



REPUBLIC OF KENYA



KENYA LAW
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Musa & 6 others (Suing on the own behalf and on behalf of Mwakirunge Residents upon the suit property/Plot No CR 345 numbering 366 Individuals) v Hassan & 4 others (Environment and Land Case 133 of 2015) [2025] KEELC 7299 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7299 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 133 OF 2015
LL NAIKUNI, J
OCTOBER 24, 2025

BETWEEN

ALI MOHAMED MUSA 1ST PLAINTIFF
ALEX MASA GWEDE 2ND PLAINTIFF
GEORGE OKUMU WANYAMA 3RD PLAINTIFF
TUKU KADZOYO TUKU 4TH PLAINTIFF
CHARLES RAMA AMOS 5TH PLAINTIFF
RASHID NASORO GANZORI 6TH PLAINTIFF
MOHAMED MVOO MUSA 7TH PLAINTIFF

**SUING ON THE OWN BEHALF AND ON BEHALF OF MWAKIRUNGE
RESIDENTS UPON THE SUIT PROPERTY/PLOT NO CR 345 NUMBERING
366 INDIVIDUALS**

AND

MAHMOOD HASSAN 1ST DEFENDANT
JAFFER KASSAM 2ND DEFENDANT
ESMAIL KASSAM 3RD DEFENDANT
MUSA KASSAM 4TH DEFENDANT
ESSAK KASSAM 5TH DEFENDANT



RULING

I. Introduction

1. This Honorable Court is tasked with the determination of the Notice of Motion Application dated 10th June, 2025 by Alex Masa Gwede, Rashid Nasoro Ganzori and Mohamed Mvoo Musa, the 2nd, 6th and 7th Plaintiffs/Applicants herein. The Application was brought under the provision of Sections 1A, 1B, 3, 3A and 63 (c) and (e) of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya, Order 8 Rule 3 and Order 21 Rule 25 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. Upon service of the Notice of Motion application, the 3rd Plaintiff responded through filing of a Replying Affidavit sworn on 8th August, 2025.

II. The 2nd, 6th and 7th Plaintiffs/Applicants' case

3. The 2nd, 6th and 7th Plaintiffs/Applicants sought the following orders from the Honourable Court:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the Honourable Court be pleased to grant leave to the Applicants to amend their pleadings as per the annexed Draft Amended Originating Summons.
 - e. That the Honorable Court be pleased to issue further or better orders as shall meet the ends of justice.
 - f. That the costs of this application be provided for.
4. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 13th paragraphed Supporting Affidavit of – ALEX MASA GWEDE, the 2nd Plaintiff/Applicant herein sworn and dated the same day with the application together with annexures marked as “AMG” annexed hereto. The Deponent averred that: -
 - a. The Affidavit was on behalf of and by the authority of his co – Applicants.
 - b. Judgment in this suit is scheduled for delivery on the 13th day of June 2025.
 - c. Upon a thorough review of the pleadings and the proceedings, they had discovered material facts and issues that were inadvertently omitted by our previous advocate from the original originating summons.
 - d. Important material particulars and/ or grounds were not pleaded yet were necessary for the just determination of the suit, and was therefore necessary in order to put the matter in its proper perspective to facilitate a just determination, i.e. that the suit property was subdivided into Plot Nos. MN/II/14216 and MN/I/14220, and therefore the original Plot Number ceased to exist. Annexed in the affidavit and marked as “AMG-2 & 3” was a copy of the map and land rates statements.
 - e. The omission to include the necessary and important particulars was occasioned by excusable mistake on the part of their previous counsel on record, and the said amendment for which



they were seeking leave, sought to repair an omission due to negligence and/ or carelessness of their previous advocate.

- f. Immediately they became aware of this omission, they instructed their present advocate to file this application on their behalf without undue delay.
- g. Their advocate on record told them that subject to Order 1 Rules 9 and 10, Order 24 Rules 3, 4, 5 and 6, 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.
- h. Order 8 Rule 5 of the Rules gave the court the general power to amend, for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, and the court may 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 was just.
- i. They now sought leave of this Honourable Court to amend their pleadings in order to properly place all relevant issues before the Court for fair adjudication. Annexed in the affidavit and marked as “AMG - 2” was a copy of the Intended Amended Originating Summons.
- j. The said amendment was necessary for the just and effective determination of the issues in dispute.
- k. Unless leave was granted to amend the pleadings, and the judgment was arrested, they stood to suffer prejudice and the matter may be determined without consideration of all relevant issues.
- l. No prejudice/hardship would be occasioned to the Respondents in whatsoever manner if the orders sought herein were granted, and the same would serve the interests of justice.
- m. This Honourable Court was versed with immense discretionary powers to arrest the imminent Judgment herein and grant the orders sought in this application.
- n. It was only fair and just and in the interest of administration of justice therefore that this Honourable Court exercises its discretion by granting the orders sought herein.

III. The response by the 3rd Plaintiff/Respondent

- 5. The 3rd Plaintiff/Respondent responded through a 19 paragraphed replying Affidavit sworn by George Okumu Wanyama, the 3rd Plaintiff who was also authorized by Co - Plaintiffs on 8th August, 2025 who averred that: -
 - a. The supporting Affidavit purportedly sworn on 10th June 2025 was fatally defective as it had failed to conform to the requirements of the provision of Section 11 of Oaths & Statutory Declaration Act, Cap. 15 Laws of Kenya. By extension, the Application, should be struck out.
 - b. The Deponent of the said supporting affidavit had egregiously misrepresented facts and illegally conferred himself authority to swear the Supporting affidavit on behalf of his co-Applicants under an authorization document that lawfully authorizes the 3rd Plaintiff solely.
 - c. The deponent of the said Supporting Affidavit was in further violation and contravention of the provisions of Order 1 Rule 12 (2) of the Civil Procedure Rules, 2010.
 - d. In the premise, the affidavit in support of the motion was incompetent for want of authority by the person deposing it.



- e. In light of the foregoing, the Affidavit and by extension the Notice of Motion must be struck out. However, and if the court is inclined to allow the affidavit as it was the Affiant responded as follows: -
- f. The contents of Paragraphs 1 and 3 were not in dispute.
- g. The Plaintiffs were strangers to the contents of Paragraph 2 of the Supporting Affidavit. The said deponent had not produced any valid document in support of the said authority.
- h. The contents of Paragraph 4 were not disputed.
- i. The contents of Paragraph 5 were disputed. The Applicant had not explained the inordinate delay in discovering the material facts allegedly inadvertently omitted by their erstwhile advocate. The Applicant had also not explained why it had taken him over 10 years to file the instant Application.
- j. The contents of Paragraph 6 of the supporting affidavit were denied in toto. In response thereto: -
 - i. The proposed amendment introduced a new case that would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action.
 - ii. Amendment of the pleadings as sought by the Applicant would deprive the Plaintiffs of their right to rely on the Limitation Act, Cap. 22.
- k. The contents of Paragraphs 9, 10, 11 and 12 were vehemently opposed. The Plaintiffs retained a legitimate expectation that this protracted litigation must come to an end. After all, Courts have been categorical that amendments of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment, particularly ten (10) years down the line is the epitome of abusing the Court process.
- l. In response to Paragraph 14, the Plaintiffs stood to suffer great prejudice as the Applicant was delaying the course of justice by filing frivolous applications such as the instant one.
- m. In response to Paragraph 15, it is trite law that the right to amend was discretionary but care must be taken to ensure that no injustice or prejudice is caused to the affected party.
- n. The Affidavit was sworn in vehement opposition of the Applicants' defective Application dated 10th June, 2025 and prayed that the application be dismissed with costs to the Interested Party.

IV. Submissions

- 6. While all the Parties were present in Court, they were directed to have the Notice of Motion Applicant dated 10th June, 2025 be disposed of by way of written submissions. Unfortunately, by the time the Court was penning down the Ruling, it had not been able to access any written submissions by any of the parties here from neither the Judiciary CTS portal nor the ELC Registry. Pursuant to that on a ruling on its own merit was reserved on 24th October, 2025 by Court accordingly.

V. Analysis and Determination

- 7. The pleadings and arguments of both parties are on record and I have considered them in full, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. For the purposes of this ruling,



and in order to reach an informed, reasonable and fair decision, I identify the following five (5) key issues for determination: -

- a. Whether the Supporting Affidavit and Replying Affidavit are fatally defective for want of proper authority.
- b. Whether the Court has jurisdiction to arrest judgment.
- c. Whether leave to amend pleadings should be granted at this stage.
- d. Whether the Respondents will suffer prejudice if the amendment is allowed?
- e. Who bears the Costs of the Notice of Motion application dated 10th June, 2025?

Issue No. a). Whether the Supporting Affidavit and Replying Affidavit are fatally defective for want of proper authority.

8. Under this sub - heading, the Honourable Court shall examine whether the supporting affidavit is fatally defective for want of proper authority. The Plaintiff/Respondent contends that the Supporting Affidavit offends the provision of Section 11 of the *Oaths and Statutory Declarations Act*, Cap. 15 and Order 1 Rule 12(2) of the Civil Procedure Rules, 2010 as the deponent allegedly lacked authority to swear on behalf of co-Applicants. Order 1 Rule 12(2) of the Rules provides that where several Plaintiffs sue, any one of them may be authorized in writing to appear, plead or act on behalf of the others.
9. However, to begin with, I note that before the Court for determination is the Applicants’ Notice of Motion application dated 10th June 2025, seeking (a) to arrest the delivery of Judgment and (b) leave to amend the pleadings in “the Civil Suit Environment and Land Court Case (Mombasa) No. 133 of 2015”. This application is opposed via the Respondents’ Replying Affidavit sworn on 8th August 2025. Judgment had been scheduled for delivery but was stayed as a result of this application.
10. It is noted that the application invokes various provisions of the *Civil Procedure Act*, Cap. 21, the *Environment and Land Court Act* (No. 19 of 2011), and the *Oaths and Statutory Declarations Act* (Cap 15), as well as applicable rules and practice directions of this Court.
11. Historically, the Plaintiffs/Applicants commenced the present suit in the year 2015. Proceedings have proceeded through full hearing and the matter was set down for Judgment in accordance with the provision of Order 21 of the Rules. Before Judgment could be pronounced, the Applicants filed the Notice of Motion application dated 10th June 2025 seeking to arrest the delivery of Judgment on the principal ground that they had discovered new evidence and wished to amend their pleadings to properly frame their case “in the interest of justice.” They further contend that certain material came to their knowledge only after closure of hearing but before delivery of Judgment; and that the amendment was necessitated by errors in the original pleadings.
12. Upon being served, the Plaintiff/Respondents filed a reply vigorously oppose the application. They argue, first, that the supporting affidavit is incompetent as it was not properly commissioned, with the deponent allegedly not present before the Commissioner for Oaths as required by law. Similar objections are pressed against the Affidavit annexed in response. Substantively, the Respondents contest both the jurisdiction of this Court to entertain an application to arrest judgment, and the bona fides of the intended amendments—asserting that these would introduce a new cause of action, cause undue delay, and prejudice their right to finality and cost-effective litigation.
13. A central question is whether the Supporting Affidavit annexed to the Notice of Motion complies with statutory and regulatory requirements regarding the making, execution, and commissioning of



affidavits in Kenya. The provision of Section 5 of the *Oaths and Statutory Declarations Act* (Cap 15) provides: -

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

14. This section which is couched in mandatory terms, is supplemented by further regulatory provisions requiring the deponent to be present before the Commissioner, and for the Commissioner to be satisfied as to the person’s identity and understanding. The provision of Order 19 Rule 3 of the Civil Procedure Rules, 2010, provides:

“

“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove...

(2) An affidavit shall not contain extraneous matter, by way of objection or prayer or legal argument or conclusion...

SUBPARA (3)

Any such extraneous matter shall be struck out by the court either of its own motion or on application by a party.”

15. Additionally, the provision of Order 51 Rule 10(1) and (2) of the Civil Procedure Rules, 2010 further provide: -

“(1) Every affidavit shall be signed by the deponent and the jurat shall be completed and signed by the person before whom it is sworn.

(2) Every affidavit shall state the place where and the date when it is sworn.

(3) Any affidavit which does not comply with subrules (1) and (2) may not be accepted in evidence.”

16. The courts have consistently held that a competent affidavit must be sworn in the presence of a Commissioner for Oaths, with both parties physically present at the same location. In the case of “Regina Munyiva Nthenge v Kenya Commercial Bank Ltd [2005] KEHC 287 (KLR)”, it was held:-

“Section 5 of the *Oaths and Statutory Declarations Act* provides that:

‘Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.’

...If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion...is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths...This court would have no alternative but strike off the replying affidavit as it is not properly commissioned...”



17. Similarly, in the case of:- “Mary Gathoni & another v Frida Ariri Otolu & another [2020] KEHC 8391 (KLR)”, the court elaborated: -

“.....the deponents and the Commissioner for Oaths, must be both present at the same place at the same time. It cannot, therefore, be that one was at Eldoret and the other at Kakamega...I ruled that that application was not properly before me for it was based on affidavits that were not properly commissioned. I declined...to grant the orders sought...”

18. And further:-

“.....The law on commissioning of affidavits is the [Oaths and Statutory Declarations Act](#)...which at section 5, states as follows: ‘Every Commissioner for Oaths...shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.’...”

19. See also “Al-Alyaan Motors Limited & another v Ngala Civil Appeal E191 of 2021; [2023] KEHC 19745 (KLR)” and “CMC Motors Group Limited v Bengeria arap Korir (2013) eKLR” both reiterating the fatal effect of a defective commissioning.

20. Further, in the case of:- “Research International East Africa Limited v Julius Arisi & 213 Others [2007] eKLR”, the Court held that failure to file written authority renders pleadings defective. However, in “the classicus locus’ case of: “Microsoft Corporation v Mitsumi Computer Garage Limited [2001] eKLR”, Justice Ringera (retired JA) emphasized that such defects are curable under the provision of Article 159(2)(d) of [the Constitution](#) and Order 51 Rule 10 of the Civil procedure Rules, 2010, provided no prejudice is occasioned.

21. Upon careful scrutiny, if the jurat or commission section is defective—e.g., stating that the deponent swore the affidavit at Mombasa, while the Commissioner’s stamp appears as Nairobi, or where electronic commissioning is not certificated per section 106B of the [Evidence Act](#)—the affidavit is fatally defective and cannot support the Notice of Motion. The consequence is fatal; the application would lack an evidentiary foundation and is liable to be struck out.

22. The application cannot stand if the supporting affidavit is defective as to commissioning or execution. The jurisprudence is emphatic: an application not supported by a competent affidavit is not properly before the court. The defect cannot be cured by the court under Order 19 Rule 7 of the Rules unless the error is purely technical, not substantive.

23. Upon scrutiny of the documentation annexed to the parties’ applications and submissions, if any affidavits supporting either the application or reply are non-compliant with Section 5 of the [Oaths and Statutory Declarations Act](#), are not signed by both the deponent and the Commissioner for Oaths in the same place and at the same time, or lack specific mention of location/date, the defect is fatal and those affidavits are struck out. The application (or opposition thereto) then falls or stands accordingly.

24. Based on the foregoing, I do proceed to direct that in the event that both the Applicants’ affidavits in support and the Respondents’ in reply are similarly defective, the effect is that the application stands unsupported and must accordingly be dismissed.

IssueNo. b). Whether the Court has jurisdiction to arrest Judgment

25. Under this sub - title, the Court is to examine whether it has the jurisdiction to arrest the delivery of the expected Judgment. One of the principal issues is whether, and in what circumstances, this Court—the Environment and Land Court—has jurisdiction to ‘arrest’ delivery of its own judgment at the stage



reached in these proceedings. Having critically combed through the law, there is no express provision that exists in the *Civil Procedure Act*, Cap. 21 or its Rules for the arrest of Judgment in civil suits. The authority for arresting Judgment is much clearer in criminal practice unlike in Civil matters. The provision of Section 324 of the Criminal Procedure Code expressly provides: -

“324. Motion in arrest of Judgment

- (1) The accused person may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the court has made and had power to make, state an offence which the court has power to try...”

26. As stated, in civil matters, arrest of Judgment is not expressly provided for. Instead, litigants are to apply for review (Section 80 of Cap. 21 and Order 45) or to amend pleadings under Order 8, before judgment is delivered. If judgment has already been read, the proper recourse is through an appeal, not by attempting to arrest or stay the judgment at the trial court.

27. The Applicants pray that judgment scheduled for 13th June 2025 be “arrested.” In the case of: “Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others [2015] eKLR”, the Court of Appeal affirmed that a trial court has inherent jurisdiction under the provision of Section 3A of the *Civil procedure Act*, Cap. 21 to arrest delivery of Judgment where justice so demands.

28. Similarly, in the case of: “Patel v EA Cargo Handling Services Limited [1974] EA 75”, the Court stressed that discretion exists to prevent injustice, but must be exercised judiciously.

29. In the case of “Njihia v Mwangi (ELC Appeal E012 of 2021) [2024] KEELC 3303 (KLR)” it was the opinion of the Court that:

“The trial court found and held that the court lacked jurisdiction to adopt the said Award. Further, the trial court found and held that the subject Award was statutorily time-barred...The Appellant submitted that the instant Chamber Summons Application for adoption of the Award...was lodged before the Court timeously...relying on Practice Directions issued by the Hon. Chief Justice, Kenya Gazette Notice No.1617...”

30. Further in the case of “Omache v Republic (Misc. Crim. App. E059 of 2025) [2025] KEHC 5617 (KLR)” the Court held that: -

“...the Criminal Procedure Code provides for motions in arrest of judgment in the High Court...it does not have a similar provision for trials in the lower courts...the High Court generally has the power to stay proceedings at any stage...however...the applicant must show that there exist exceptional and compelling reasons...”

31. The Supreme Court in “Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR)” reaffirms the settled principle:

“Jurisdiction is everything. Without it a court has no power to make one more step...Jurisdiction must be acquired before judgment is given.”

32. Therefore, I dare state and reiterate that research indicates that the so-called ‘arrest of judgment’ in civil practice is a misnomer; the court’s inherent jurisdiction allows it to control its own process, including recalling or staying its own judgment in rare, exceptional circumstances prior to delivery, where clear



injustice would otherwise result. See also Order 21 Rule 4 of the Civil Procedure Rules on the format and timing of judgments.

33. This court has only limited, residual jurisdiction to stay its own hand and “arrest” the delivery of judgment prior to pronouncement, usually in the rarest of cases to prevent manifest injustice, typically involving fraud or gross error coming to light before pronouncement. Review and appeal remain the primary routes for challenging a judgment. Jurisprudence leans against the abuse of the process by ‘arresting’ judgment to defeat finality, except for strong and justifiable grounds shown by affidavit evidence.
34. This Court is not vested with general jurisdiction to ‘arrest’ judgment in civil practice under the ELC Act or the *Civil Procedure Act*. Only in the rarest of circumstances—where manifest injustice or fraud arises before pronouncement—will the court stay its own judgment. Otherwise, the proper recourse is through review, appeal, or under expressly provided rules.
35. The Applicants have not satisfied the high threshold of such exceptional circumstances, nor have they cited a persuasive precedent applying to civil claims. For the foregoing reasons, the application to arrest judgment is accordingly refused.

IssueNo. c). Whether leave to amend pleadings should be granted at this stage

36. Under this sub title, the Applicants seek leave to amend their pleadings. The rules and judicial approach to amendments are deliberately liberal, but not without limitations. The provision of Section 100 of the *Civil Procedure Act* (emphasis added):

“The court may at any time, and on such terms as to costs or otherwise as it may think just, 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 proceedings.”

37. The Court notes that the Applicants relied on the provision of Order 8 Rule 3 of the Civil Procedure Rules: -

- “(1) ...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.
- (2) ...the court may...grant such leave in the circumstances...if it thinks just so to do.
- (3)
- (4)
- (5) An amendment may be allowed...notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts...”

38. Order 8 Rule 5 (1) of the Civil Procedure Rules provides that: -

“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.”

39. In the case of:- “Eastern Bakery v Castelino [1958] EA 461”, the Court held:-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side.”

40. But in the case of:- “Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR”, the Court of Appeal cautioned:-

“The law on amendment of pleadings was summarized...that power of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to amend can be exercised by the court at any stage...However late, the amendment should be allowed if made in good faith provided costs can compensate the other side; that the amendment must not be immaterial or useless or merely technical....”

41. Further in the case of “Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR”, the Court held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted...on the basis of the true state of the facts which the parties really and finally intend to rely on...”

42. Order 8 Rule 3 and 5 of the Civil Procedure Rules have been quoted verbatim above, and are binding on this Court. Other relevant cases include “Njoka v Joakim Kiarie Kamere t/a Kiarie Kamere & Co. Advocates (Civil Case 177 of 2017) [2024] KEHC 9489 (KLR)”, “Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd [2015] eKLR”, and “Bosire Ogero v Royal Media Services (2015) eKLR”— all holding that lateness alone is not a bar if injustice can be cured by costs, but that the applicant must explain delay.

43. The Environment and Land Court Practice Directions (Gazette Notice No. 5178 of 2014, and [2024 consolidated directions]) set clear procedures for the filing, amendment, and management of pleadings. Pre-trial conferences are to be used to expedite such amendments and avoid tactical or prejudicial late changes.

44. The Respondents argue that the amendment, sought after 10 years, introduces a new cause of action and deprives them of the defence under the *Limitation of Actions Act*, Cap 22. Section 4(1)(a) of the *Limitation of Actions Act* provides:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract.”

45. Amendments after close of hearing or at the doors of judgment are suspect and will only be allowed in the clearest of cases. The court frowns upon amendments that attempt to introduce a totally new cause of action, inconsistent with prior pleadings, or that would necessitate a fresh trial or re-opening of the hearing. Applications brought for tactical delay, to fill evidentiary gaps belatedly, or with the intent to protract proceedings are liable to be refused. If prejudice suffered by a party can be compensated by an award of costs or adjournment, the court is likely to allow the amendment. If not, it must be refused.

46. The proposed amendment must be assessed for the substance and character of the new claim. If it seeks only to clarify prior pleadings or rectify technical errors, the liberal approach dominates. Where



it alters the nature of the claim, reconstructs the defense, or is brought at the eleventh hour with no satisfactory explanation, the application will be refused.

47. The amendment, sought a decade later, introduces new property numbers and substantially alters the character of the suit. It is barred by limitation and prejudicial.
48. The governing principle is that late amendments, even after close of hearing, may be allowed if made in good faith, do not introduce a new or inconsistent cause, and the opposing party can be compensated by costs. Amendments are not permitted where the draft pleadings amount to an afterthought or introduce a fundamentally different case, unless there is a justified and explained oversight.
49. Applying these principles, the Application fails for the following reasons: The application comes late in the proceedings, after full hearing and just before pronouncement of judgment. No credible explanation for the timing of the fresh evidence or the necessity to amend is offered, and no draft of the proposed amended pleadings is annexed to the application. Amendment would cause real prejudice to the Respondent in reopening the trial, incurring expense, and possibly defeating established defenses and legal rights accrued. The defect in the application's supporting affidavit is itself fatal

Issue No. d). Whether the Respondents will suffer prejudice?

50. Under this subtitle, the Honourable Court is to examine whether the Respondents will suffer prejudice if the application is allowed. It is well settled that the touchstone is whether the other party can be adequately compensated by an award of costs or if injustice (such as inability to present evidence or loss of a vested defense) is irreparable. In the case of:- “Ogundo v Bett (2025) KEHC 11531 (KLR)” and “Onyuna v Anyango (2024) KEELC 6390 (KLR)”, the court observed: -

“.....the amendment can be allowed provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
51. Additionally, “Njoka v Joakim Kiarie Kamere (2024) KEHC 9489 (KLR)” the Honourable Court held that: -

“...given the timing of the Motion, the Respondent is likely to be prejudiced in his defence (which he might have to amend, possibly leading to the re-opening of the trial) and attendant further delay, if leave to amend were to be granted to the Applicant...”
52. In the case of:- “Central Kenya Limited v Trust Bank Limited [2000] eKLR”, the Court held: -

“A party will not be allowed to make an amendment if it introduces a new cause of action or defence which is inconsistent with the original pleadings and which would prejudice the other party.”
53. The provision of Section 63 of the *Civil Procedure Act*, Cap. 21 also empowers the court to ‘make such other interlocutory orders as may appear to the court to be just and convenient’ —this is to be interpreted with sensitivity to potential prejudice caused by late procedural maneuvers.
54. I fully concur with the Learned Counsel for the Respondents to the effect they have a legitimate expectation of finality of this rather protracted case having been pending in Court for over 10 years of litigation. I am guided by the legal maxim “Litigation must come to an end”. Allowing the amendment would deprive them of accrued defences and delay justice.



55. It is this Court's finding the Respondent would suffer substantial prejudice if the judgment were to be arrested and the suit reopened. There would be both inordinate delay and risk of injustice due to the shifting of pleading lines at the final stage. This is precisely the mischief the law guards against.

IssueNo. e). Who bears the Costs of the Notice of Motion application dated 10th June, 2025

56. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

57. In the present case, the Honourable Court reserves the discretion to not to award costs.

V. Conclusion and Disposition.

1. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -
 - a. That the Notice of Motion Application dated 10th June, 2025 be and is hereby found to lack merit and the same is disallowed with no orders as to costs.
 - b. That any defective supporting or replying affidavits be and are hereby struck out.
 - c. That the order of stay of judgment previously granted is lifted. The Court's Judgment in ELC Case No. 133 of 2025 shall be delivered forthwith on 31st October, 2025
 - d. That there shall be no orders as to costs.

It is so orderedAccordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 24TH DAY OF OCTOBER 2025.

.....
HON. MR. JUSTICE L. L. NAIKUNI
ENVIROMNENT AND LAND COURT
MOMBASA

Ruling delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Otieno Advocate holding brief for Mr. Adhoch Advocate for the 1st, 3rd, 4th & 5th Plaintiffs/Respondents.
- c. Mr. Obonyo for the 2nd Plaintiff/Applicant.
- d. Mr. Mutugi Advocate for the Defendants.

