



REPUBLIC OF KENYA



**Wanyonyi & another v Masoni & another (Environment & Land Case
160 of 2017) [2025] KEELC 4274 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 160 OF 2017**

EC CHERONO, J

MAY 22, 2025

BETWEEN

ASHON SIKOLIA WANYONYI 1ST PLAINTIFF

LUKA MAKOKHA WANYONYI 2ND PLAINTIFF

AND

SELINA NAMALWA MASONI 1ST DEFENDANT

BUNGOMA COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant filed a Notice of Motion dated 20/03/2025 under Article 27, 40,159 (2) (d) of the Constitution of Kenya, 2010, Section 1A,1B, 6 & 100 of the Civil Procedure Act, Order 1 Rule 10 and Order 8 Rule 3,7 (2) (3), Order 11 Rule 3 (1) (h) and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders;
 - a. That leave be granted to the defendant/applicants to amend the statement of defence dated 23/05/2018 which was filed by the 1st defendant/Applicant.
 - b. That upon granting Order 1 above the defendant/applicants amended statement of defence and counter-claim dated 21/03/2025 be deemed as duly filed.
2. The application is premised on the grounds apparent on the face of the application supported by the affidavit sworn by the 1st Applicant on 20/03/2025 by the Selina Namalwa MasonI, the 1st Applicant herein.
3. The 1st Defendant/Applicant deposed that a statement of defence was first filed on 23/05/2018 in person without the guidance of counsel and in the absence of crucial documents to support her case. That she has now retained an advocate to represent her and she prays that the court allows her to amend



her statement of defence and counter-claim which she claims raises triable issues with high chances of success.

4. The application is opposed by the Respondents vide grounds of opposition dated 22/03/2025 wherein they stated that the amendments sought do not abide by the law and rules under Order 8 of the Civil Procedure Rules. That the proposed amended statement of defence annexes a further document which includes unrelated parties and set of facts thus, it is irregular, unprocedural and a nullity.
5. When the said application came for directions, Parties agreed to have the application canvassed by written submissions within given timelines. At the close of the timelines given, none of the parties filed and placed reliance on the pleadings on record.

Analysis and determination

6. I have carefully considered the said Notice of motion and the grounds in support thereto, the supporting and Replying affidavits as well as the applicable law and the singular issue for determination in this application is whether this court should allow the application for amendment of the defence and counterclaim.
7. The general power to amend pleadings draws from Section 100 of the Civil Procedure Act. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.
8. The purpose of amendments is set out in Order 8 rule 5 of the Civil Procedure Rules provides as follows:

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

9. Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

10. This court has had the opportunity to peruse the initial statement of defence dated 23/05/2018 and what the Applicant refers to as amended statement of defence and counter-claim. I note that the Applicant has separately filed defence and the counter-claim as opposed to pleading the same concurrently as is ordinarily the practice. The said counter-claim has introduced a new party namely Scholastica Wakasa Nasimiyu (Suing as the legal representative of Mary Gorret Nasimiyu) as a 3rd plaintiff.



11. As regards the main issue in contention, Order 7 rule 8 of the *Civil Procedure Rules* provide that ;

“where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.”
12. My understanding of the above provision is that the law permits a defendant to bring a counterclaim not only against the plaintiff but also against any other person who, if the counterclaim were pursued as a separate suit, would be a proper defendant to that action. In other words, the rule allows a defendant to introduce additional parties as defendants to the counterclaim, provided the cause of action arises out of the same or connected circumstances. However, the rule does not authorize the creation or joinder of a new plaintiff through a counterclaim. A counterclaim is, by definition, a defensive pleading that allows a defendant to assert a claim against a plaintiff or any other appropriate defendant, but it cannot be used as a mechanism to introduce an independent claim against a party not already before the court.
12. Strictly speaking, therefore, a counterclaim may only be filed by an existing defendant in the suit and must be directed against an existing plaintiff or a person added as a defendant to the counterclaim in accordance with the Rules. It cannot serve as a platform for litigating claims that fall outside the scope of the existing suit or for initiating a new cause of action in the name of another individual. In this case, the intended claim against Scholastica Wakasa Nasimiyu (suing as the legal representative of Mary Gorret Nasimiyu) is not properly part of a counterclaim. Enjoining her amounts to a new and distinct cause of action, introduced in favor of a party who is not the defendant, and against a party who was not originally part of the proceedings. As such, it falls outside the permissible scope of a counterclaim and would require a separate and properly instituted suit if it is to be pursued at all.
12. In my considered view, the rationale underlying Order 7 Rule 8 of the *Civil Procedure Rules* is to prevent a multiplicity of proceedings and to ensure that all claims—whether arising from the same or different causes of action—between the parties to a suit are determined within the same forum. The provision does not envisage a scenario where a defendant initiates an independent suit on the same cause of action but instead provides a mechanism through which such claims can be raised via a counterclaim. Furthermore, I am of the view that where the facts giving rise to a counterclaim and set-off are so closely connected to the original suit, it is only prudent and efficient for both to be heard and determined together. To sever the counterclaim from the main suit would not only result in unnecessary duplication of proceedings and increased costs, but would also undermine the overriding objective set out under Section 1A(1) of the *Civil Procedure Act*, which mandates the just, expeditious, proportionate, and affordable resolution of civil disputes.
13. The application for amendment is merited and the same is hereby allowed on the following conditions;
 - a. The 1st defendant to file and serve a proper Amended defence and counterclaim within three (3) days from the date of this Ruling.
 - b. Thereafter, the plaintiffs/Respondents shall be at liberty to Amend, file and serve the plaint in accordance with the *Civil Procedure Act* and the Rules made thereunder.
14. It is so ordered.



DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Oira for the 1st Defendant/Applicant.
2. Mr. Sichangi for the plaintiffs/Respondents.
3. Bett C/A.

