



REPUBLIC OF KENYA



Mara North Holding Company Ltd v Masek & 4 others (Environment and Land Case 403 of 2017) [2025] KEELC 7804 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE 403 OF 2017
LN GACHERU, J
NOVEMBER 12, 2025**

BETWEEN

MARA NORTH HOLDING COMPANY LTD PLAINTIFF

AND

SANAT OLE MASEK 1ST DEFENDANT

PARSEEN OLE RAKWA 2ND DEFENDANT

MONARCHS LODGE SAFARI LTD 3RD DEFENDANT

DISTRICT LAND REGISTRAR, NAROK COUNTY 4TH DEFENDANT

MARA NORTH CONSERVANCY 5TH DEFENDANT

RULING

1. By a Notice of Motion Application dated 14th April 2025, the 3rd Defendant/Applicant, Monarchs Lodge Safari Limited, has sought for various Orders. The application is premised under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 1 Rule 6 and 51 of the Civil Procedure Rules, and Article 159 of *the Constitution*. The orders sought are:
 - i. That the 3rd Defendant/Applicant be granted leave to establish a case against the 1st Defendant, Sanaet Ole Masek;
 - ii. That the court grants leave to the 3rd Defendant/Applicant to file and prosecute a cross-suit against the 1st Defendant, to be heard together with the present case;
 - iii. That costs of the application to be provided for.
2. The Application is supported by the grounds stated on its face and the Supporting Affidavit sworn by Eng. Hani Saliba, a Director of the 3rd Defendant/Applicant, who averred that the 1st Defendant was



- the legal and bona fide owner of the land parcel CIS-MARA-KOIYAKI-DAGURUGURUETI/4316, before transferring its title to the 3rd Defendant.
3. That the 1st Defendant sold the disputed parcel land Cis-mara-koiyaki-Dagurugurueti/4316, to the 3rd Defendant/ Applicant through a valid sale agreement dated 21st January 2014. However, as noted in the 3rd Defendant's pleadings, the Plaintiff later filed this suit seeking injunctive orders to stop the 3rd Defendant/Applicant from developing a tented camp resort on the property—orders that remain in force to date.
 4. That the 3rd Defendant's Director recently discovered that, despite the pending case, and the 1st Defendant having already received full payment for the land sale, the he has continued to receive rental payments from the Plaintiff over the same parcel of land. The 3rd Defendant/ Applicant contended that this conduct not only weakens the 3rd Defendant's ownership rights but also constitutes fraudulent dealings by the 1st Defendant.
 5. Further, the 3rd Defendant/Applicant contended that in the interest of justice, the court should allow it to file a Counter-claim against the 1st Defendant within this same proceeding so that both suits can be heard and determined together. The Applicant asserts that special and peculiar circumstances, exist which justify granting the orders sought, pending inter-parties hearing and determination of this suit. The applicant argued that the Application has been made timeously and in good faith.
 6. In his Supporting Affidavit, Eng. Hani Saliba, a resident of the UAE and Director of the 3rd Defendant/Applicant, Monarchs Lodge Safari Limited, reiterated the background and basis of the application. He further averred that the 1st Defendant, Sanaet Ole Masek, was the lawful and bona fide owner of land parcel Cis-mara-Koiyaki-dagurugurueti/4316 before transferring the said title to the 3rd Defendant through a Sale Agreement executed on 21st January 2014.
 7. He further deponed that despite the valid sale and payment of the agreed purchase price, the 3rd Defendant / Applicant has never been able to enjoy ownership of the suit property due to a pending injunction obtained by the Plaintiff. The injunction, filed through an injunctive application, sought to restrain the 3rd Defendant from developing a tented camp resort on the suit property, and the Order remains in force to date. Copies of the application and the certificate of title were annexed to his Affidavit as exhibits "HS-1" and "HS-2."
 8. He further asserted that it has recently come to his attention that the Plaintiff continues to pay lease rentals to the 1st Defendant. He contended that such actions by the Plaintiff/ Respondent undermine the 3rd Defendant's ownership rights, and injures the 3rd Defendant's/Applicant's Counter-claim, as they contradict the lawful transfer of ownership already effected through the sale agreement.
 9. The deponent also averred that the continued payment of lease rentals by the Plaintiff to the 1st Defendant demonstrates fraudulent conduct between the two and effectively revives a previously cancelled lease agreement between the Plaintiff and the 1st Defendant. Eng. Hani Saliba also contended that this situation undermines the 3rd Defendant's ownership rights and further justifies the need for judicial intervention.
 10. He emphasized that it is imperative for the court to grant leave for the 3rd Defendant to allow it to cross-examine both the Plaintiff and the 1st Defendant. He maintained that the 3rd Defendant has a solid case against both Plaintiff and 1st Defendant, and holds them equally responsible for the financial losses suffered since the execution of the sale agreement.



11. In conclusion, the deponent claimed that by granting the orders sought, it would be in the interest of justice, as the matter presents special and peculiar circumstances. He contended that the application was made timely, in good faith.
12. The Application is opposed by the Plaintiff/ Respondent vide the Replying Affidavit of Daniel Muli, a Director of Mara North Holdings Limited, who averred that the instant application, is devoid of merit and is an abuse of court process, fatally defective, frivolous, and bad in law. He argued that the 3rd Defendant/Applicant has moved the court under the wrong legal framework, specifically Order 1 Rule 6 of the Civil Procedure Rules, which pertains to the joinder of parties liable on the same contract. He further contended that the proper legal framework for lodging a claim against a Co-defendant is Order 1 Rule 24 of the Civil Procedure Rules.
13. Daniel Muli further averred that the 3rd Defendant's intention, as per the draft Notice of Claim annexed to his Supporting Affidavit, is to seek indemnity from the 1st Defendant. He contended that the application lacks a Certificate of Urgency, making the orders sought incapable of being granted. Additionally, he disputed the validity of the claims made in the 3rd Defendant's Supporting Affidavit, and claimed that the said averments are false and unsupported by evidence. The deponent reiterated that the instant Application is defective, lacks merit, and constitutes a gross abuse of the court's process, warranting its dismissal with costs to the Plaintiff.
14. The Applicant filed a Supplementary Affidavit, sworn by the same Eng. Hani Saliba, who contended that, upon advice from his advocates, the Replying Affidavit sworn by Daniel Muli on 26th June 2025 is defective and misleading. He asserted that his application was properly filed under Sections 1A, 1B, and 3A of the Civil Procedure Act, the 2010 Civil Procedure Rules, and Article 159 of the Constitution, among other enabling provisions of law that allow the court to deliver justice fairly.
15. Further, he averred that as the 3rd Defendant, who is also a Plaintiff in a Counter-claim, the Applicant is legally entitled under Order 1 Rule 6 of the Civil Procedure Rules, 2010 to enjoin any Co-defendant, including the 1st Defendant, since all parties are litigating over the same contractual subject matter. He explained that his employee, Mr. Sammy Moriji, at his advocates' request, approached the 1st Defendant amicably to request his bank statements, but the 1st Defendant declined to produce them, though he allegedly admitted receiving rental payments from the Plaintiff/Respondent.
16. Subsequently, Mr. Moriji contacted another acquaintance, Nkuyata Mereru, a defendant in a related Civil Suit No. 122 of 2017, concerning adjacent land. Mr. Mereru provided his bank statement, which, according to Eng. Saliba, confirmed that the Plaintiff has been paying rent to him—evidence suggesting that the Plaintiff's conduct is not clean. The deponent asserted that the Replying Affidavit by Daniel Muli merely issues denials without addressing the key question of whether the Plaintiff continues to pay rent to the 1st Defendant, thereby implying that the Plaintiff is withholding material information from the court.
17. In conclusion, he urged the court to consider his averments and the annexed evidence for a fair determination of the instant Application.
18. The Application was canvassed by way of written submissions. The 3rd Defendant/ Applicant filed its written submissions dated 28th July 2025, through Viviene Partners Advocates. The Plaintiff/ Respondent filed his written submissions dated 26th August 2025, through Oyomba, Mosota & Wamwea Advocates.
19. In its submissions the 3rd Defendant/Applicant raised these issues for determination;



- i. Whether the 3rd Defendant/Applicant's order to establish a case against the 1st Defendant and institute a cross-suit and for the same to be heard together with this instant suit in tandem should be granted?
 - ii. Whether the 1st Defendant and the Plaintiff are party to fraud that is injurious to the 3rd Defendant/Applicant's claim?
20. The Applicant submitted that the 1st Defendant was the bona fide owner of land parcel Cis-mara-koiyaki-dagurugurueti/4316, which he sold and transferred to the Applicant through a duly executed sale agreement dated 21st January 2014. Despite full payment and transfer, the 3rd Defendant/Applicant has been deprived of ownership and use of the said property, and barred from building a tented camp resort due to injunctive orders obtained by the Plaintiff, Mara North Holding Company Limited, which remain in force to date.
21. The Applicant further submitted that while the 1st Defendant/ Respondent received the full purchase price, the Plaintiff has continued to pay him lease rental monies, an act that demonstrates collusion and fraud between the Plaintiff and 1st Defendant and keeps alive a lease that had already been cancelled by a court order barring any dealings, sales, or leases over the suit land Cis-Mara-Koiyaki-Dagururueti/4316, 4317 and 4318.
22. Relying on Order 1 Rule 6, Order 7 Rule 3, Order 2 Rule 14, and Order 51 Rule 10 of the Civil Procedure Rules, alongside Sections 1A, 1B, and 3A of the *Civil Procedure Act*, the Applicant argues that procedural technicalities should not defeat substantive justice. It emphasized that as a Plaintiff in its Counter-claim, it has the right to join Co-defendants, including the 1st Defendant, who remains contractually and legally linked to the dispute. The Applicant relied on several judicial precedents—including *Bernard James Ndeda v Magistrates and Judges Vetting Board* [2018] eKLR, *Arthi Highway Developers Ltd v West End Butchery Ltd* [2015], *Waita v Kenya Hospital Association* [2025], and *Daikyo Japan Motors Ltd v Fairuz Feisal Yasin* [2020]—to support its position that Counter-claims and cross-suits raising interlinked issues should be heard together to avoid multiplicity of suits and ensure efficient administration of justice.
23. The Applicant further submitted that the continued payment of rent by the Plaintiff to the 1st Defendant during the pendency of this case constitutes fraud, deceit, and breach of contractual trust, as it contravenes existing court orders, and deprives the 3rd Defendant/Applicant of its ownership rights. The 1st Defendant's concealment of his bank statements further supports the claim of fraudulent intent.
24. The 3rd Defendant/ Applicant also submitted that both the Plaintiff and the 1st Defendant have acted in bad faith and collusion, using the injunctive orders to unjustly benefit financially while suppressing the Applicant's lawful ownership and development rights.
25. In conclusion, the 3rd Defendant/Applicant urged the Court to find that the Plaintiff and 1st Defendant have engaged in fraudulent conduct and violated contractual and legal obligations. It urged the Court to grant it leave to join the 1st Defendant as a party to its Counter-claim against the Plaintiff, and that the Cross-suit be heard simultaneously with the main suit to promote efficiency, fairness, and finality.
26. The Applicant further submitted that the Plaintiff, through Daniel Muli's Affidavit, did not expressly deny the allegation of continuing rental payments—an omission that the Applicant views as tacit admission. The Applicant pleaded with the Court to allow the Application in the interests of justice.



27. In his submission the Plaintiff/Respondent argues that the 3rd Defendant's application is brought without a proper legal framework. It cited Order 1 Rule 6 of the Civil Procedure Rules, which Order provides that; "joinder of parties liable on the same contract; The Plaintiff may at his option as parties to the same suit all or any of the persons severally, or jointly and severally liable, or any one contract, including parties to bill as of exchange and promisory notes", to emphasize that the Applicant has misapplied the rule.
28. The Plaintiff maintained that failure to identify the proper legal framework for the Notice of Motion by the Applicant renders the instant Application fatally defective as filed and bad in law. That rule governs the joinder of parties liable on the same contract and is applicable at the initiation of a suit by the Plaintiff, not for inter-defendant claims.
29. Reliance was made in the case of *Njiha vs Kimani & another KESC 19(KLR)*, where the court held that
- "Consequently, the only applicable source of law when moving the supreme court are *the constitution*, the *Supreme Court Act*, and the Supreme Court Rules, 2012. The *appellate jurisdiction act* is not applicable when moving this Court. Neither is the civil procedure code. In the *Hermanus* case, this court has indicated how it should be moved, thus [paragraph 23]:
- "..... it is trite law that a court of law has to be moved under the correct provisions of the law."
- Hence without thus identifying the proper legal framework for the motion, an application is liable to be struck out."
30. The Plaintiff raised the following issues for determination;
- i. Whether the Applicant is deserving to be granted the orders sought?
 - ii. Whether the 1st Defendant and Plaintiff are party to fraud that is injurious to the 3rd Defendant/Applicant's claim?
31. On whether the Applicant is deserving to be granted the orders sought the Plaintiff submitted that the Applicant has failed to comply with the procedural requirement of filing a Certificate of Urgency, which is a prerequisite for an application to be certified and heard on an urgent basis. In the absence of such a certificate from the Applicant's advocates, the prayer for urgency is procedurally defective and incapable of being granted.
32. Additionally, the Plaintiff submitted that the second prayer sought by the 3rd Defendant/Applicant is misconceived, as the 1st Defendant is already a party to the suit. The Plaintiff argued that the proper procedure for a Defendant to raise a claim against a Co-defendant is provided under Order 1 Rule 24 of the Civil Procedure Rules, which allows a Defendant to serve a Notice making such a claim without leave of court. The Plaintiff also argued that the Applicant's request for leave is therefore unnecessary and legally unfounded, rendering the prayer redundant and procedurally irregular. The Plaintiff/Respondent relied in the case of *Impact Properties Limited v Owiti & 2 others KEELC 4329 (KLR)*.
33. Further, the Plaintiff/Respondent submitted that the mechanism of a Cross-suit or Counter-claim, as envisaged under Order 7 rule 3, is intended to be invoked against the Plaintiff, not against a Co-defendant. Where a defendant seeks to raise a claim against another Defendant already party to the suit, the proper procedure is outlined under Order 1 rule 24 of the Civil Procedure Rules, reliance was made in the case of *Onyango vs Opondo & 2 others [2024] KEELC 3617(KLR)*.



34. On whether the 1st defendant and Plaintiffs are party to fraud that is injurious to the 3rd Defendant/Applicant' claim the Plaintiff/Respondent submitted that the 3rd Defendant/Applicant failed to adduce any tangible or credible evidence to support allegation of fraudulent conduct on part of the Plaintiff and the 1st Defendant, and therefore the claim remains speculative and unsubstantiated. Further, that the 3rd Defendant/ Applicant relied on hearsay evidence and documents from third party without proper context and authentication. The Plaintiff/Respondent submits that fraud must be pleaded with particularity, as established in numerous judicial precedents among them is the case of *Kariuki vs Kawa & 2 others* [2024] KEHC 9066 (KLR)
35. In conclusion, the Plaintiff/Respondent prayed that the 3rd Defendant's Application be dismissed with costs, emphasizing that the Application is not only devoid of merit but also an abuse of the court process, frivolous, procedurally defective, and legally untenable, having been brought in disregard of the clear provision of Order 1 Rule 24 of the Civil procedure rules.
36. The above are the argument for and against the instant application. The court has carefully read the instant Application, the argument for and against the same, the cited authorities and the relevant provisions of the law, and it renders itself as follows;-
37. The single issue for determination is whether the Application is merited. The main prayer by the applicant is to be allowed to make a case against the 1st Defendant, and for leave to be allowed to file a Cross-suit against the 1st Defendant. This Application is vehemently opposed by the Plaintiff/ Respondent herein.
38. The Plaintiff basis of argument is that the Application is brought under the wrong provisions of the law, being Order 1 Rule 6, which deals with Joinder of parties liable on same contract instead of Order 1 Rule 24 of the Civil Procedure Rules, which states; -
- “(1) Where a defendant desires to claim against another person who is already a party to the suit—
- (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
- (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.



(3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.”

39. A cursory look at the instant Application shows that the said Application is anchored under various provisions of the law being Sections 1A, 1B and 3A of the *Civil Procedure Act*, which provisions of law deals with the Overriding Objective of the Act, and the unfettered powers of the Court to issue orders that are necessary for the end of justice to be met, and to prevent abuse of the court process.

40. Further the Application is brought under Article 159 of *the Constitution*, and under said Article 159 2(d), the court is urged to administer justice without undue regard to technicalities. The application is also based on any other enabling provisions of the law.

41. In its submissions, the 3rd Defendant relied on Order 2 Rule 14, which states; -

“No technical objection may be raised to any pleading on the ground of any want of form.”

42. This court takes cognizance of Order 51 Rule 10(2) of the Civil Procedure Rules, which states; -

“(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

43. By dint of Article 159(2)(d) of *the Constitution*, Sections 1A,1B and 3A of the *Civil Procedure Act*, and Order 51 rule 10(2) of the Civil Procedure Rules, this court finds that even if the Applicant quoted the wrong Section of the law, the said wrong quotation is on the form, and does not affect the substantive prayers sought or substantive justice. Consequently, that omission cannot defeat this Application.

44. In the case of ; Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR, the court held;

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice.”

45. The Applicant has sought leave to file cross suit against the 1st Defendant, whom it has accused of having sold the land to the 3rd Defendant/Applicant, and the other parties. Thereafter, the Plaintiff obtained injunctive orders against the Defendants, and therefore, the 3rd Defendant/Applicant could not construct its tented camp resort, but the 1st Defendant continues to receive rental payments from the Plaintiff/Respondent herein.

46. It is the Applicants contention that the act of the 1st Defendant amount to deceit, is fraudulent and a collusion with the Plaintiff, and thus its Counter- claim against the 1st Defendant. The 1st Defendant did not file any documents to oppose the allegations made by the 3rd Defendant/Applicant.

47. However, the Application is opposed by the Plaintiff, who apart for alleging that the Application is brought under the wrong provisions of the law argued that there is no evidence of any collusion or fraud between the Plaintiff and the 1st Defendant.

48. It evident that pleadings are allegations, which allegations must be proved by calling of evidence. The 3rd Defendant/Applicant cannot be expected to avail the evidence of the alleged collusion, deceit or fraud at this stage of seeking for leave to file a Cross-suit against the 1st Defendant.



49. Order 7 Rule 3 of the Civil Procedure Rules provides:

A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a Cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

50. Further, Order 7 Rule 8 provides;-

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

51. It is clear that the 3rd Defendant/Applicant herein has a claim against the 1st Defendant emanating from the suit property herein. Order 7 rule 8 above contemplates that where a defendant has a claim based on the same or different causes of action as between the parties, then to avoid multiplicity of proceedings and claims based on the same facts, a cross action by counter-claim or set off may be filed. See the case of Waita v Kenya Hospital Association t/a The Nairobi Hospital [2025] KEHC 8685 (KLR)

The court takes note of Provisions of Order 7 Rule 8 CPR

wherein it is provided:-

8 “where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaims were to be enforced by cross-action would be defendants to such cross-action and shall deliver to the court his defence...”

The above procedure is expressly demonstrated by the defendant in its counterclaim, so that when the plaintiff faults the defendant for failure to follow the correct procedure, and fails to provide what it deems to be the correct procedure, the court is at a loss.

52. In applying the above principles, this court finds that the 3rd Defendant/ Applicant has a claim against the 1st Defendant emanating from the same facts as the suit filed by the Plaintiff. The parties and cause of action are the same, and to avoid multiplicity of suit, the Applicant should be allowed to file a Counter-claim and/or cross suit against the 1st Defendant herein.

53. Though the 3rd Defendant/ Applicant did not anchor its Application under Order 7 Rule 8 of the CPR, this court is satisfied that the quoted provisions of law, and particularly any other enabling provisions of law, gives this court latitude to apply the provisions of Order 7 Rule 8, and finds that the said provisions have been satisfied. The Applicant has satisfied the court that there is need to file Counter-claim or Cross-suit against the 1st Defendant within this suit to avoid multiplicity of



suits. See the case of Daikyo Japan Motors Ltd & 2 others vs Fairuz Feisal Yasin & another (2020) KEHC10243(KLR), where the court held;-

“I am also of the considered view that, the circumstances leading to the cross-action by way of Counter-claim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. Separating the Counter-claim from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of Section 1A (1) of the *Civil Procedure Act*.

Similarly, Order 7 rule 3 of the Civil Procedure Rules as insinuating that a Counter-claim is to be treated as a cross suit with all the indicia of pleadings as a Plaintiff. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as a suit and cross suit and have them disposed of in the same trial.”

54. For the above reasons, the court finds the Plaintiff/ Respondent objection to this Application is not merited. However, the court finds and holds that the 2nd Defendant’s/Applicant’s Application dated 14th April 2025, is merited and the same is allowed entirely in terms of prayers No. 2 and 3 respectively, with costs to the 3rd Defendant/ Applicant , payable by the Plaintiff/ Respondent herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 12TH DAY OF NOVEMBER 2025.

L. GACHERU

JUDGE

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Ms Omamo holding brief for Mr. Oyomba for Plaintiff/Respondent

N/A for 1st Defendant /Respondent

N/A for 2nd Defendant /Respondent

Ms Wanjiru for 3rd Defendant/ Applicant

N/A for 4th Defendant/ Respondent

N/A for 5th Defendant/ Respondent.

