



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC LAND PETITION NO. E001 OF 2023**

**BETWEEN**

**CHASE BANK KENYA LIMITED (UNDER LIQUIDATION).....**  
**PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF MACHAKOS.....1<sup>ST</sup>**  
**RESPONDENT**

**ZAFRULLAH**  
**KHAN.....2<sup>ND</sup>**

**RESPONDENT**  
**DUNCAN KABUI.....3<sup>RD</sup>**  
**RESPONDENT**

**AND**

**MATHATANI LIMITED.....1<sup>ST</sup>**  
**INTERESTED PARTY**

**MUSTI INVESTMENT LIMITED.....2<sup>ND</sup>**  
**INTERESTED PARTY**

**JULIUS MATHEKU KISING’U.....3<sup>RD</sup>**  
**INTERESTED PARTY**

**AND**

**MUSTI INVESTMENT LIMITED.....1<sup>ST</sup> CROSS  
PETITIONER**

**JULIUS MATHEKU KISING’U.....2<sup>ND</sup> CROSS  
PETITIONER**

**VERSUS**

**CHASE BANK KENYA LIMITED (UNDER LIQUIDATION)...1<sup>ST</sup>  
RESPONDENT**

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**RESPONDENT**

**DUNCAN**

**KABUI.....3<sup>RD</sup>**

**RESPONDENT**

**MATHATANI**

**LIMITED.....4<sup>TH</sup>**

**RESPONDENT**

**RULING**

1. Before this court for determination are three notices of motion filed by various parties to the proceedings, dated 20/06/2024, 03/07/2024, and 13/03/2025. A summary of the motions and the responses thereto will be made shortly.

**Motion dated 20/6/2024**

2. In this unopposed matter, the 2nd and 3rd interested parties (IPs), who are also cross-petitioners, have moved the court

pursuant to the provisions of **Article 159** of the **Constitution**, **Sections 1A, B,** and **3A** of the **Civil Procedure Act**, and **Order 51 Rule 1** of the **Civil Procedure Rules**, as well as all other relevant laws. These IPs are seeking the following reliefs:

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***a) That this honourable court be pleased to order the Director of Business Registration Services, and/or his representative, to give evidence and/or furnish the court with information regarding the shareholding and/or directorship of the 1st IP from its incorporation to the present date.***

***b) That the honourable court be pleased to summon the Chief Land Registrar and/or his representative to provide the court with all records pertaining to Land Reference Number 12498/4, the suit property, along with all its subdivisions.***

***c) That the honourable court be pleased to summon the Director of Criminal Investigations to furnish the court with an investigation report related to the suit property, Land Reference Number 12498/4.***

***d) That the costs of this motion be in the cause.***

3. The motion is premised on the grounds listed on its face and the supporting affidavit of counsel Daniel Ngugi Kamau, sworn

on the date of this instant. A summary of the grounds supporting the motion is: (a) the petitioner's claim in **Land Reference No. 12498/4 (“suit property”)** is founded on the belief that the 2nd and 3rd respondents are shareholders of the 1st IP and that these shares are held in trust for the petitioner; (b) information regarding who the directors of the 1st IP are can only be obtained from, and/or provided by, the Office Registrar of Companies (**“ORC”**); and

4. (C)The petitioner and the 1st and 2nd IPs have submitted ownership documents concerning the suit property, and therefore, it would be appropriate for the Chief Land Registrar, as the custodian of such records in trust for the people of Kenya, to provide the court with information on the current ownership status of the suit property. (d) There has been an active investigation by the Directorate of Criminal Investigation (**“DCI”**) pursuant to a report by the 2nd and 3rd IPs; (e) It is only imperative that the three public officers be summoned for the court to be in a position to hear and determine the matter before it conclusively, and to deter duplicity of suits that might arise therefrom. Although the affidavit referenced annexures, none were submitted to the court.

### **3<sup>rd</sup> respondent’s motion dated 3/07/2024**

5. This motion is made pursuant to the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 1 Rule 10(2), 2 Rule 15(1) and (2), and Order 51 Rule 1** of the

**Civil Procedure Rules** and all other enabling provisions of the law, and he prays for the following orders: -

***a. The 3rd respondent's name should be struck out of the suit as he has been improperly joined.***

***b. The petition dated 14/07/2023, be struck out for disclosing no reasonable cause of action against the 3rd respondent; and***

***c. The petitioner bears the costs of this motion and the entire suit.***

6. The motion is grounded on the apparent facts on its face and the 3rd respondent's supporting affidavit, sworn on the same date as the motion. It mainly states: (a) The petition seeks declaratory orders, a permanent injunction, and compensatory orders for alleged interference with the petitioner's rights and interests in the suit property based on alleged trespass and purported alienation of the suit property; (b) the 3rd respondent was not involved in either the said trespass or alleged alienation, and the petition attributes these interferences to the 1st respondent, thus no cause of action can arise against the 3rd respondent; and

7. C) The prayers sought in the petition cannot reasonably be enforced against the 3rd respondent; d) the petition is premised on deliberate misrepresentation of facts and falsehoods, noting that the 1st IP was indeed incorporated as a special purpose vehicle ("**SPV**") to be used by the petitioner

for its own investment purposes, and not with the intent of defrauding the petitioner; e) the claim that the 3rd respondent misappropriated the petitioner's funds and/or deposits for the purchase of the suit property, and caused it to be registered in his own name with the intent to defraud the petitioner, is entirely unfounded; f) that the suit arises from an alleged trespass and purported alienation of the suit property; and, lastly, (g) the titles and relevant documentation for the properties registered in the names of the SPV were handed over to Kenya Deposit Insurance Corporation (**"KDIC"**) in April 2016, hence the 3rd respondent cannot alienate the suit property.

8. The petitioner challenges this particular motion through the affidavit of John Magesa Ombasa, who deposed an affidavit on 27/03/2025, and he chiefly avers: a) the petition seeks various declarations and reliefs regarding land ownership, constitutional violations, and trespass. The core issue revolves around the suit property, which was acquired using misappropriated depositors' funds by former senior officials of the Bank, including the 3rd respondent; b) investigations conducted by KDIC revealed that senior officers, including the 3rd respondent, registered and acquired third-party companies as SPVs to hold properties purchased using misappropriated depositor funds, One such SPV being the 1st IP in which the 2nd and 3rd respondents acquired 53,999 and 6,001 shares respectively therein in 2010; and

9. C) The suit property was initially charged to the Development Bank of Kenya ("**DBK**") on 23/09/2011 as security for a Kshs. 135 million loan. However, following the acquisition, the 1st IP, the 2nd, and the 3rd respondents unlawfully transferred depositors' funds amounting to Kshs. 135,660,000 from the Bank to the DBK to settle the loan; d) Upon being confronted by the Bank's auditors, the 2nd and 3rd respondents confirmed that the 1st IP and its assets, including the suit property, were held in trust for the Bank; e) Hence, the 3rd respondent was actively involved in the fraudulent acquisition and misappropriation of depositor funds for the purchase of the suit property, and his claim that the petition is based on misrepresentations and falsehoods is, therefore, entirely unfounded.
10. F) In recognition of the Bank's beneficial ownership, KDIC demanded that the 2nd and 3rd respondents facilitate the transfer of shares and the suit property to the Bank. In response, the 2nd and 3rd respondents handed over the original title documents to KDIC, which continues to hold them; g) In the circumstances, the 3rd respondent has clearly played an active and central role in the misappropriation of depositors' funds and the acquisition of shares in the 1st IP, which form the factual and legal basis of the constitutional and statutory violations raised in the petition.
11. Finally, h) The 3rd respondent was a direct beneficiary of the alleged fraudulent scheme and participated in actions that

prejudiced the petitioner's constitutional rights, and the reliefs sought - including declarations of ownership and accountability for misappropriated funds - require his participation in these proceedings, and a cause of action subsists against him.

**Petitioner's motion dated 12/03/2025**

12. This one has been moved pursuant to the provisions of **Article 159(2)** of the **Constitution of Kenya, 2010**, and **Rules 18** and **19** of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013**, as well as all enabling statutes and provisions of the law, and the petitioner prays for orders that: -

***a. Leave be granted to the petitioner to amend its pleadings in terms of the draft amended petition annexed hereto.***

***b. The respondents and IPs be granted corresponding leave to file amended answers to the petition and/or statements of response where applicable, within such period as this honourable court may direct.***

***c. The costs of this motion be costs in the cause.***

13. The motion is based on the apparent grounds on its face and John Ombasa's supporting affidavit, sworn on the same date as the motion. Since some of the assertions are a repetition of the

affidavit of 27/03/2025, it will be unnecessary to reiterate them. Still, significantly, it is maintained that: a) the amendment of the petition as proposed is necessary to identify the real dispute between the parties and to enable the court to effectually and completely adjudicate upon and settle the real issues in controversy between the parties;

14. B) It is a trite proposition of the law that amendments to pleadings before a hearing should be permitted without unreasonable restriction. Furthermore, the proposed amendments will not cause any prejudice to the Respondents and IPs, as they will be given the opportunity to file amended answers to the petition and/or statements of responses if necessary. Ultimately, c) the proposed amendment aims to add specific reliefs concerning the particular loss suffered by the petitioner, which is attributable to the conduct of the 2nd and 3rd respondents and 1st IP. These reliefs would facilitate a comprehensive, final, and effective resolution of the real dispute between the parties.

15. Upon service, the 3rd respondent vigorously opposed the motion through his affidavit sworn on 30/05/2025, and notably, he argues that: a) The motion is an afterthought, merely intended to cover the gaps exposed by his response to the petition and his pending motion; b) He had already responded and prepared his case based on the petitioner's filed pleadings, hence the petitioner cannot now purport to retract the pleadings which bind it; and finally, c) the amendments

constitute a new implication and introduce a new cause of action against him in the form of trespass.

16. Upon the court's directions, various parties filed their respective submissions on the motions, with **Ms Oraro and Co. Advocates** for the petitioner filing theirs dated 27/03/2025 on the motion dated 12/03/2025, **Ms Munga Kibanga & Co. Advocates** for the 3rd respondent filing two sets of submissions on the motions dated 3/07/2024 and 12/03/2025, and finally, **Ms Ngugi Kamau Advocates** for the 2nd and 3rd IPs dated 20/03/2025 on the motion dated 20/06/2024.

17. The court has considered these submissions and the arguments contained therein, alongside the provisions of the law relied upon and the judicial precedents cited, which shall be taken into account in this court's analysis and determination. Consequently, having carefully examined the motion, its grounds, affidavits, and submissions, the key issues for determination are: a) **whether the petitioner should be permitted to amend the petition;** b) **whether a cause of action has been disclosed against the 3rd respondent;** and c) **whether the summons should be issued against specific government officials.** These issues will be addressed in chronological order.

**a) Whether the petitioner should be permitted to amend the petition**

18. In addressing this issue, it is imperative to establish the relevant legal provisions and prevailing judicial precedents. In filing the current motion, the petitioner appropriately invoked this court's jurisdiction pursuant to **Rule 19** of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013**, which mandates that a party must formalise such a motion. The court's authority to entertain this motion is derived from **Rule 18**, which permits it to grant leave to any party to amend pleadings at any stage of proceedings. Under the present circumstances, this case remains active before the court; therefore, the court determines that the motion is duly before it.

19. In Kenya, numerous judicial pronouncements have been made regarding the guiding principles on the amendment of pleadings. However, prior to proceeding, it is noteworthy that the 3rd respondent, who argued on this issue by citing case law, did not tender copies of the relevant copies thereof. Consequently, the court is hesitant to refer to them. We shall now revert to case law that this court wholly associates itself with.

In the three-judge decision of **Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party) [2014] KEHC 7356 (KLR)**,

which dealt with the issue of amendment of constitutional petitions, stated thus on the essence of amendments:-

***“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, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”***

This decision went further in elucidating the guiding principles in the following manner at **paragraph 19** thereof: -

***“Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, 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.”***

***See also Sadera & 2 others v Kerema & 7 others [2025] KECA 458 (KLR)***

20. The foregoing legal provisions and precedents explicitly indicate that the court possesses discretionary authority to amend pleadings at any juncture before judgment, to deal with the substantive question or issue raised by the parties. This discretionary authority is exercised to promote the achievement of justice. Nonetheless, the exercise of such discretion must be judicious and not arbitrary, as accurately submitted.

21. Nevertheless, the 3rd respondent argues that the amendments are afterthoughts, made in bad faith, will cause injustice and prejudice him, and that an award of costs cannot adequately compensate him, as it also introduces the cause of action of trespass. Respectfully, this court differs from him, since, as a general rule, leave to amend is usually granted. Moreover, the cause of action of trespass was already pleaded in paragraphs 35 and 38 of the petition; only that the amended petition now seeks relief on this cause of action, not only against other parties as previously sought, but also against the 3rd respondent.

22. The other issue raised in the amendment is the alternative relief of a declaration that the 2nd Respondent, 3rd Respondent, and 1st IP created an equitable mortgage over the suit property in favour of the petitioner by depositing the original title with the petitioner to secure a loan of Kshs. 135,000,000/-. However, this relief stems from paragraph 39 of the petition, which states that the suit property was acquired using depositors' funds that were misappropriated from the Bank by the 2nd and 3rd respondents, who have allegedly failed or refused to perfect the transfer of the titles to the said properties to the Bank.

23. Consequently, it cannot be claimed that the amendment was made in bad faith. As concerns prejudice, some parties have yet to submit documents in response to the petition, and the 3rd respondent will have a chance to amend his pleadings; thus, no injury will be caused to him, and costs can adequately remedy any injustice. It is the considered opinion of this court that the amendment is necessary to ensure justice between the parties. Hence, the court finds the motion to be justified.

**b) Whether a cause of action has been disclosed against the 3<sup>rd</sup> respondent**

24. In the present case, although the 3rd respondent has instituted proceedings before the court under the provisions of the **Civil Procedure Rules**, the pertinent legal framework concerning the striking out of claims in constitutional petitions is outlined in **Rule 5** of the **Constitution of Kenya**

**(Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013.** Nevertheless, this error constitutes a mere technical oversight by the 3<sup>rd</sup> respondent. Of particular relevance is **sub-rule (d)**, which confers authority upon this court to, at any stage of the proceedings, either upon or without the application of either party, and on such terms as it deems just, order that the name of any improperly joined party be struck out. Accordingly, the motion is duly filed before this court.

25. The 3<sup>rd</sup> respondent has stated that no cause of action has been disclosed against him, particularly regarding the cause of action of trespass, and therefore, it is necessary to establish what a cause of action is. In considering this definition, this court refers to the Court of Appeal decision in **Diana Katumbi Kiio v Reuben Musyoki Muli [2018] KECA 860 (KLR)**, which defined it as follows: -

**A 'cause of action' is:**

***".... every fact which is material to be proved to entitle a party to succeed and every fact which the defendant would have a right to traverse." per Aldous LJ in Ord vs Upton [2000] 1 All ER 193.***

***Lord Esher, M.R. in the case of Read vs Brown (1888), 22 QBD 128, defined it as:-***

***“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.***

***while Lord Diplock in Letang vs. Cooper [1964] 2 All ER 929 at pg 934 opined:-***

***“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”***

26. Having established what constitutes a cause of action and considering that an allowance has been granted for the petitioner to amend its petition, this court finds no difficulty in concluding that a cause of action has been levied against the 3rd respondent. This is clearly evidenced in paragraph 39 of both the original and amended petitions, as well as in the reliefs sought in the amended petition. Other relevant paragraphs that contain allegations regarding the propriety of the 3rd respondent's dealings over the suit property are found in paragraphs 15, 17, 21, 22, 23, and 24 of the petition, which are also retained in the amended petition. Pointedly, at this juncture, it would be premature to determine if the cause of action of trespass will sustain against the 3<sup>rd</sup> respondent.

27. Furthermore, as repeatedly affirmed by the courts, striking out pleadings is a severe measure that should be used sparingly and only as a last resort, and even then, solely in the most evident cases, and this court defers to the dicta in **Non-Governmental Organizations Coordination Board v EG & 5 others [2023] KESC 102 (KLR)** where the apex court made the following rendition: -

***“Alive to the fact that the power to strike out pleadings is a draconian measure that ought to be employed sparingly and only as a last resort and even then, only in the clearest of cases, as has been explained in a long line of previous decisions, including Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others, Civil Appeal (Application) No 228 of 2013; [2013] eKLR.”***

28. Anchored on this and drawing guidance from **sub rule (a)**, which states that where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents so that the question as to which of the respondents is liable, and to what extent, may be determined among all parties, this court finds that the 3rd respondent is a pertinent party to these proceedings and further finds that a cause of action subsists against it.

**c) Whether the summons should be issued against specific government officials.**

29. The provision that authorises this court to issue summonses to individuals, including those whose attendance is required to give evidence or produce documents, is found in our **Order 16, Rule 1** of the **Civil Procedure Rules**. Since no party has objected to this motion and considering that the persons against whom summons have been sought are public officers who are custodians of public documents relevant to the resolution of the issues raised in the proposed amended petition and cross-petition, this court finds that the motion is merited.

30. As this court concludes, it has noted that numerous applications have been filed in this matter with no end in sight. To promote justice and expedite the hearing, no further applications will be entertained in this matter, except for the pending application dated 3rd June 2025 filed by the counsel for the 2nd respondent and 1st interested party, which was filed after the matter had been reserved for ruling. In the end, and for the aforementioned reasons and findings, this court hereby grants the following orders with costs being in the cause: -

***a. The notice of motion dated 3/07/2024 is hereby dismissed.***

***b. The Director of Business Registration Services, and or his representative, is hereby summoned***

***to give evidence and or furnish the petitioner with records in regard to the shareholding and/or directorship of the 1<sup>st</sup> IP Mathatani Limited from the time of its incorporation to date.***

***c. The Chief Land Registrar and/or his representative is hereby summoned to give evidence and or furnish the petitioner with all records relating to Land Reference Number 12498/4, the suit property, including all its subdivisions.***

***d. That subject to availability thereof, the Director of Criminal Investigations is hereby summoned to give evidence and or furnish the petitioner with an investigation report concerning the suit property, Land Reference Number 12498/4.***

***e. The petitioner to file and serve its amended pleadings in accordance with the draft amended petition within 21 days hereof.***

***f. Upon service, the respondents and interested parties shall have corresponding leave to file amended answers to the petition and/or statements of response where applicable.***

***g. A mention date shall be scheduled for the hearing of the application dated 3/06/2025.***

***h. Unless with the court's leave and subject to order (g) above, no further applications shall be entertained by this court.***

***i. Costs shall be in the cause.***

Orders accordingly.

**Delivered and Dated at Machakos this 8<sup>th</sup> day of  
December, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
8.12.2025**

**Ruling delivered virtually through Microsoft Teams Video  
Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr Chepkwony holding brief for Miss Lubano for petitioners.

Mr. Ngugi Kamau for 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

Miss Asli for 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party.

Miss Ndunda for 1<sup>st</sup> respondent.