



**Muriuki (Suing as the Legal Representative of the Estate of James Muriuki Kiambo v Kiambo  
(Environment & Land Case 31 of 2017) [2022] KEELC 3041 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3041 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 31 OF 2017**

**EC CHERONO, J**

**MAY 6, 2022**

**BETWEEN**

**ALICE WAMBUI MURIUKI (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF JAMES MURIUKI KIAMBO) ..... APPLICANT**

**AND**

**BENSON NJIRU KIAMBO ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated July 6, 2021 whereby she seeks the following orders: -
  - a. That this honourable court be pleased to grant the defendant/applicant leave to amend our defence dated April 6, 2017 and filed in court on the 10<sup>th</sup> of April, 2017.
  - b. That the amended defence annexed hereto be deemed as duly filed and served.
  - c. That the costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the application and is supported by the supporting affidavit and further affidavit of the applicant herein sworn on July 6, 2021 and January 24, 2022 respectively.
3. The plaintiff/ respondent opposed the application by way of a replying affidavit sworn on September 8, 2021.
4. When the application came up for hearing on December 6, 2021 the parties through their advocates on record agreed that the application be disposed of by way of written submissions.
5. The applicant filed her submissions on January 24, 2022 while the respondent filed his on March 3, 2022.



### **Applicant's Case And Submissions:**

6. The applicant's case is that she substituted her deceased father upon obtaining letters of administration ad litem and being granted leave by this honourable court on July 16, 2020.
7. She stated that pleadings had already closed when she substituted the original defendant and she discovered that there was dire need to amend the defence to reflect the true and correct position and seek additional prayers in the amended defence and counterclaim.
8. She stated that the amendments sought will enable the honourable court to determine the issues raised and will not prejudice the plaintiff/respondent as he will have an opportunity to amend his plaint.
9. She further stated that the issues raised are pertinent issues in the intended amended defence that touch on the suit property and thus she is not trying to delay the matter as alleged by the respondent.
10. She submitted that in the proposed amended defence she has introduced a counterclaim with particulars explaining why the respondent is not entitled to the prayers sought in the plaint and that they are not meant to mislead this honourable court or prejudice the respondent.
11. She contends that section 100 of the Civil Procedure Act and order 8 rule 5 (1) of the Civil Procedure Rules cloth this honourable court with discretionary powers to allow any party to amend his pleadings at any stage of the proceedings for purposes of determining the real question in controversy between the parties.
12. She argued that for the court to determine the dispute in question, the amendments sought should be allowed as prayed.
13. She submitted that under article 159 (a) of the Constitution, this court is bound to deliver substantive rather than technical and procedural justice.

### **Respondent's Case And Submissions:**

14. The respondent's case is that the defendant intends to introduce new issues in the case which were not raised when the matter was being certified ready for hearing.
15. He stated that the matter was part heard and was pending judgment and starting the suit afresh will prejudice him as he had already testified and closed his case.
16. He stated that the defendant is deliberately delaying this matter as the issue brought in the counterclaim is that of lifting the caution which can only be done after the suit has been determined.
17. He stated that the defendant was allowed to testify and close her case and in case she is not willing to do so, that this honourable court should proceed to give a judgment date.
18. He submitted that the defendant is starting a new suit as she has deleted the whole defence and prepared a fresh one. Further that the counterclaim is bringing new issues which needs to be determined and will require him to make major amendments in the plaint and file a defence to the counterclaim.
19. He submitted that he will be required to file new documents and bring in new evidence which is not relevant to the current suit and thus the same will prejudice him.
20. He submitted that the matter was fully heard and closed by both parties on July 17, 2019 and that parties had been ordered to file written submissions and that the substituted defendant was only required to file submissions.



21. He submitted that the application will delay the matter further and will prejudice him as he has been waiting for judgment since 2019.
22. He submitted that the application to remove the caution can be dealt with after the suit has been finalized and does not serve any meaningful purpose at this juncture.

**Analysis:**

23. I have looked at the application, the parties' rival affidavits and submissions as well as the relevant law.
24. The main issue for determination in this application is whether the defendant should be granted leave to amend the defence.
25. Order 8, rule 3 of the [Civil Procedure Rules](#) provides as follows:
  - (1) Subject to order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
26. In the case of *Suleiman v Karasha* [1989] e KLR the Court of Appeal held that:

“Under the [Civil Procedure Rules](#), the parties can amend their pleading with the leave of the court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just.”
27. In the instant application, the defendant has given explanation for the proposed amendment on the basis that pleadings had already closed when she substituted the original defendant whereupon she discovered that there was dire need to amend the defence to reflect the true and correct position and seek additional prayers in the amended defence and counterclaim.
28. The plaintiff/respondent opposed the application stating that, granting the said application would prejudice him as the case had already been heard and what was pending is the filing of submissions.
29. From the records of this honourable court, it is noteworthy that the parties herein through their advocates had recorded a consent which was adopted by court on February 11, 2021.
30. The effect of the said consent order is that the matter be would re-opened and heard *de novo*. The parties also agreed to file further list of documents and statements and that the defendant would be allowed to testify.
31. From the said consent, it is evident that even before the filing of the instant application, the plaintiff was agreeable to the matter being heard afresh and also to the filing of further documents and statements.
32. I have looked at the amended defence and counterclaim annexed as AWM – 001 and I am persuaded that the amendments sought are not idle but will enable this honourable court to effectually determine all questions involved in this suit.
33. The applicant has explained why she seeks to make the proposed amendments at this stage. I find that the same is satisfactory to warrant the exercise of this honourable court's discretionary powers.



**Conclusion:**

34. In view of the foregoing it is my considered view that the notice of motion dated July 6, 2021 has merit and the same is hereby allowed as follows: -
- a. The defendant is granted leave to file and serve her amended defence and counterclaim within 7 days.
  - b. The plaintiff is granted corresponding leave to file and serve a reply to the said amended defence if need arise within 14 days upon service by the defendant.
  - c. The applicant to bear the costs of the application.
  - d. The parties to take a mention date to confirm compliance.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 6TH DAY OF MAY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of: -**

- 1. Mr. Bwonongá for the Defendant/applicant**
- 2. Ms Amba holding brief for Ndana for the Plaintiff/Respondent**
- 3. Kabuta – Court clerk.**

