



REPUBLIC OF KENYA



**Ngula v Kuria & 2 others (Environment & Land Case
115 of 2011) [2025] KEELC 4518 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 115 OF 2011**

CA OCHIENG, J

JUNE 16, 2025

BETWEEN

BERNARD MBALUKA NGULA PLAINTIFF

AND

ZUHURA NJERI KURIA 1ST DEFENDANT

MUGO NJERU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. What are before Court for determination are two applications. The first application is the Plaintiff's Notice of Motion application dated the 28th November, 2024 where he seeks the following Orders:
 - a. That this Honourable court be pleased to strike out the 1st and 2nd Defendants amended Statement of Defence and Counterclaim dated 24th November 2014.
 - b. That this Honourable Court be pleased to strike out the 1st and 2nd Defendants supplementary list of documents dated the 7th June 2019.
 - c. That costs of this application be provided for.
2. It is premised on grounds on its face and on the supporting affidavit of Nzilani Muteti, Advocate. She avers that in opposition to the suit, the 1st and 2nd Defendants filed the amended statement of defence and counterclaim dated the 24th November 2014 but never annexed a verifying affidavit to the counterclaim, thus it should be struck off.
3. She states that on 11th February 2016, the matter came up for pre-trial directions of which, it was certified ready for hearing as the 1st and 2nd Defendants informed the Court that they had fully complied. However, vide an application dated the 26th May 2021, the 1st and 2nd Defendants' sought



to re-open the Plaintiff's case but their application was dismissed and the Plaintiff's case was closed after PW3 testified. She contends that when the matter came up for defence hearing on 11th November 2024, the 1st and 2nd Defendants purported to produce a supplementary list of documents dated the 7th June 2019, which was not served upon the Plaintiff, until 12th November 2024. Further, that the said list was filed after close of pleadings and after pre-trial directions had been issued on 11th February 2016. She hence seeks to have them expunged from the record.

4. In response to the said application, the 1st and 2nd Defendant's filed a replying affidavit and a supplementary affidavit sworn by the 2nd Defendant. They also filed the Notice of Motion application dated the 26th February 2025 seeking the following Orders:
 - a. Spent.
 - b. That this Honourable court be pleased to grant leave to the 1st and 2nd Defendants/Applicants to amend their defence and counterclaim.
 - c. That the draft further amended defence and counterclaim annexed hereto be treated as the 1st and 2nd Defendants/Applicant's further amended defence and counterclaim and that the same be deemed as having been fully filed subject to payment of requisite court fees.
 - d. That cost of this application be costs in the cause.
5. The application is premised on grounds on its face and on the 2nd Defendant's supporting affidavit. He avers that this matter has been heard and the Plaintiff and the 3rd Defendant have closed their cases. However, when he took the stand, in a bid to give evidence on his own behalf and on behalf of the 1st Defendant, the Plaintiff objected to any reliance on the supplementary list of documents dated the 7th June 2019, which objection was sustained, with directions to serve and the matter was adjourned for defence hearing on 17th March 2025 but before the said date, the Plaintiff filed the Notice of Motion dated the 28th November 2024. He insists that the said application flies on the face of Article 50(1) of *the Constitution* and seeks the court to consider procedure as against substantive justice, contrary to Article 159 (2) (d) of *the Constitution*. Further, that it offends the oxygen principle under section 1A and 1B of the *Civil Procedure Act*, which contemplates facilitating a fair, just, expeditious, proportionate resolution of civil disputes.
6. He avers that they should be given an opportunity to present their evidence, as it would be unfair to dismiss both their pleadings being their defence including counterclaim as their defence has not been faulted. He also avers that section 100 of the *Civil Procedure Act* gives this court general powers to amend any defect or error in proceedings at any stage for the purpose of determining the real substantive issues thus he seeks to bring his counterclaim into conformity with Order 7 rule 5 (a) of the Civil Procedure Rules.
7. The application is opposed by the Plaintiff vide his replying affidavit filed herein. He avers that to seek to amend the defence and counterclaim is an attempt to re-open the Plaintiff's case and the 3rd Defendant's case which have long been closed. Further, that re-opening his case will cause him great injustice as amendments will delay hearing. He insists that the application is an afterthought filed long after the defence was filed in 2014.

Submissions

8. In his submissions, the Plaintiff submitted that the 1st and 2nd Defendants Counterclaim dated the 24th November 2014 was not supported by a verifying affidavit as required under Order 4 Rule 1(2) of the Civil Procedure Rules and is therefore fatally defective and irregular. Further, that the 1st and 2nd



Defendants did not seek leave to file or extend the time for filing their supplementary list of documents dated the 7th June 2019, thus they offend the provisions of Order 2 Rule 13 of the Civil Procedure Rules as they were filed without leave and after close of pleadings.

9. On whether the 1st and 2nd Defendants should be granted leave to file an amended Defence including Counterclaim, the Plaintiff submitted that to re-open the case through pleadings will cause him great injustice. Further, that the 1st and 2nd Defendants' application is an afterthought meant to cure the defect of the 1st and 2nd Defendants amended Statement of Defence and Counterclaim. To buttress his averments, he relied on the following decisions: *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 and *Eastern Bakery v Castelino* (1958)1 EA 461.
10. The 1st and 2nd Defendants in their submissions reiterated their averments in support of their instant Notice of Motion application and those in opposition to the Plaintiff's application. They urged the Court to consider rendering substantive justice in line with Article 159 (2) (d) of *the Constitution* and allow the suit to proceed to substantive hearing. They further submitted that under Section 100 of the *Civil Procedure Act*, this Court is permitted to allow amendments at any stage of proceedings.
11. They reiterated that allowing the Plaintiff's instant application would contravene Article 50 of *the Constitution* on the right to fair hearing as doing so would be tantamount to denial of that right. Further, that striking out the amended defense where the defense has not been faulted would amount to a miscarriage of justice as the Plaintiff's suit will not have been defended. To support his averments, he relied on the following decisions: *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR and *Joseph Ochieng & 2 Others v First National Bank of Chicago* [1995] eKLR.

Analysis and Determination

12. I have considered the two instant Notice of Motion applications including the respective affidavits as well as rivalling submissions, the issue for determination is whether the 1st and 2nd Defendants' Statement of Defence including Counterclaim dated the 24th November 2014 as well as the Supplementary List of Documents dated 7th June, 2019, should be struck out for having been filed out of time or if they should be granted leave to amend their Statement of Defence including Counterclaim to bring it into conformity with Order 7 Rule 5 (a) of the Civil Procedure Rules.
13. The Plaintiff has sought to have the 1st and 2nd Defendants' Defence and Counterclaim dated the 24th November, 2014 as well as Supplementary List of documents dated the 7th June, 2019, to be struck out for failing to annex a verifying affidavit and being filed without leave respectively. The 1st and 2nd Defendants on other hand have sought for leave to amend their Statement of Defence and Counterclaim to bring the said Counterclaim in conformity with law.
14. Order 4 Rule 1 (2) of the Civil Procedure Rules provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff while Order 4 Rule (5) & (6) stipulates thus:
 - “(5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims. (6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”



15. Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 provides circumstances, under which a party can strike out pleadings and provides inter alia:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is an abuse of the process of the court.”

16. In this instance, I note the 1st and 2nd Defendants filed a Defence including Counterclaim but failed to annex a verifying affidavit in support of their Counterclaim. On whether lack of a verifying affidavit invalidates a Defence including Counterclaim, the Court in *Luke Cheruiyot and 37 Others v National Oil Corporation NRB CA Civil Appeal No. 91 of 2019 [2015] eKLR* favourably cited the case of *Microsoft Corporation v Mitsumi Computer Garage Ltd. & Another [2001] KLR 470* and stated thus:

“Rules of procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predicable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.

17. Further, the Court of Appeal in *Luke Cheruiyot and 37 Others v National Oil Corporation (Supra)* stated that:

“As recently as 11th July, 2014 the position taken by the Court in *Research International East Africa Ltd v Julius Arisi & 213 Others (supra)*, was reiterated in the case of *Kenya Oil Company Limited v Javantilal Dharamshi Gosrami [Nairobi Civil Appeal No. 324 of 2005] (UR)*. There, we said: “The provisions of Rule 1 (6) of Order 4 (formerly rule 1 (3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars. The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase “the court may....’ in Order 1 (3) and in the new Order 1 (6) gives the court discretion whether or not to strike out a plaint as the court held in *Arisi case (supra)*” In the end the court dismissed the appeal which was against an order of the High Court refusing an application to strike out the plaint and instead giving leave to the respondent to file a compliant verifying affidavit. In dismissing the appeal, the Court reiterated the principle stated in *D.T. Dobie & Company (K) Ltd v Muchina [1982] KLR 1* that the discretion of the court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from the judgment seat unless the case is hopeless.”



18. While in the case of *Kiraku v Eastleigh Route Sacco Limited* (Civil Appeal E057 of 2021) [2022] KEHC 11809 (KLR) (Commercial and Tax) (22 July 2022) (Judgment), it was held that:

“I hold that the power to strike out a pleading is still discretionary and in this case, the Tribunal ought to have given the Appellant a chance to rectify its position since it had filed a counterclaim and also explained why it failed to file the verifying affidavit. Having taken the position that filing of a verifying affidavit was mandatory, the Tribunal did not address whether the reasons proffered by the Appellant were sufficient or determine whether in fact the Respondent would be prejudiced by an order allowing the verifying affidavit to be filed.”

19. I note Order 4 of the Civil Procedure Rules does not make it mandatory for a Defence to have a verifying affidavit. Further, the Statement of Defence including Counterclaim sought to be struck out has been on record since 2014, before the suit was set down for hearing. I note the Plaintiff even filed a reply to Defence and Defence to Counterclaim. Further, the Plaintiff has now sought to strike out the Statement of Defence including Counterclaim after closing his case without demonstrating what prejudice he stands to suffer. It is my considered view that the Statement of Defence even without the Counterclaim, raises triable issues and it cannot be sacrificed on the basis that a Counterclaim did not have a verifying affidavit. I opine that the Plaintiff seeks to rely on procedural technicalities which offends the provisions of Article 159 (2) (d) of *the Constitution*. In the foregoing while relying on the legal provisions cited as well as the decisions cited and invoking the oxygen principle under section 1A and 1B of the *Civil Procedure Act*, I will decline to strike out the Statement of Defence including Counterclaim dated the 24th November, 2014, as sought by the Plaintiff.
20. As to whether I should strike out the 1st and 2nd Defendants supplementary List of documents dated 7th June, 2019, filed out of time and without leave, I note from the Court record, their Counsel on 11th February 2016 confirmed that they had complied with Order 11 of the Civil Procedure Rules. Further, during the hearing, there was no indication that they intended to file further documents. I further note that they had sought to reopen the Plaintiff's case which was declined and the Plaintiff including 3rd Defendant have already closed their cases. Insofar as leave is discretionary, I opine that it should not be used to prejudice an opposing party. In the circumstance, I will proceed to expunge from record, the Supplementary List and Bundle of Documents dated the 7th June, 2019, filed out of time and without leave.
21. As to whether the 1st and 2nd Defendants should be granted leave to amend their Statement of Defence including Counterclaim, I note they have sought to amend their pleadings to bring the Statement of Defence and Counterclaim in compliance with Order 7 rule 5 (a) of the Civil Procedure Rules. It is trite that section 100 of the *Civil Procedure Act* grants courts general powers to allow amendments of pleadings at any stage for the purpose of determining the real substantive issues.
22. In the case of *Tarmohamed v Mariakani Holdings Limited & Another* [2022] KECA 122 (KLR), the Court of Appeal stated that:
- “...Rules that apply to amendment of pleadings will apply, namely that amendments should be liberally allowed, if they can be made without injustice to the other side, or where such injustice can be compensated by costs.”
23. In this instance, the 1st and 2nd Defendants' Defence including Counterclaim was filed more than twelve (12) years ago. Further, the Plaintiff and 3rd Defendants have closed their respective cases. I note the 1st and 2nd Defendants have only sought to amend the Statement of Defence including Counterclaim to



bring it into conformity with Order 7 rule 5 (a) of the Civil Procedure Rules and there is no indication that they are introducing new issues.

24. In the circumstances, while associating myself with the decisions quoted, at this juncture I find that the amendments sought, will not be prejudicial to both the Plaintiff and 3rd Defendant as it only seeks to cure a procedural technicality for inclusion of a verifying affidavit. I will grant leave to the 1st and 2nd Defendants to amend their Statement of Defence including Counterclaim. I direct the 1st and 2nd Defendants to file and serve their Amended Statement of Defence including Counterclaim within seven (7) days.
25. In the foregoing, I find the 1st and 2nd Defendants' Notice of Motion application dated 26th February, 2025 merited and will allow it. I however find the Plaintiff's Notice of Motion application dated the 28th November, 2024 partially successful and will allow it to the extent of expunging the Supplementary List of Documents dated the 7th June, 2019 from the Court records.
26. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Nzuva for Plaintiff

Ms Munyoki for Mwangi for 1st and 2nd Defendants

Court Assistant: Joan

