



REPUBLIC OF KENYA



KENYA LAW
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**Buluma v Buluma & 2 others (Environment and Land Case
28 of 2017) [2025] KEELC 4887 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 28 OF 2017**

**BN OLAO, J
JULY 2, 2025**

BETWEEN

FRANCIS ODONGO BULUMA PLAINTIFF

AND

PRISCAH NIGHT MANYURU 1ST DEFENDANT

CONSOLATA AUMA MANYURU 2ND DEFENDANT

JOHN OSIGE 3RD DEFENDANT

RULING

1. When this suit came up for further hearing on 6th February 2025, MS Nabulindo counsel for the 1st Defendant drew to the Court's attention that she had only been served on 27th January 2025 with the Plaintiff's further documents long after the pre-trial. It later transpired that in fact, the Plaintiff had served the 1st Defendant's counsel with a defence to the 2nd Defendant's counter claim and not merely documents.
2. The Court directed that MS Nabulindo files a formal application.
3. The 1st Defendant has now approached this Court with her Notice of Motion dated 14th February 2025 and filed under Order 2 Rule 15(1) (d) and Order 8 of the *Civil Procedure Rules* as well as Section 3A of the *Civil Procedure Act*. The Motion is anchored on the grounds set out therein and is also supported by the 1st Defendant's supporting affidavit of even date.
4. By that Motion, the 1st Defendant seeks the following orders:
 1. The Honourable Court do strike out the Plaintiff's defence to the 2nd Defendant's counter claim.



2. That in the alternative, the Honourable Court do allow the Plaintiff's defence to the 2nd Defendant's counter claim.
3. That the Court be pleased to order the Plaintiff to pay to the 1st Defendant the costs of this application.
5. The gist of the application is that the 2nd Defendant filed her defence and counter claim on 6th December 2023 and the same was served on the Plaintiff on 16th April 2024. Thereafter, pre-trial directions were taken on the same day of service i.e. 16th April 2024 and hearing was fixed for 30th September 2024 when the parties attended Court but the Plaintiff's advocate was attending to a patient.
6. The 1st Defendant contends that it is improper for documents to be filed after pre-trial without leave of the Court. Therefore, the Plaintiff's defence to the 2nd Defendant's counter claim should be struck out.
7. Annexed to the Motion are the following documents:
 1. Email extract.
 2. 2nd Defendants' defence and counter-claim.
8. The 2nd Defendant did not oppose the Motion and filed a Notice Not to Oppose the Motion dated 14th February 2025 and added that the said Motion be allowed in its entirety with costs to the 2nd Defendant.
9. The Plaintiff filed a replying affidavit dated 6th March 2023 in which he deposed, inter alia, that the 1st Defendant's Motion is misconceived as the Plaintiff's defence to the 2nd Defendant's counter claim and defence do not relate to the 1st Defendant in any way. That the 2nd Defendant's amended defence and counter-claim was served upon the Plaintiff's counsel on 16th April 2024 the same day when the matter was coming up for hearing and that was why the suit was adjourned since his counsel needed to take instructions from him. The hearing was therefore adjourned for that reason and both parties and the Court were aware of the Plaintiff's intention to file a defence to the counter-claim and it is not true that the same was filed without leave of the Court. The defence to counter-claim was therefore properly filed.
10. That it is a procedural right for the Plaintiff to respond to a defence and counter-claim filed by a Defendant as it is an essential component of proceedings and striking it out will prejudice his case. That the 1st Defendant will not suffer any prejudice since the Plaintiff's defence merely responds to the 2nd Defendant's counter-claim and does not introduce any new facts or evidence. The Motion should therefore be dismissed with costs.
11. The Court directed that the Motion be canvassed by way of written submissions. However, Ms Nabulindo counsel for the 1st Defendant informed the Court that she would not be filing any submissions and neither did Mr Okutta counsel for the 2nd Defendant file any submissions. Submissions were only filed by Ms Kawira instructed by the firm of Calistus & Company Advocates for the Plaintiff.
12. I have considered the Motion, the Plaintiff's replying affidavit and the 2nd Defendant's Notice not to object to the Motion.
13. It is not in dispute that the 2nd Defendant's defence and counter-claim to the Plaintiff's claim is dated 6th December 2023 and was served upon the Plaintiff on 16th April 2024. The Plaintiff filed his defence to the 2nd Defendant's counter-claim on 27th January 2025 some nine (9) months later. That was done without the leave of the Court and after the pre-trial had been done.



14. Order 2 Rule 13 of the [Civil Procedure Rules](#) provide that:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter-claim 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.”

15. The 2nd Defendant amended her defence on 6th December 2023 and filed it together with her counter claim which was served upon the Plaintiff on 16th April 2024. Therefore, pleadings closed on 30th April 2024 which was 14 days later.

16. Order 8 Rule 1 (1) of the [Civil Procedure Rules](#) provides that:

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

Rules 2 and 3 of the same Order provide that:

(2) “Where an amended plaint is served on a Defendant-

(a) if he has already filed a defence, the Defendant may amend his defence; and

(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.

(3) “Where an amended defence is served on a Plaintiff-

(a) if the Plaintiff has already served a reply on that Defendant, he may amend his reply; and

(b) the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.”

Clearly therefore, the Plaintiff did not comply with the Rules. In paragraphs 5, 6 and 7 of his replying affidavit, the Plaintiff has deposed as follows:

5: “That my advocate on record (Mr Ngegenye) informs me that on 30th September 2024, Mr Mideva was in Court holding brief for him and his instructions were that he was not to proceed with the hearing because he intended to file a defence to the 2nd Defendant’s counter-claim.”

6: “That on the above date, the hearing was adjourned to allow my counsel time to file a defence to the 2nd Defendant’s counter-claim.”

7: “That the Court and the parties were well aware of my intention to file a defence to the counter-claim and as such it cannot be said that the same was filed without due leave of Court.”

While it is true that the Plaintiff had hinted to the fact that he would be filing a defence to the 2nd Defendant’s counter-claim, no leave was sought to do so and therefore, it is not sufficient for him to claim “that the Court and the parties were well aware of my intention to file a defence to the counter-claim...”. Being aware of the Plaintiff’s intention to file a response to the 2nd Defendant’s counter claim is not the same thing as filing the same or seeking leave to do so. That



is why the 1st Defendant seeks the striking out of the Plaintiff's defence to the 2nd Defendant's counter-claim.

17. Striking out a pleading is a draconian power which, as Madan JA (as he then was) stated in the case of *D.T. Dobie & Company (k) Ltd -v- Joseph Mbaria Muchina & Leah Wanjiku Mburia* C.A. Civil Appeal No 37 of 1978 (NBI) should only be applied sparingly and in obvious cases.
18. In this case, while it is true that the Plaintiff has flouted the rules with respect to the timelines within which he ought to have filed his defence to the 2nd Defendant's counter-claim, I have not heard the 1st Defendant state how this delay will prejudice her case. I think an order for costs will ameliorate her. Indeed, as rightly pleaded by the Plaintiff in paragraph 11 of his replying affidavit, his defence merely responds to the 2nd Defendant's counter-claim.
19. This Court is also guided by the majority decision in the case of *Nicholas Kiptoo Arap Korir Salat -v- IEBC & Others* C.a. Civil Appeal No 228 of 2013 [2013 eKLR] where W. Ouko and J Mohammed JJA (Kiage JA dissenting) held that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.” Emphasis mine.

If this Court were to accede to the Motion by the 1st Defendant and strike out the Plaintiff's defence to the 2nd Defendant's counter-claim, that would mean that the Plaintiff will be left with no defence to the counter-claim. That would be an injustice to the Plaintiff arising out of a mere lapse in procedure. I don't think it would be fair to take that route especially in view of the fact that no prejudice has been caused to the 1st Defendant following the lapse. The Motion by the 1st Defendant is therefore for dismissal but an order for costs in her favour will suffice.

20. Ultimately therefore and having considered the 1st Defendant's Notice of Motion dated 14th February 2025, I issue the following disposal orders:
 1. The Motion is dismissed.
 2. The Plaintiff's defence to the 2nd Defendant's counter claim be deemed as duly filed and served.
 3. The Plaintiff shall meet the 1st Defendant's costs of the Motion.
 4. As the matter is part heard, it be mentioned on 17th July 2025 for purposes of taking a further hearing date convenient to all parties.

BOAZ N. OLAO

JUDGE

2ND JULY 2025



RULING DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

2ND JULY 2025

