

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLC No. E006 OF 2023

SABINA KEMUNTO NYANGACHA
PLAINTIFF

VERSUS

RAYMOND NYAGWOKA
1ST DEFENDANT

WYCLIFFE NYAANGA NYAGITARI
2ND DEFENDANT

INNOCENT NYAGITARI BARASA
3RD DEFENDANT

LAND REGISTRAR, NYAMIRA
4TH DEFENDANT

ATTORNEY GENERAL
5TH DEFENDANT

RULING

1. Proceedings commenced in this matter on 5th December 2023 when the Plaintiff filed Plaint dated 4th December 2023. He sought judgment against the Defendants jointly and severally for:

A. Declaration that the plaintiff is the registered and/or lawful owner of LR No. Kitaru Settlement Scheme/13.

B. A declaration that the subdivision of LR No. Kitaru Settlement Scheme/13 into Kitaru Settlement Scheme/134, 135, 136, 137 and 138 was irregular, unlawful, illegal, null and void.

C. A declaration that the 1st, 2nd and 3rd defendants herein are trespassers on LR No. Kitaru Settlement Scheme/13.

D. An order of eviction be issued against the 1st, 2nd and 3rd defendants, agents, and/or servants from LR No. Kitaru Settlement Scheme/13.

E. Permanent injunction be issued against the 1st, 2nd and 3rd defendants their agents and servants from entering, re-entering, trespassing unto, building on, depositing, building materials and/or dealing in any manner with the suit land LR No. Kitaru Settlement Scheme/13.

F. General damages for trespass.

G. Costs and interest.

2. The 1st to 3rd Defendants responded to the Plaint by filing Statement of Defence and Counter Claim dated 20th March 2024. They sought dismissal of the Plaintiff's case and judgment in their favour as follows:

(a) A declaration that the 1st defendant is registered proprietor of land parcel L.R. No. Kitaru Settlement Scheme/136, the 2nd defendant is the registered

proprietor of land parcel L.R. No. Kitaru Settlement Scheme/137 and the 3rd defendant is the registered proprietor of land parcel L.R. Nos. Kitaru Settlement Scheme/134, 135, 138.

(b) A permanent injunction restraining the plaintiff from interfering with the defendants' quiet use, possession and occupation of land parcels LR. Nos. Kitaru Settlement Scheme/134, 135, 136, 137 and 138.

(c) Costs of the plaintiff's suit and of the counterclaim be awarded to the defendants.

3. On 12th June 2024, this Court (differently constituted) issued pre-trial directions to the parties to file witness statements and scheduled a hearing date for the main suit. Subsequently, the trial commenced and the Plaintiff's case was closed on 21st January 2025. Defence cases were then heard and ultimately closed on 8th July 2025. The parties were then directed to file final written submissions.
4. On 20th August 2025, the Plaintiff filed her written submissions on the main suit. Subsequently, on 6th October 2025, the 1st to 3rd Defendants/Applicants moved this Court vide Notice of Motion dated 6th October 2025, which is the subject of this ruling. The application is brought under **Section 3A** of the **Civil Procedure Act** and **Order 4 Rule 1 (5)** of the **Civil Procedure Rules**.

5. The following orders are sought the application:

(a) Spent

(b) Leave be granted to the 1st, 2nd and 3rd defendants/applicants to lodge an Affidavit in verification of their Counterclaim.

(c) Costs of the Application be in the cause.

6. The Application is premised on the grounds on the face of it and is supported by affidavits sworn on 6th October 2025 by the 2nd Defendant and Mr Herbert Nyamurongi, counsel for the 1st to 3rd Defendants/Applicants. They deposed that Mr Nyamurongi of Nyamurongi and Company Advocates inadvertently failed to draw and file an affidavit in verification of the counterclaim and that the Applicants stand the risk of losing their counterclaim as a result of a mistake that was not of their own. They added that Mr Nyamurongi only became aware of this omission when it was pointed out by the Plaintiff in his submissions on the main suit.

7. They also deposed that the Court has wide and unfettered discretion to act in the best interest of justice in allowing the application, which will enable them to comply with the law. That the Plaintiff would not be prejudiced should the application be allowed, which in any case, if discernible, could be ameliorated by way of costs.

8. In response, the Plaintiff filed a Replying Affidavit which she swore on 9th October 2025. She deposed that the application was hollow, frivolous and vexatious and without any legal foundation whatsoever since it was filed after the suit had been heard and finalized. That the Applicants and their legal counsel were well aware of the legal requirement to file a verifying affidavit to accompany their counter claim in accordance with Order 7 Rule 5 of the Civil Procedure Rules. She added that the Applicants had not even filed their submissions on the main suit and were seeking leave of the Court to grant the said prayers too late in the day.
9. The Plaintiff went on to state that the Court does not have the legal capacity to grant the request and that pleadings closed a long time ago. That the Applicants ought to have been diligent when filing the counter-claim and that the application is an abuse of the court process which ought to be dismissed with costs.
10. Counsel for the 4th and 5th Defendants informed the Court that his clients do not oppose the application.
11. The application was canvassed through written submissions. The Applicants filed submissions dated 1st November 2025. Relying on Section 3A of the Civil Procedure Act and the case of **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] KECA 73 (KLR)**, they submitted that the Court has inherent jurisdiction which

can be exercised even in circumstances governed by rules of court and that this is a proper case for the Court to exercise the jurisdiction by allowing filing of the verifying affidavit.

12. The Applicants further submitted that their advocate had explained that failure to file the affidavit was due to an inadvertent oversight. Relying on the cases of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR)** and **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] KECA 183 (KLR)** as well as the oxygen principle, they argued that the Court exists to render justice and that the risk of injustice in disallowing the application far exceeds that of allowing it. They contended that the Plaintiff had not demonstrated that any prejudice would be occasioned to her by allowing the application and added that any prejudice would be curable through an award of costs.

13. The Plaintiff filed submissions dated 17th October 2025. She contended that it was not legally tenable for the Court to grant the orders sought and that the Applicants had approached the Court with unclean hands. She went on to submit that the Applicants were indolent, and the Court could not consequently intervene on their behalf.

14. The Plaintiff relied on the decision of the Court of Appeal in **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5**

others [2015] eKLR where the Court emphasised the duty of advocates and litigants to ensure expeditious disposal of cases and that **Sections 1A** and **1B** of the **Civil Procedure Act** could not be used as a panacea to heal every sore litigation in breach of rules of procedure.

15. The Plaintiff further quoted the case of **Ngorika Farmers Cooperative Limited vs. John Kiarie and 2 Others, Nyahururu ELC No. 23 of 2017** where the Court the court declined to intervene on behalf of the Plaintiff for being indolent. Lastly, the case of **Dreamline Express vs. Roackwell Mbivya Siku & Another, Mombasa Misc. Application No. E311 of 2023** was cited for the proposition that equity aids the vigilant and not the indolent and that **Order 7 Rule 5 of the Civil Procedure Rules** does not stipulate that a party should file an application to file a verifying affidavit after filing a counter-claim. The Plaintiff therefore urged the Court to dismiss the application with costs.

16. I have carefully considered the application, the affidavits and the submissions. The issue that arises for determination is whether leave to file a verifying affidavit in respect of the counter claim should issue.

17. **Order 7 Rule 5 of the Civil Procedure Rules** stipulates as follows: -

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- (a) an affidavit under Order 4 rule 1 (2) where there is a counterclaim;***
- (b) a list of witnesses to be called at the trial;***
- (c) written statements signed by the witnesses except expert witnesses; and***
- (d) copies of documents to be relied on at the trial.***

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

18. The Plaintiff contends that there is no legal provision permitting a party to apply to file a verifying affidavit long after they have filed a counter-claim. Indeed, from the provisions cited above, a party responding to a suit through a counter-claim is required to file the verifying affidavit simultaneously with the counter-claim. The question I have to grapple with is whether leave can be granted to a party who fails to do so, in order to afford them an opportunity to regularize their pleadings.

19. In deciding that issue, I am guided by the decision of the Court of Appeal in **Luke Cheruiyot & 37 others v National Oil**

Corporation of Kenya [2015] KECA 572 (KLR) where the Court cited the earlier case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd. & Another [2001] KLR 470** where it was held as follows: -

“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.”

20. Thus, it is manifest that in determining such an issue, the Court is called upon to consider the competing rights against the wider interests of justice. There is no dispute that the Applicants did not file a verifying affidavit together with their counter-claim. I have considered the explanation given by the

Applicants and I note that they alluded to inadvertent mistake of their counsel.

21. Mistakes do happen, and counsel, even the most experienced, are not immune from human frailties. It is axiomatic that mistake of counsel ought not to be visited upon the litigant, especially where such a mistake or omission has been sufficiently explained. The reasons advanced by Mr Nyamurongi, counsel for the Applicants, are satisfactory and form sufficient basis to warrant exercise of discretion in the Applicants' favour.

22. Regarding the issue of potential prejudice to be suffered by the Plaintiff, I note that the Plaintiff has had an opportunity of being heard and ventilating her case before the Court during the trial. A verifying affidavit is merely meant to confirm the correctness of the averments stated in the counter-claim. No novel issue emerges from it that would require new evidence. It would be a travesty of justice to drive the Applicants from the seat of justice on account of failure to comply with rules of procedure in the circumstances.

23. I bear in mind the wise counsel of Madan JA (as he then was) in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)** thus:

“If an action is explainable as a likely happening which is not plainly and obviously impossible the

court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

24. The wide discretion of the court which is to be exercised in the interest of substantive justice was emphasised by the Court of Appeal in **Luke Cheruiyot and 37 Others v National Oil Corporation** (Supra) when Court recounted its previous decisions thus:

“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).”

25. For the foregoing reasons, I find no prejudice to the Plaintiff beyond that which can be cured by an award of costs. The interests of substantive justice will be best served by allowing the Applicants to regularize their pleadings and to file the verifying affidavit in support of their counter-claim. The main suit can then be determined on its merits as opposed to procedural technicalities, an approach which **Article 159 (2) (d)** of the **Constitution** eschews. I find merit in the application.

26. In the result, I make the following orders:

a) Leave is granted to the 1st, 2nd and 3rd Defendants to file and serve a verifying affidavit in respect of

their Counterclaim within 7 (seven) days from the date of delivery of this ruling.

b) Costs of the application are awarded to the Plaintiff.

Dated, signed, and delivered at Nyamira, this 26th day of November 2025.

**D. O. OHUNGO
JUDGE**

Delivered in the presence of:

Mr Ochwangi for the Plaintiff

Ms Mukoya holding brief for Mr Nyamurongi for the 1st to 3rd
Defendants

Mr Rana for the 4th and 5th Defendants

Court Assistant: B Kerubo