



**Ndungu v KPMG International Co-operative (Commercial Case E139 of 2019)
[2025] KEHC 13458 (KLR) (Commercial and Tax) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E139 OF 2019
AA VISRAM, J
SEPTEMBER 25, 2025**

BETWEEN

RICHARD BORO NDUNGU PLAINTIFF

AND

KPMG INTERNATIONAL CO-OPERATIVE DEFENDANT

RULING

Background

1. The Defendant has moved this Court by way of a Notice of Motion dated 19th November, 2024, seeking orders that specified paragraphs of the Plaintiff's Reply to Defence dated 22nd October, 2024, be struck out and that the Supplementary Bundle of Documents filed contemporaneously therewith be expunged from the record.
2. The Application is premised on the contention that the Reply introduces new causes of action, issues and reliefs which had not been pleaded in the Plaint and to which the Defendant has no procedural opportunity to respond.
3. The Plaintiff opposes the Application, contending that the impugned paragraphs are responsive to the Defence, that striking out is a draconian remedy, and that in any event any technical deficiency may be saved by Article 159(2)(d) of the *Constitution*.
4. Both parties filed written submissions. I have carefully considered the Notice of Motion, the rival submissions, and the authorities cited.



Issues for Determination

5. The following issues arise for determination:-1. Whether the Reply introduces new causes of action or reliefs contrary to the [Civil Procedure Rules](#). 2. Whether the defects, if any, may be cured under Article 159(2)(d) of the [Constitution](#). 3. Whether the Supplementary Bundle of Documents is properly on record. 4. What orders ought to be made as to costs.

Whether the Reply Introduces New Causes of Action

6. Order 7, rule 17 of the [Civil Procedure Rules](#) permits a Plaintiff to file a reply, but the scope of such a pleading is limited to joining issue with the defence and, where appropriate, raising matters in answer to the defence. The Rules do not permit the introduction of fresh causes of action or reliefs at that stage.
7. The Defendant points to paragraph 4(j) of the Reply which introduces a claim for tortious interference, and paragraph 23 which prays for damages in respect of discrimination and defamation. These are substantive new claims not pleaded in the Plaintiff.
8. The Plaintiff's position is that these averments merely provide "contextual explanation" of the breaches alleged in the Plaintiff. Respectfully, I am not persuaded. A claim for defamation or for tortious interference is not ancillary context but an independent cause of action which, if permitted, would materially alter the character of the suit.
9. Our courts have consistently emphasised that parties are bound by their pleadings: [Gandy v Caspair](#) [1956] EACA 139; [Daniel N Mugendi v Kenyatta University & 3 Others](#) [2013] KECA 41; and most recently [Vishva Stones Supplies Co. Ltd v RSR Stone](#) (2006) Ltd Civil Appeal (Application) E308 of 2020 [2024] KECA 978. A party cannot introduce new matters outside the framework of the pleadings. To allow so in the present matter would deny the Defendant the opportunity to respond or controvert the new matters raised for the first time in the reply.
10. I therefore find that the Reply does in fact introduce new claims and reliefs contrary to the [Civil Procedure Rules](#) and law as stated above.

Whether Article 159(2)(d) Provides a Cure

11. The Plaintiff urges the Court to overlook any deficiencies under Article 159(2)(d) of the [Constitution](#). The Supreme Court has held, however, that this provision is not a panacea for substantive breaches of the [Civil Procedure Rules](#). See [Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others](#) Petition No. 14 of 2013 [2014] eKLR.
12. What is in issue here is not a procedural slip, but the substantive attempt to enlarge the cause of action through a Reply to Defence. This, in my view, is not curable under Article 159.

The Supplementary Bundle of Documents

13. The Plaintiff further filed a Supplementary Bundle of Documents dated 22nd October, 2024. These documents are intended to support the new averments contained in the Reply to Defence. Having found that those averments are improperly before the Court, it follows that the documents founded upon them may not be allowed to remain on record.

Conclusion and Orders

14. Based on the reasons set out above, I am persuaded that the Defendant's Application is with merit. The Reply filed on 22nd October, 2024, impermissibly introduces new causes of action and reliefs,



thereby prejudicing the Defendant who has no procedural avenue to respond. Article 159(2)(d) does not sanction such departure.

15. Accordingly, the Court makes the following orders:-

1. Paragraphs 4(c), 4(e), 4(g-j), 5, 6, 7, 8, 9, 11 (insofar as it refers to paragraph 6), 18, 19 and 23 of the Reply to Defence dated 22nd October, 2024, are hereby struck out.
2. The Plaintiff's Supplementary Bundle of Documents dated 22nd October 2024 is expunged from the record.
3. The costs of this application are awarded to the Defendant.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

Court Assistant: Lisper

.....for Defendant/Applicant

.....for Plaintiff/Respondent

