



REPUBLIC OF KENYA



KENYA LAW
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**Ololabura & another v Kilusu & 2 others (Environment & Land Case
E015 of 2023) [2025] KEELC 4278 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E015 OF 2023**

MN MWANYALE, J

JUNE 5, 2025

BETWEEN

MICHAEL LINKATO OLOLABURA 1ST PLAINTIFF

OLE UNUA TONKEI 2ND PLAINTIFF

AND

DAVID LEBOO KILUSU 1ST DEFENDANT

KILGORIS DISTRICT LAND REGISTRAR 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 30.01.2025 which seeks to amend the 1st Defendants statement of Defence but the same was strenuously opposed by the Plaintiff's culminating into an oral hearing of the application.
2. The grounds in support of the application are; -
 - i. that the statement of defence as currently filed was filed without the benefit of the perusal of the 2nd and 3rd Defendants defence, which was filed later.
 - ii. The intended amendments are meant to clarify how the Defendant came into possession of the suit land but not to change the cause of action.
 - iii. The application will not prejudice the plaintiff and it is meant for the court to arbitrate all issues with the correct party and will serve the interests of justice if the application is allowed.
3. The application is premised on Section 1A, 1B, 3, 3A, 63(e) and 100 of the *Civil Procedure Act*, Section 3, 7a and 19 of the ELC Act and under order 8 Rule 3 and 5 and Order 51 Rule 1 of the Civil Procedure Rules.



4. The application is further supported by the supporting affidavit of David Leboo Kilusu the 1st Defendant, who reiterates the grounds in support of the application and has annexed a copy of the adjudication record, a copy of the Draft amended Defence which includes a counter-claim.
5. The Plaintiff is opposed to the application vide the replying affidavit by Samuel Lekakeny Kinanta who deposes that; -
 - i. The application is an abuse of the court process, as there is no genuine reason to warrant invoking the discretion of the court to allow the amendment, the Amendment would change the cause of action as the legality of the 1st Defendant title is being challenged by the plaintiff's suit.
 - ii. That Applicant is in possession of the title measuring 6.52 Ha over Transmara/Kimintet 'D'/480, while the plaintiffs have title over Transmara/Kimintet 'D'/480 measuring 136.52 Ha.
 - iii. That the counter-claim brings a new issue of whether the 1st Defendant is entitled to the suit land by virtue of being a member of the ranch hence a new issue altogether from the issue of the illegitimate title held by the 1st Defendant.
6. The application was argued orally with Mr. Ongiti prosecuting the same while Mr. Ngeno opposed the same. The 2nd and 3rd Defendant opting not to participate in the application.

Issues of Determination

7. Upon consideration of the application, the rival affidavits as well as submissions, the only issue for determination is whether or not the application is merited.

Analysis and determination

8. The proposed Amendments are said to be in response to documents filed by the 2nd and 3rd Defendants in their defence.
9. Order 8 Rule 3 of the Civil Procedure Rules as well as Section 100 of the *Civil Procedure Act* which the Applicant has cited in his application empowers the court to allow an application for amendment.
10. The gravaman of the application is that the Applicant has found new facts and evidence and based on the list of documents filed by the 2nd and 3rd Defendants, which facts were not available at the time he filed his original defence and hence the need to Amend. The Respondent's view is that the same alters and changes the cause of action.
11. The suit herein has not been heard and the general rule is that an amendment can be allowed before a Judgment, so as to bring the real issues in controversy before the court.
12. The court is cognisant that the plaintiff will have a chance to file a defence to the counter-claim and parties will call evidence in support of each of their respective cases.
13. It would be important for the court to adjudicate on all issues in controversy once and for all and in that regard the court finds that no prejudice will befall the Respondent.
14. The court thus allows the application in terms of prayers 1 and 2, with costs in the cause, so as to bring all issues in controversy to the fore, and hence application is merited.



15. The Respondent to file and serve their Reply to defence and defence to counter-claim within 15 days from today.

DATED AT KILGORIS THIS 5TH DAY OF JUNE, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Ngeno for Respondent

Ms. Njeri h/b for Mr. Nyasimi for the Applicant

