

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLC NO. E146 OF 2018

CLIFFORD GEORGE ROOK
PLAINTIFF

VERSUS

RUTH NYAWIRA WAMBUI & 10 OTHERS
DEFENDANT

RULING

1. The 11th defendant Jack Wandai Matheka & co Advocates were the advocates representing the plaintiff in this very suit, only for them to become defendant later on. After they ceased representing the plaintiff, Omagwa Angima & Company Advocates came in and filed the further amended plaint dated 7th March 2025. In the further amended plaint, Jack Wandai Matheka t/a Jack Wandai Matheka & Company advocates were joined as the 11th defendant.
2. This is a ruling on a Notice Of Preliminary Objection dated 13th September 2024 by Mr. Gikandi, advocate appearing for the 11th defendant based on the following grounds:
 - a. That no summons to enter appearance were issued or served on the 11th defendant as provided under **Section 20** of the Civil Procedure Act and Order 5 Rule 8 of the Civil Procedure Rules;
 - b. That the suit has abated as against the 11th defendant for failure to extract, issue and serve the 11th defendant with the summons to enter appearance;
 - c. That the suit is scandalous frivolous and vexatious and an abuse of court process as it does not disclose any cause of action against the 11th defendant;

- d. That all paragraphs of the further amended paint from 1 to 25 do not mention the 11th Defendant except paragraph 11 which describes the 11th defendant;
 - e. That no pleading or prayer in the further amended plaint applies or demand from the 11th the defendant.
3. The preliminary objection came up on 25th September 2025 when the suit was scheduled for hearing and the court was enjoined to hear it first. The court partially heard the submissions of the parties on the P.O. on that date and upon Mr. Moriasi's insistence that he was being prejudiced for having been ambushed by the preliminary objection, on the date of the hearing the court allowed an adjournment and ordered submissions to be filed on the P.O.

Submissions of The 11th Defendant.

4. The objector's submissions are dated 29th September 2025. It is submitted that the plaintiff instructed the 11th the defendant to lodge this suit but after a few amendments a further amended plaint dated 7th March 2025 was filed in which its former advocate was joined as a 11th defendant; that there is no pleaded cause of action against the said advocate, no particulars of wrongdoing, breach of duty or any other legally recognized claim against the advocate. Also, none of the prayers sought in the further amended plaint are directed at him. In the submissions, the following issues were framed for determination
- a. Whether the suit against the 11th of the defendant is an abuse of the Court process and should be struck out;
 - b. Whether the further amended plaint discloses any reasonable cause of fraction against the 11th defendant;
 - c. Who should bear the costs.
5. It was argued as follows by the objector's counsel: under order 2 Rule 10(1)(a) CPR, and the decision In Independent Electoral And Boundaries Commission And Another Versus Stephen Mutinda Mule

And Three Others 2014 eKLR, a party is bound by his pleadings. A party must plead with reasonable precision the case intended to be proved. The defendant must be able to understand clearly the case he is called upon to answer. That although the plaintiff's witness statement contains a litany of allegations against the 11th defendant it is trite law that evidence cannot be a substitute for pleadings and the case of MWK Versus CWN Civil 250 Of 2018 2023 KECA 235 KLR was cited in support of that proposition. It was stated that the plaintiff has dragged in his former advocate into the suit without establishing any legal basis for that course of action in his foundational pleading, and he should not be permitted to take even one more step against the 11th defendant; that the further amended Plaint fails to plead that any undertaking was given, the nature and terms of any such undertaking and the specific manner in which it is alleged to have been breached by the 11th defendant.

Submissions of The 8th And 9th Defendants

6. The 8th and 9th defendant's adopted the submissions of the 11th defendant wholly, stating that it is not in dispute that the 11th defendant was the plaintiff's advocate; that the 8th and 9th defendants are the registered proprietors of the suit property **Kilifi/Jimba/395**; that the 9th respondent paid the consideration for sale of the suit property being Kenya Shillings 45,000,000 out of which Ksh 14,000,000 was paid to the applicant through his advocate; that the plaintiff and the 11th defendant discussed agreed and executed an advocate client agreement and indemnity on how to share the Kenya Shillings 14,000,000 million; that therefore, the only 2 issues arising are whether the plaintiff's pleadings raise any triable issues against the 11th defendant and whether the issue of a professional undertaking by the Plaintiff's former advocate can be sufficiently handled in this instant suit. Regarding the first issue, it is

stated that the Plaintiff should be restricted to what is contained in the pleadings. Regarding the second issue, it is submitted that the plaintiff having entered into an agreement between him and his advocate as to how the Kenya Shillings 14,000,000 should be shared, then the dispute before this court is that of an advocate client and that this court is therefore the wrong forum for its disposal.

Submissions Of The Plaintiff

7. The plaintiff's submissions are dated 6th October 2025. Relying on the celebrated Mukisa Biscuit Manufacturing Company Limited Versus West And Distributors Limited 1969 EA 696, counsel for the plaintiff submitted that under Order 2 Rule 15 Sub Rule 2, no evidence shall be admissible on an application under sub rule 1(a), but that rule proceeds to state that the application shall state concisely the grounds on which it is made; that however any objection based on grounds (b) and (d) in Order 2 Rule 15 (1) are based on evidence and that goes against the tenor of the preliminary objection which is supposed to raise a pure point of law based on the assumption that the facts are uncontested and can dispose of a suit.
8. As to whether the suit should be struck out as against the defendant, it was submitted that the objection should be raised by way of an application as provided for under Order 2 Rule 15 (1) (b), (c) and (d); that submissions would not be enough to take a place of such an application supported by affidavit evidence. The 11th defendant flouted the rules by filing an omnibus preliminary objection based on Order 2 Rule 15(1)(a)(b) and (d) CPR. Mohamed Al Amin and Abdulpazak Omar Amin versus Mohamed Abdallah Mohamed Mombasa HCC 757 of 1995 and Moser Versus Khan and Another Civil Case 85 Of 2019 2022 KEHC 17038 KLR were cited in

support of the proposition that no evidence should be adduced when a party is proceeding under Rule 15(1)(a). was also cited. It was submitted that the 11th defendant undertook on 22nd November 2021 to pursue the withdrawal of the instant suit failure to which he was to refund the sum of Kenya Shillings 14,000,000, but in violation of that undertaking by 26th January 2023, the same advocate was, at the instructions of the Plaintiff, amending the plaint to join the 8th and 9th defendants. It is proposed that should the court proceed to strike out the 11th defendant from the proceedings, parties will proceed to a hearing based on a disputed professional undertaking whose maker is not before the court; that in any event the 11th defendant has already filed his Statement of Defense and would not be prejudiced in any manner.

Analysis and Determination

9. It is correct that after the further amended plaint was filed the 11th defendant filed a defense dated 11th September 2024. That defence contains only 4 substantive paragraphs as follows:
 - a. The 11th defendant averred that the further amended plaint does not disclose any cause of function against the 11th defendant in all the paragraphs;
 - b. The 11th defendant states that the further amended plaint filed by the Plaintiff herein is *mala fides*, frivolous and vexatious and an abuse of the court process and ought to be strike (sic)out.
 - c. That no summons were extracted and issued to the 11th defendant.
 - d. The jurisdiction of this court is admitted save that no cause of action against the 11th defendant has been disclosed.

10. It is clear that from inception the defendant did not consider that the plaint contains any material to which he ought to respond to in order defend himself, and he let all parties know it.

11. Kenya Power & Lighting Co. Ltd v Onserio & 3 others [2025] KEHC 3833 (KLR)

26. Of cardinal importance, the claim by the Respondent was untenable and offended Order 2 rule 10 (1) and (2) of the Civil Procedure Act. The said rule requires particularization of particulars of negligence. The Rule provides as follows:

“Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind, except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”

12. Kamau & another v Kyalo & another [2025] KEHC 2491 (KLR) held as follows:

“It is trite that parties are bound by their pleadings and any evidence that is at variance with the pleadings goes to no issue. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows on the issue:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.””

13. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

14. *Kenya Power & Lighting Co. Ltd v Onserio & 3 others* [2025] KEHC 3833 (KLR)

30. The question of what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 as follows:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

15. *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

16. Not even submissions on the issue of the undertaking, if nit pleaded and testified on, would redeem the plaintiff’s case against the defendant, despite a concession that there was such an undertaking between all parties save the 11th defendant. Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR held as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

17. This court agrees with the 11th defendant that all parties are required to plead with precision the case they intend to prove and that the defendant must be able to understand clearly the case he is called upon to answer. Nothing must be assumed. Facts must be laid on the table. It is on the basis of the pleadings that a party will be allowed to testify. All other evidence not supporting statements in a pleading would have to be rejected by Court at the hearing as a waste of valuable judicial time. In the case of Independent Electoral

and Boundaries Commission and Another Versus Steven Mutinda Mule and Three Others 2014 KLR the court stated as follows:

“8. The Appellants’ contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1st Respondent’s election thereby essentially assisting the Petitioner in an impermissible manner. The 1st Respondent in submissions filed in this Court supported this argument by the Appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows; “it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

9. Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus; “In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

10. To the above submissions by the Appellant and the 1st Respondent through its learned counsel Mr Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2nd to 4th Respondents both in their written submissions and in the address before us by Mr Laichena, their learned counsel.

11. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that

parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score.”

18. In the case of MWK VS CWN Civil Appeal Number 250 Of 2018 2023 KECA 235 KLR the court stated as follows:

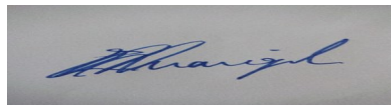
“The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR found and held as follows in respect to the essence of pleadings in an election petition:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings”

19. In the present case, if it was indeed necessary to join the 11th defendant there must have been facts that prompted the plaintiff to consider that joinder. Without pleading those facts against it, the

- further amended plaint is incomplete; it cannot aid the plaintiff in respect of his claim against 11th defendant.
20. Having regard to Order 10 Rule 10(1)(a), that further amended cannot be allowed to stand because it would otherwise render the 11th defendant to be a mere spectator in a case where he has been named as a defendant without requiring him to tender in the evidence to dispute any statement of fact leveled against him, as there is none, and waste much of his time.
21. I therefore find that the further amended plaint dated 7th March 2025, as drawn, has violated Order 10 Rule 1 of the Civil Procedure Rules and that the claim against the 11th defendant ought to be struck out, and it is hereby struck out with costs to the 11th defendant. This suit shall be mentioned on 20/4/2026 for directions as to hearing.

Dated, signed and delivered at Malindi on this 18th February 2026.



**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**