



**Mutisya & 8 others v Mulemba (Environment and Land Case  
114 of 2019) [2025] KEELC 7367 (KLR) (29 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7367 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 114 OF 2019  
NA MATHEKA, J  
OCTOBER 29, 2025**

**BETWEEN**

**JOHNBOSCO KISOME MUTISYA ..... 1<sup>ST</sup> PLAINTIFF  
FRANCIS MAKAU MUTISYA ..... 2<sup>ND</sup> PLAINTIFF  
WILLIAM MULEMBA MUTISYA ..... 3<sup>RD</sup> PLAINTIFF  
GRACE N'THAMBA MASWII ..... 4<sup>TH</sup> PLAINTIFF  
MARTHA MBULA MUTISYA ..... 5<sup>TH</sup> PLAINTIFF  
ELIZABETH MUTINDI PAUL MUINDI ..... 6<sup>TH</sup> PLAINTIFF  
RAPHAEL KYENGE MUTISYA ..... 7<sup>TH</sup> PLAINTIFF  
JOSEPH MUTHINI MUTISYA ..... 8<sup>TH</sup> PLAINTIFF  
COLLECTOR MUENI MUTISYA ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**GABRIEL MULEMBA ..... DEFENDANT**

**RULING**

1. The first Application is dated 23<sup>rd</sup> January 2025 and is brought under Section 1, 1B and 3A of the *akn ke act 1924 3 Civil Procedure Act* Under Order 8 Rule, 3, Order 24 Rule 3 and Order 2 Rule 15 of the Civil Procedure Rules seeking the following orders;
  1. That this Honourable Court be pleased to grant leave for the 3<sup>rd</sup> Plaintiff to be substituted with Administrators Ad litem out of time.
  2. That this Honourable Court be pleased to grant leave to amend the Originating Summons filed herein in terms of the draft annexed amended Originating Summons.



3. That if the orders are granted as prayed, the annexed draft amended Originating Summons be deemed as duly filed subject to payment of requisite fees.
  4. That this Honourable Court be pleased to strike out pleadings drawn and filed by the firm of M. Mutinda & Associates Advocates and all consequential orders thereto by virtue of the advocate having been struck off from the Roll of Advocates.
  5. That costs of this application be provided for.
2. It is based on the following grounds that the amendment is necessary to enable this Honourable Court to properly and accurately determine the issues before it. That it is only the 3<sup>rd</sup> Plaintiff herein who has the requisite locus standi to institute this suit and possesses the most likely prospects of success. That the Applicants are the Administrators Ad litem of the 3<sup>rd</sup> Plaintiff herein and the amendment of this suit is necessary to enable the Applicants to appropriately frame their prayers. That the pleadings drawn and filed by the firm of M. Mutinda & Associates Advocates. That the Applicants have changed their Advocates, and the amendment is necessary to enable the new Advocates to properly take conduct of and effectively prosecute this suit. That the Defendant Respondent shall suffer no prejudice by the said amendment.
3. This court has considered the application and the submissions therein. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court 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.
4. Further, Order 8, rule 5 gives the court the general power to amend.
- 5.
- (1) 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
- Section 1A of the *akn ke act 1924 3 Civil Procedure Act* provides for the overriding objective of the *akn ke act 1924 3 Civil Procedure Act* and the rules made thereunder and provides as follows:
- “ 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
5. Section 1B of the same Act, on the other hand provides for the duty of court and states:



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.
6. The Respondent strongly opposed the application in that the proposed amendment the 3<sup>rd</sup> Plaintiff states that they have changed their advocates and wish to retain only the 3<sup>rd</sup> Plaintiff who has the locus standi to institute this suit. It also wishes to introduce a prayer for damages which is a new cause of action. That the suit against the 3<sup>rd</sup> Plaintiff abated in 2022 and the prayer for substitution cannot be granted.
7. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others*, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”
8. On the issue of amendment of pleadings in the case of *AAT Holdings Limited vs Diamond Shields International Ltd* (2014) eKLR, the court cited the principles as set out by the Court of Appeal in *Central Kenya Ltd Case No. 222 OF 1998* as shown below;
  - (i) That are necessary for determining the real question in controversy.
  - (ii) To avoid multiplicity of suits provided there has been no undue delay.
  - (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
  - (iv) That no vested interest or accrued legal rights is affected; and
  - (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.
9. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a originating summons is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In the case of *Isaac Awuondo vs Surgipharm Ltd & Another* (2011) eKLR the Court of Appeal had the following to say:

In *Moi University Vs Vishva Builders Limited* - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the



commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30 - We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *H.D Hasmani v. Banque Du Congo Belge* (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel vs. E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

10. The 3<sup>rd</sup> Plaintiffs state that they seek to remove all the other Plaintiffs and substitute the 3<sup>rd</sup> Plaintiff to remain alone. This suit was filed in 2019. Be that as it may, I have perused the proposed Amended Originating summons. From the grounds given, the Applicant states that it is only the 3<sup>rd</sup> Plaintiff herein who has the requisite locus standi to institute this suit and possesses the most likely prospects of success. That the Applicants are the Administrators Ad litem of the 3<sup>rd</sup> Plaintiff herein and the amendment of this suit is necessary to enable the Applicants to appropriately frame their prayers. This is a sneaky way of trying to leave the proceedings without paying costs. The 3<sup>rd</sup> Plaintiffs could easily apply for substitution of the 3<sup>rd</sup> Plaintiff before the suit abated and not amendment of the pleadings. The other Plaintiffs dragged the Defendant to court and now wish to leave the suit without any consequences as to costs. I find that this contravenes order 8 of the Civil Procedure Rules. I find that this application is not merited and is dismissed with costs.
11. The second application is dated 7<sup>th</sup> March 2025 and is brought under Order 42 Rule 6(2) and 51 Rule 1 of the Civil Procedure Rules, 2010, Under Sections 1A, 1B, 3A and 63E of the *akn ke act 1924 3 Civil Procedure Act* seeking the following orders;
  1. That this Honourable Court do certify this application urgent and be heard exparte in the first instance.
  2. That this Honourable Court be pleased to order the Plaintiffs to provide security for costs of Kshs. 8,000,000 = by depositing the same in Court pending hearing and determination of this suit.
  3. That in the alternative the Honourable Court be pleased to order the Plaintiffs or the intended Plaintiffs to provide reasonable security for costs which shall be deposited in court before any intended proceeding and replacement of the previous Plaintiffs pending the hearing and determination of the suit.
  4. That the costs of this application be in the cause.
12. It is based on the grounds that the Defendant is the registered owner of the suit property known as Matuu Ikaatini 676. In the year 2019, nine Plaintiffs filed the Originating Summons against the Defendant claiming his suit land under the doctrine of adverse possession to which Originating Summons the Defendant retained legal services and filed his Defence by way of a Replying Affidavit and parties had complied by filing their witness statements and documents. While the pendency of the suit the Plaintiffs attempted to gain entry to the suit land and tried to make bricks and cut trees with the intention of building houses. That on 12<sup>th</sup> February, 2021 Hon. Justice O. A. Angote delivered a Ruling after interpartes hearing restraining the Plaintiffs, their servants and or agents from excavating, digging, making bricks, constructing, cutting trees, sub-dividing, selling and or in any other way interfering



- with the conditions and state of the suit property known as Matuu Ikaatini 676. The Plaintiffs filed an application on 2<sup>nd</sup> March, 2021 seeking orders of the court allowing them to cultivate on the Defendant's suit land which application was opposed by the Defendant in his Replying Affidavit sworn on 22<sup>nd</sup> March, 2021 and submissions filed on 4<sup>th</sup> May, 2021 which application is pending determination.
13. That the 3<sup>rd</sup> Plaintiff died and the Plaintiffs attempted to inter his remains on the suit land however on 18<sup>th</sup> January, 2022 Hon. Lady Justice C.A. Ochieng, delivered a Ruling after inter partes hearing restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs Respondents, their agents, family members, relatives, employees and or their servants and the legal representatives of the Estate of the 3<sup>rd</sup> Plaintiff if any from entering, digging, burying the remains of the 3<sup>rd</sup> Plaintiff and or interfering whatsoever with the suit property known as Matuu Ikaatini 676 which order was duly served upon Benedetta Makenye Muvinda on 20<sup>th</sup> January, 2022. That on 11<sup>th</sup> August, 2022 the Plaintiffs filed an application dated 1<sup>st</sup> July, 2022 seeking to amend the Originating Summons to the effect of replacing all the Plaintiffs with totally different persons as Plaintiffs which application the Defendant filed a Replying Affidavit and submissions but the Plaintiffs have never prosecuted that application to date which is pending determination. That on 17<sup>th</sup> February, 2023 the Plaintiffs filed a Notice of Withdrawal of Suit dated 15<sup>th</sup> February, 2023 which Notice of Withdrawal the Honourable Court through its Ruling delivered on 1<sup>st</sup> November, 2023 struck out on account of being an abuse of the court process and ordered that there be no subsequent proceedings or suit that may be brought upon the same or substantially the same cause of action before payment of the costs of this suit as envisaged under Order 25 Rule 4 of the Civil Procedure Rules, 2010.
  14. That the Plaintiffs retracted and filed an application dated 23<sup>rd</sup> January, 2025 which is a replica of the application dated 1<sup>st</sup> July, 2022 seeking to amend Originating Summons in effect to replace all the principal Plaintiffs with new parties as Plaintiffs and brought other new cause of action. That the Plaintiffs have no justiciable claim against either the Defendant having admitted that they have no locus standi to institute the suit and possess no prospects of success. The Plaintiffs are not keen on setting down the suit for hearing and are only keen at keeping the Defendant in court corridors for eternity. The Plaintiffs or the intended Plaintiffs have not fixed a board and have no know assets that may be disposed off to recover the Defendant's costs. That the Defendant has previously been awarded costs which have not been paid to date. The Defendant has incurred and will continue incurring huge expenses defending a hopeless suit. The Defendant may never recover costs of the suit from the Plaintiffs or the prospective Plaintiffs.
  15. The application was canvassed by way of written submissions which the court has duly considered. The applicable law in an application for security for costs is order 26 Rule 1 of the Civil Procedure Rules which provides as follows;
    - (1) In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party."
  16. As rightly submitted by the Defendant Applicant, grant for orders sought herein is a matter of judicial discretion as the court held in the case of Shah and others vs Manurama Limited and others (2003) E.A 294 Cited with approval in the case of Ahmed Kulimye Bin & 2 others vs Kenya Revenue authority & another (2012) eKLR . The same position was taken by the court in the case of Cancer Investments Limited vs Sayani Investments Limited (2010) eKLR.



17. The test in an application for security for costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bonafide defence. This was the holding in the case of Shah vs Sheti Civil Appeal No.34 of 1981.

18. The same principles were espoused in the case of Jayesh Hasmukh Shah Vs Narin Haira & another (2015) eKLR in which the court held;

It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account."

19. In an application for security for costs, the Applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of Kenya Education Trust vs Katherine S.M. Whitton Civil Appeal No 310 of 2009.

20. It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of Marco Trols & Explosive Limited vs Mamunje Brothers Limited (1988) EKLr 730 this point was enunciated by the court in the following terms;

The exercise of the court's power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable."

21. Being guided by those legal principles, the only issue for determination is whether or not an order for security for costs can issue against the Plaintiffs. As discussed above, one of the principles to consider is the ability of the Plaintiffs to pay the costs in the event that they are not successful and that, is one of the grounds relied upon by the Defendant. Article 50 of *akn ke act 2010 constitution the Constitution* provides that;

Every person has the right to have his dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body."

22. In the case of Shakalanga Jirongo vs the Board of National Social Security Fund HCC No 957 of 2000 in which the court held that;

Poverty is not sufficient ground for an order for security for costs."

23. In the case of Noornamohammed Abdullah vs Ranchorbhai J. Patel (1962) EA 447 wherein the court held that;

It is right that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided."



24. In the case of *Keystone Bank Limited & 4 others vs I&M Holdings Limited & another* (2017) Eklr where the court held;

In an application for security of costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven.”

25. The court notes that the Applicant has just made a general statement that the Respondents may not be able to settle the costs in the event that they do not succeed in their suit because they have no known assets. That the Plaintiffs or the intended Plaintiffs have no fixed a board and have no known assets that may be disposed off to recover the Defendant’s costs. To that extent, it did not discharge its evidential burden.

26. On the issue of whether the Plaintiffs have a bonafide claim, the court has perused the originating summons as filed. As was held in the case of *Shah vs Sheti* (supra), the test in an application for security for costs is whether the Defendant has a bona fide defence. I am alive to the fact that at this stage, the court should not consider the merits of the case or the Defendant’s defence as that is the mandate of the court when it hears the matter. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be unfair in the circumstances of this case, to order the Plaintiffs to deposit the amount sought for, security for costs.

27. In view of the foregoing, I am of the considered view that the application is not merited and the same is hereby dismissed. The costs shall abide the outcome of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF OCTOBER 2025.**

**N.A. MATHEKA**

**JUDGE**

