 2/7/2024 should be struck out. The plaintiff simplified the task for this court when it admitted that the amended plaint was filed without leave of court. However, he tries to justify the unauthorized filing by stating that the defendants are also guilty of having filed a defence and counterclaim out of time.
10. Documents filed without leave have been irregularly filed and should not be allowed on the record. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR held as follows of documents filed without extension of time having been secured first:

“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.”

11. This is not a simple amendment. It conflates the issue of amendment of pleadings with the issue of withdrawal of claims against parties and the concomitant question of who ought to pay for the costs of the withdrawn claim. The most inappropriate aspect of the amendment is that it sought to withdraw a case against a defendant who had filed a defence and counterclaim. I think the right of the defendants to object to such a move had crystallized. The issue of costs of the party against whom the claim had been withdrawn should have been addressed in an application for leave to amend at which such a party would be expected to raise the issue and the court to address the same.
12. I find that the amended plaint dated 2/7/2024 was filed without leave of court and consequently I hereby strike it out. Consequently, all other pleadings filed subsequent to it and in response to it are hereby struck out. The costs of the application of all the defendants shall be borne by the plaintiff.
13. The issue of costs of suit upon withdrawal does not then arise as all the defendants, save the 8<sup>th</sup> defendant, remain as per the original plaint filed on 6/3/2024 and dated 28/2/2024.
14. This matter shall be mentioned on 24/9/2025 for further directions. Any application for regularization of pleadings or amendment shall be filed within 21 days of today and shall be addressed before 24/9/2025 either by consent of the parties or by way of hearing.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF MAY 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

