



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wagiciengo v Sichangi & Partners Advocates & 2 others (Civil Suit
247 of 2018) [2025] KEHC 9627 (KLR) (Civ) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 247 OF 2018

JN MULWA, J

JULY 3, 2025

BETWEEN

ANASTACIA WAGICIENGO PLAINTIFF

AND

SICHANGI & PARTNERS ADVOCATES 1ST DEFENDANT

CYRUS MAINA 2ND DEFENDANT

GEORGE SICHANGI 3RD DEFENDANT

RULING

1. By the application dated 10/2/2025 the Applicant who is the 2nd Defendant seeks orders for leave to file an amended defence and counterclaim out of time and is supported by his affidavit sworn on 10/2/2025 and a supplementary affidavit he swore on 5/5/2025.
2. The Respondents filed a replying affidavit dated 27/3/2025. March 2025 in opposition to the application.

Applicant's case.

3. The Applicant states that the suit was commenced sometime in 2018 and upon service of the Plaint, he filed a defence dated 6/12/2018 and now seeks to file an amended defence and a counterclaim against the Plaintiff, which he avers if granted will assist the court in determining the real issues between the parties at the hearing of the suit.



Respondent's case.

4. The Respondent states that the suit herein was filed on 19th October 2018, and the 2nd Defendant filed his Statement of Defence on 6th December 2018, wherein he denied the key averments in the Plaintiff and liability, adding that the suit is hold and the applicant had able time for six years to amend its defence and file the counterclaim.
5. Additionally the Respondents argue that that this is yet another delaying tactic by the Applicant to delay its progress after his preliminary objection was dismissed by the court on issue of the suit being time barred by statute; that this application is nothing but a delaying tactic aimed at further prolonging the hearing and determination of this matter, which had already been set down for hearing on the 13th February 2025.
6. The Respondents argue that amendments should not be allowed where they prejudice the other party or cause unnecessary delays, citing Article 159(2)(b) of *the Constitution*.
7. The Applicant's further argue that the suit is yet to take off and the intended amendment is necessary for the court to fully determine the issues in dispute between the parties and absence of such leave to amend, it risks being denied an opportunity to ventilate its defence fully which is contrary to the right to be heard as envisaged under Article 50 (1) of *the Constitution* of Kenya.
8. The Applicants further contend that the Plaintiff has not revealed what such prejudice is and as such, noting the proposed amendments raise crucial issues, the interests of justice tilt towards allowing the amendment to allow for all issues to be presented before court for determination and to avoid driving either party from the seat of justice.
9. Only the Applicant filed submissions, which the court has considered.

Applicant's submissions.

10. The Applicant submitted that the criteria for grant of leave to a party to amend its pleading is very elaborate as set out under Section 100 of the *Civil Procedure Act* and Order 8 Rule 3 of the Civil Procedure Rules. Section 100 of the *Civil Procedure Act* makes provisions on the General Power of a Court to Amend pleadings, and gives the Court the discretion to allow an amendment for the purpose of determining the real question or issue raised by or depending on the proceeding. The said section provided verbatim as follows:

“General power to amend

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

11. The Applicant cited the provisions Order 8 Rule 3 of the Civil Procedure Rules which prescribes powers and procedures within which the Court exercises discretion to grant a party leave to amend its pleadings as each particular case demands.



12. The Applicant's rely on the case of *Diamond Trust Bank Kenya Limited v John Wakaba Joseph & another* [2013] eKLR, wherein the Honourable Court in pronouncing itself on the above issue, held as follows:

“Order 8 Rules 3 and 5 of the Civil Procedure Rules gives the court discretion to allow amendments at any stage of the proceedings in order to bring forth all issues in dispute between the parties for exhaustive and conclusive determination. The significant and guiding principle is to do justice between the parties. This can only be achieved by having all issues in dispute being brought forth for the Court to determine them.”

Issue for determination.

Whether the application for amendment has merit and ought to be granted.

13. The general power to amend pleadings draws from section 100 of the *Civil Procedure Act*. Parties have a right to amend their pleadings at any stage of the proceedings albeit that right is not absolute, for it is dependent upon discretion of the court.
14. In exercise of this discretion, the courts are reminded to exercise discretion judiciously and in line with the criteria set out under Order 8 Rule 3 of the Civil Procedure Rules which stipulates: -
- 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.
15. Order 8, Rule 5 gives the court the general power to amend or to allow amendment and provides: -
- 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 on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
16. In this case, it is evident that the Applicant desires to amend its defence and file a counterclaim out of time. The Respondents have opposed the application on the grounds that the matter has already been set down for hearing and both parties had exchanged their documents in compliance with the pre-trial directions and that the 2nd Defendant/Applicant's attempt to amend his pleadings at this stage would not only cause further delays but would also prejudice the Plaintiff/Respondent, who has been waiting for over six (6) years for this matter to be heard and determined.
17. While citing the case of *Kenya Commercial Bank Ltd v Kenya Planters Co-operative Union* [2010] eKLR, the Respondents urged that if the Applicant is allowed to amend his pleadings at this juncture it defeats the principle of finality in pleadings.
18. The suit herein was filed on 19th October 2018, and the 2nd Defendant filed its Statement of Defence on 6th December 2018, wherein he denied the key averments in the Plaintiff's claim. The 2nd Defendant/Applicant filed a Preliminary Objection claiming that the Plaintiff's claim was statute-barred under the *Limitation of Actions Act* (Cap 22, Laws of Kenya) as it was a tortious claim. The Preliminary Objection was dismissed. The Applicants have filed the current application for amendment on 11th February, 2025, which is a period of six years as per the reply of the Respondent since the claim was filed in court.



19. In the case of Ocean Foods Limited v Osotpa Company Limited & 2 Others (2020) eKLR it was held that: -

The court however notes that, as rightly pointed out by the defendants, there was a long delay, on the part of the plaintiff in not only filing the defence to counterclaim, out of time, but also in filing the instant application. I find that the apparent long delay notwithstanding, this court still has the inherent power under section 3A of the *Civil Procedure Act*, to permit the plaintiff to amend its pleadings at any time before judgment.

20. In J. C. Patel v D. Joshi [1952] 19 EACA 12, the court held: -

The rule of conduct of courts in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be made if it can be made without injustice to the other side.

21. It is the Court's view that despite the long delay, there is no evidence that the application is being made in bad faith. The apparent delay though inordinate will not prejudice the plaintiffs. The proposed amendments will aid the court to determine all issues between the parties at once as to avoid a multiplicity of suits being filed by and or against the same parties. The court has power to make orders for ends of justice to be met, and to dispense justice without undue procedural technicalities as stated at Article 159 (2) (d) of *the Constitution*, and Section 3A of the *civil Procedure Act*, shall not cause any prejudice to the Respondents. In any event, the Respondents may be compensated by way of costs for the prejudice if any.

22. Based on the foregoing, the Court finds that the Applicant has ably demonstrated that the amendment and introduction of a counterclaim to the defence are justified at this stage and that it will assist the parties and the court to arrive at a just conclusion. The Respondent shall suffer no prejudice if orders sought are allowed.

23. In the end, the Applicant's motion dated 10/2/2025 is hereby allowed. The 2nd Respondent/Applicant is granted leave of 10 days to file the Amended Defence and Counterclaim.

Costs of the application shall abide in the suit.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY, 2025

.....
JANET MULWA.
JUDGE

