REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLC NO. E104 OF 2019
(AS CONSOLIDATED WITH MALINDI ELC NO 4 OF 2019- ALYVIDZA INVESTMENTS LTD VS SEVEN ISLANDS WATAMU LIMITED & 3 OTHERS)

THE WATAMU MEN FRIDAYS LTD…… PLAINTIFF

VERSUS

THE HON ATTORNEY GENERAL & 4 OTHERS …… DEFENDANTS

RULING

1. The application dated **11th November 2025** is seeking the following orders:
    a. That this court be pleased to add the National Land Commission as a party to this suit as one of the defendants;
    b. That this court be pleased to grant leave to the applicant to file a counterclaim in this suit within 14 days and the annexed draft counterclaim be deemed duly filed and served upon payment of the requisite court fees;
    c. That this court be pleased to review and/or vary its earlier orders and directions issued on 25th November 2025 to allow the applicant to amend its statement of defence and to file further documents;
    d. That the applicant be granted leave to amend its defence in terms of the draft amended defence annexed hereto and to file and serve the same within 14 days of the grant of leave;
    e. That the applicant be granted leave to file and serve a Further List of Witnesses, Witness Statements, and a Further List and Bundle of Documents within 14 days of the grant of leave;
    f. That consequent to the grant of leave, the Draft Amended Defence the Further List of Witnesses, Witness Statements and the Further List and Bundle of Documents be deemed as duly filed and served upon payment of the requisite court fees;
    g. That the plaintiffs be granted liberty to amend their pleadings and to recall any witnesses if necessary pursuant to the amendments allowed herein;
    h. That the costs of this application be provided for.

2. The application is supported by the sworn affidavit of **Roberto Renzi**, the director of Seven Islands Watamu Limited.
3. The grounds upon which the application has been brought are as follows: the applicant desires to amend his defence to bring before the court relevant and important matters that are absolutely necessary for the fair determination of the dispute before this court, as well as add the National Land Commission as a defendant in order to enable the applicant to bring and necessary parties to the dispute in the matter. The applicant desires to file a counterclaim to seek orders to declare that the title deeds held by the plaintiffs were obtained fraudulently, illegally and unprocedurally through a corrupt scheme in breach of existing Court orders, and that the said titles are null and void and they ought to be quashed. He also seeks to file a counterclaim to plead and invoke relevant constitutional provisions that protect the applicant's right to property; that the law allows amendments to pleadings and addition of parties at any time before judgment; that the amendment of the pleadings herein and addition of the National Land Commission are an integral element of the applicant's right to be heard as enshrined in the Constitution of Kenyan 2010; that is sufficient ground adduced herein for the court to review its orders made on 25th November 2025 disallowing the applicants oral application for amendment on account of failure to produce the said draft amended defence and copies of the further documents intended to be filed; that unless the orders of 25th November 2025 are reviewed or varied, the applicant will be barred from amending its defence or filing crucial further documents and witness statements necessary for the determination of this matter; that the suit was scheduled for hearing on 25th February 2026 and unless the matter is heard urgently, the applicant would suffer extreme prejudice; the plaintiffs have already testified in this matter but since they can amend their pleadings and recall their witnesses,

there will be no prejudice occasion to the plaintiffs that cannot be a compensated by an award of costs; that the present case is a very complicated dispute between the plaintiff and **15** other individuals holding parallel subdivision title deeds that were created over the applicant's parcel of land and it is absolutely necessary that the court gets a complete picture of the dispute before it and hear all the parties involved in the dispute.

Response of Plaintiff in ELC No 4 Of 2019 (Alividza Investment Limited) and Plaintiff in ELC 104 2019 (Watamu Men Fridays Limited.)

4. The plaintiff (Alividza Investment Limited) in ELC No 4 of 2019 filed grounds dated 22nd December 2025. The plaintiff in ELC 104 2019 (Watamu Men Fridays Limited) filed a replying affidavit dated 16th January 2026. The response of these respondents cumulatively is that pleadings closed in 2020 when all parties were ably represented by counsel; that the applicant has not demonstrated a reasonable explanation why a new party should be joined approximately one and a half years after the plaintiff closed its case; it has not been demonstrated why the National Land Commission should be joined in a suit where none of the plaintiffs has a claim against it, the dispute before Court is a private law claim over competing titles the validity of which can be fully and conclusively determined without the participation of the National Land Commission, the test for joinder in **Order 1 Rule 10 2 CPR** has not been met as the National Land Commission is not a necessary party; that in any event the administrative opinions or findings of the National Land Commission cannot displace or substitute judicial determination by this court; that the National Land Commission can be called as a witness; that the application is calculated to delay the conclusion of the suit, the application is an omnibus application meant to delay the due process of the law; a

prayer for review of this court's orders will be oppressive against the plaintiff; that the applicant has come to court with unclean hands and is undeserving of equity since he has declined to purge contempt; that the application for leave to amend the statement of defence and introduce a counterclaim is governed by **Section 100** of the Civil Procedure Act and the relevant rules and the discretion of the court is not unfettered; the delay in bringing this application is unexplained, inexcusable and highly prejudicial the plaintiffs; that the introduction of a counterclaim at this advanced stage would reopen pleadings long closed as to necessitate fresh responses, evidence and possibly rehearing and thereby undermine procedural certainty and the orderly conduct of the trial, and would amount to rewarding indolence and tactical delay; that the 5th defendant has not demonstrated any discovery of new and important matter or evidence, or any error apparent on the face of the record, or any other sufficient reason under **Order 45** of the Civil Procedure Rules; that mere dissatisfaction with the court's directions does not constitute a ground for review, the application cannot be excused under **Sections 1 (a)** and **(b)** or the Civil Procedure Act and is an abuse of the court process.

Applicant's submissions dated 29th December 2025

5. The applicant filed submissions dated 29th December 2025 in support of the proposal to join the National Land Commission to these proceedings The applicant's counsel cited *Five Star Agencies Limited and Another Versus National and Commission and 2 Others 2024 KECA 439 KLR* and *Communication's Commission of Kenya and 3 Others Versus Royal Media Services Limited and 7 Others Nature Foundation Limited (Proposed Interested Party) 2014 KESC 52 KLR.*

6. It was submitted that the statutory functions of the National Land Commission expressly set out in **Section 5** of the **NLC Act 2012** which mandate the Commission *inter alia* to instigate investigations either on its own motion or upon a complaint into present or historical land injustices and to recommend appropriate redress and that the dispute here in which concerns competing titles arising from historical irregularities in land adjudication and allocation within the **10** mile-wide coast strip falls within this statutory and constitutional mandate.
7. Regarding amendments proposed to the Defence and a proposal to file a Counterclaim as permitted by Order 7 Rule 3 CPR, Central Kenya Limited Versus Trust Bank Limited and Five Others 2000 KECA 3607 KLR was quoted, as was *Elijah Kipngeno Arap Bii Versus Kenya Commercial Bank Limited 2013 KECA 345 KLR* for the proposition that the governing principle is that amendments should be freely allowed where these are to bring before the court all matters in controversy and facilitate a just determination of the dispute. It is posited that the proposed Amended Defence and Counterclaim do not introduce a new or unrelated cause of action but arise directly from the same transaction and facts already before the court; that the overarching principle is that courts exist to resolve disputes on their merits rather than to trap parties in technicalities; that refusal to allow their amendments would risk a partial or complete adjudication of the dispute particularly given the complex historical and statutory issues surrounding the suit property. It is proposed that no prejudice will be occasioned to the other parties by the grant of the leave sought, and any convenience, if at all present, can be adequately remedied by an award of course and by granting them corresponding liberty to amend their pleadings and recall witnesses as already prayed. The case of *Institute for Social Accountability and Another Versus*

Parliament of Kenya and Two Others Commission for The Implementation of the Constitution Interested Party 2014 KEHC 7356 KLR was cited for the proposition that 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.

8. Regarding whether there is sufficient cause for review and or variation of the courts orders and directions issued on 25th November 2025, it was submitted that the ground on which the application made orally on 25th November 2025 failed was that the applicant had failed to place before the court draft amended defence and copies of the further documents sought to be relied on; that they refusal was thus founded on a procedural misconception and constitutes an error on the face of the record because in practice and procedure, draft pleadings and supporting documents cannot be introduced for the first time through an oral application; that the proper mode of introducing those documents is through a formal application; that the refusal of the application shut the applicant from pursuing the correct procedure and unjustly curtailed its right to amend its pleadings or place before the court material evidence necessary for the just determination of the dispute and the orders should thus be reviewed or varied to avert serious prejudice to the applicant.

Watamu Men Fridays Limited Submissions

9. The plaintiff in **ELC 104 OF 2019** Watamu Men Fridays Limited filed submissions dated 14th January 2026. Regarding joinder of the National Land Commission, *David Kuria Mbote and 10 Others 2021 KECA 425 KLR* was cited for the principles governing joinder of parties. Various shortcomings in the documents relied upon by the applicant were pointed out by the plaintiff's counsel whose

conclusion was that the court is being misled to believe that the National Land Commission is a necessary party yet the Commission has not made any determination in favour of the applicant, giving it the suit property and is thus not a necessary party.

10. It is further stated that by the time the suits were filed in **2019 Gazette Notice 6862 of 17th July 2017** relied on by the applicant was in existence and the applicant who was able represented by counsel from the onset, was well aware of the above decision as at the time of filing its defence, and never made any attempt to join the National Land Commission then; that pleadings closed **5** years ago and the applicant is now attempting to join a new party after a year and a half since the close of the plaintiff's case without an explanation; that the applicant's proposals, despite the applicant's manifest indolence, would if allowed defeat the principle of just and timely disposal of suits. Due to such lack of explanation, the orders sought are not deserved; that in any event NLC is not a necessary party.

11. On the issue of whether the defence should be amended and a counterclaim should be filed*, Nyanza Spinning and Weaving Mills Limited Versus Credit Bank Limited & 2 Others Civil Suit 28 Of 2012 2025 KEHC 18534 KLR* and *Kassam Versus Bank of Baroda Kenya Limited HCCC 2122 Of 1999* were cited, and it was submitted that though the power of the court is discretionary, such discretion must be exercised judiciously and in accordance with the applicable laws and procedural rules; that such amendment would delay the disposal of the suit, which was ripe for defence hearing; that the filing of a further list of witnesses, witness statements and further list and bundle of documents should be declined as it amounts to an ambush and an abuse of the court process; that the applicant's right to amendments, review and joinder of parties must be balanced with the plaintiff's right to access justice through time

disposal of suits as provided for under Article 48 of the Constitution of Kenya and Sections 1A and 1B, CPA.

12. Regarding review of the orders of 25th of November 2025, it was submitted that though the court has power to review its decision such power must be exercised within the framework of Section 80 CPA and Order 45 Rule 1 CPR 2010; that there is no error which is self-evident or apparent on the face of the record and this court merely declined to allow the application for amendment; that the material before Court is insufficient to invoke the court's jurisdiction for review.

Alyvidza Investments Ltd's Submissions

13. The plaintiff in ELC Number 4 Of 2019 (Alividza Investments Limited,) filed submissions dated 19th January 2026. Counsel for the plaintiff submitted that the application is fatally effective procedurally, is belated and an abuse of the court process as the suit is at the defence hearing stage. Counsel cited *Departed Asians Property Custodian Board Versus Jaffer Brothers Limited 1999 1 EA 55* for the proposition that a party should only be joined where his presence is necessary and not merely because he has relevant evidence to give. The decision in *Civicon Limited Versus Kivuwatt Limited 2015 eKLR* was cited for the proposition that joinder is not automatic and must be justified. Counsel maintained, just like counsel for the Watamu Men Fridays Limited, that nobody in the case has pleaded any relief, claim or cause of action against the National Land Commission and the present dispute is a private law contest over competing titles whose validity can be fully determined without the participation of the NLC; that the findings of the National Land Commission in **Gazette Notice 6862 of 17th July 2017** do not transform NLC into a necessary party.

14. Proposed amendment of defence and introduction of a counterclaim was also objected to on the same ground as those in

the Watamu Men Fridays Ltd submissions, with the additional case of *Ochieng and Others Versus First National Bank of Chicago 1995 eKLR* being quoted as authority against inordinate and unexplained delay in seeking amendments. Also that the unexplained delay of **4** years since the close of pleadings in **2020** is fatal to the application for amendment. The introduction of a counterclaim or reopened pleadings necessitate fresh responses and evidence and undermine procedural certainty. Regarding review, it was submitted, citing *National Bank of Kenya Versus Ndungu Njau 1997 eKLR*, that there has been no evidence presented of discovery of new matter or error on the face of record or any sufficient reason to warrant review.

15. Counsel also submitted that Sections 1A and 1B CPA do not excuse indolence or tactical delay and cited the case of *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others 2014 eKLR*; that the present application is oppressive and intended to delay justice within the meaning of such proceedings given by the Court of Appeal in *Muchanga Investment Limited Versus Safaris Unlimited Africa Limited 2009 eKLR*.

Analysis and determination.

16. The issues arising for determination in the present application are as follows:

    a. **Whether NLC should be joined as a party in the present suit;**
    b. **Whether the order of the court made on 25th November 2025 ought to be varied or set aside;**
    c. **Whether leave to amend defence and file a counterclaim ought to be granted;**
    d. **Whether leave ought to be granted for the applicant to file a Further List of Witnesses, Witness Statements, and a Further List and Bundle of Documents;**
    e. **Who ought to bear the costs of the application?**

17. Regarding the first issue, the law in Order 1 Rule 10(2) provides as follows:

> "10. Substitution and addition of parties [Order 1, rule 10]
> (1) .....
> (2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

18. Joinder of necessary parties is aimed at ensuring all parties affected by a dispute are before the court to in order to enable the court deliver an effectual and complete adjudication of the matter before it. It thus prevents a multiplicity of suits. It also ensures that all parties necessary for the enforceability of the decree emanating from the suit are joined and that they are granted an opportunity to be heard.

19. In *Erdemann Property Limited v Co-operative Bank (K) Limited; Lake Basin Development Authority (Intended Interested Party) (Civil Case E271 of 2022) [2024] KEHC 10187 (KLR) (Commercial & Admiralty) (11 July 2024) (Ruling)* the court observed as follows:

> "In the case of Joseph Njau Kingori –vs- Robert Maina Chege & 3 Others [2002] eKLR, Nambuye, J (as she then was) set out the guiding principles applications seeking for joinder of parties as follows: -
>
> > "…parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore, in case of a Defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to

> adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings."

20. The question that arises is whether the National Land Commission is a necessary party in this suit. A major pointer to the possible answer is that none of the plaintiffs chose to join it in their suit. None made any prayers against it. Neither is the applicant indicating in his application whatever prayers he would seek against it. That is not all; the applicant wishes to have the National Land Commission be joined as a defendant, meaning that it would be for the plaintiffs to seek and frame and include a cause of action against it, and amend their respective plaints and plead against it. The plaintiffs revolt at the idea since their stance is that they do not have a claim against it and the present case is one of private interests regarding competing titles. The applicant has not stated that its proposed counterclaim would be against the National Land Commission.

21. This court would be hesitant to join a party against whom none of the parties is ready to make a claim, and who is evidently useful only as a witness, as seen in the recent decision in the case of *Malindi ELCLC NO. E146 OF 2018- Clifford George Rook Vs Ruth Nyawira Wambui & 10 Others* where the court held as follows:

> "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, the further amended plaint is incomplete it cannot aid 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 will 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.

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."

22. It is the view of this court that so far, the National Land Commission is not a necessary party in these proceedings and that in any event its officers can be summoned as witnesses for any of the parties in the present suit subject to the rules of procedure and the circumstances obtaining in the present suit. The prayer for its joinder ought to be rejected for those reasons.

23. Regarding the prayer or setting aside or varying the order made on 25th November 2025, this court is of the view that the order was made on the merits of the oral application before the court. Ordinarily applications for leave to amend and to file documents out of time especially at an exceedingly late stage as it was in this case, ought to be made by way of a formal application, a fact which must have been known to Mr. Munyao even as he made his application. The fact remains that an oral application and a formal application are two different things altogether. No greater injustice, especially in the face of objection by the adversary, would be occasioned in any adversarial litigation were the court to grant an oral application for leave to amend pleadings and file fresh documents which have not been seen by the other side. Objection having been raised, any decision allowing that oral application may amount to an ambush from a very unlikely quarter: the court. In this court's view, that decision of the court was made on merit and is only subject to appeal to the Court of Appeal as there is no discovery of new and important matter or evidence, or any error apparent on the face of the record, or any other sufficient reason under **Order 45** of the Civil Procedure Rules that may warrant its review or setting aside by this court. This court has stated hereinabove that an oral application

and a formal application are two mutually exclusive means of moving the court. They are not mutually dependent on one another such that a formal application would fail on ground of *res judicata* where there has been an earlier unsuccessful oral application. That finding therefore sets the applicant free to prosecute the present formal application, despite lack of success in the oral application, without any fear of a preliminary objection on *res judicata*.

24. Regarding the prayer for amendment of the defence and inclusion of a counterclaim, it is the case that much time has passed since the applicant's pleadings were filed, and since the pleadings closed, and since the plaintiff's closed their case. A brief history of the two matters will put the application in its proper perspective.

25. ELC 104 of 2019 was filed by Watamu Men Fridays Limited on 4th December 2019. From inception Remo Renzi and 7 Islands Watamu Limited were named as the 4th and 5th defendants respectively and they filed their Memorandum of Appearance on 16th December 2019 through Ahmednasir Abdulkadir & Company advocates. An application dated 1st November 2021 was filed by them through the same law firm, seeking consolidation of this suit with **Malindi ELC 4 of 2019**. They filed their consolidated list of documents in the consolidated matter on 7th March 2022. They filed their defence in ELC No 4 of 2019 on 7th March 2022. They filed their defence in ELC 104 of 2019 on 7th March 2022. The consolidated suit was heard on 8th December 2022 when their advocates fully participated in the proceedings, and also on 7th March 2023 when again their advocate, Ms. Asli, was also involved. On 29th January 2024, the applicant occasioned an adjournment of the suit and was condemned to costs, and it was marked the last adjournment at their instance. The plaintiff's cases in both suits were marked as closed on 28th February 2024 and the hearing of the defence case in the consolidated cases was scheduled for 20th May 2024. The hearing of

the defence cases never took place because an application was filed by the plaintiff in ELC Number 4 Of 2019 dated 22nd April 2024. It is noteworthy that the activities of the applicant herein prompted that motion and led to the ruling of this court issued on the 18th December 2024 on that application, finding that the applicant was in contempt of the orders of this court. Following that holding the applicant filed a motion dated 28th January 2025 seeking to review and/or set aside its ruling dated 18th December 2024, which review motion was also dismissed. On 24th November 2025, the director of the applicant, Roberto Renzi, was fined Kenya shillings 300,000/- and in default to serve 3 months' imprisonment. About 15 days later, on 11th December 2025 the applicant filed the present application. The hearing of the present suit is scheduled for 25th February 2026 and with that date looming, the present application was filed.

26. **Section 1A** and **1B** of the Civil Procedure Act provide as follows:

"1A. Objective of Act
(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."
1B. Duty of Court
For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
(a)the just determination of the proceedings;
(b)the efficient disposal of the business of the Court;

(c)the efficient use of the available judicial and administrative resources;
(d)the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
(e)the use of suitable technology."

The five golden strands comprising the overriding objective as embodied by the provisions of the two sections are as follows:

a. Just determination of disputes;
b. Expeditious disposal of disputes;
c. Proportionality in administration of justice;
d. Affordability of justice;
e. Efficiency in the finalization of disputes.

27. The two plaintiffs in the present cases are of the view that the prayers in the present application if granted would go against the five strands with much emphasis on strands **(a), (b) (c)** and **(e).**

28. Courts have often ruled in favour of the greater sense of substantive justice in many instances of procedural defaults or error on the part of litigants or their counsel.

29. Relatable is the dicta of Duffus, President, Court of Appeal in *Patel v EA Cargo Handling Services Ltd [1974] EA 75*, albeit in respect of judgment entered against an applicant, thus: -

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given it by the rules……. the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure"

30. In *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR* the court stated as follows, albeit regarding stay of execution:

> "There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."

31. In *Machakos Miscellaneous Application No. 77 Of 2021 Mbukoni Services Limited & Anor Mutinda Reuben Nzili, Rose Ndunge Mutinda & Ors* the court stated as follows:

> "27. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103."

32. The present case is one in which the applicant has been involved in the suit from inception. However, he is applying at the eleventh hour to amend the defence and file a counterclaim as well as join a new party to the case. this court has already ruled against the joinder of the National Land Commission as seen above. The question that arises is whether the broad approach set out in *Patel, John Gachanja Mundia* and *Mbukoni Services Limited* (supra) can be applied to the present applicant.

33. Even though a court is possessed of discretion to allow amendments at any stage in the suit, inordinate delay and the conduct of the applicant are crucial factors militating against a decision in favour of amendments. In *Eastern Bakery v Castelino [1958] 1 EA 461* the court stated as follows:

> "…amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be

compensated by costs….the court will not refuse to allow an amendment simply because it introduces a new case…..but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit…the court will refuse leave to amend where the amendment would change the action into one of a substantially different character…or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the writ…the main principle is that an amendment should not be allowed if it causes injustice to the other side."

34. The period of delay on the part of the applicant's action under consideration is evidently inordinate given that the applicant has been involved in this litigation since inception. In *Daykio Plantations Limited v Galba Mining Limited & 4 others [2025] KEHC 4504 (KLR)* the court held as follows:

> "36. As already stated, the hearing of this case came to a close after all parties' witnesses testified. The plaintiff's witnesses testified and were extensively cross examined on some of the issues that prompted this application. Although the plaintiff stated that the application was filed without delay, that cannot certainly be true.
> 37.The court will exercise its discretion and allow a party to amend but will not do so where the amendment will cause prejudice to the other party."

35. The affidavit of the applicant must be scrutinized for any reasonable explanation for delay. Secondly, the potential prejudice must be weighed. A perusal of the applicant's affidavit evidence does not reveal any or any reasonable explanation for the inordinate delay in seeking joinder, amendments, inclusion of a counterclaim and leave for late filing of documents. The applicant's replying affidavit is a veritable ode to the long standing complexity of the Kilifi Jimba, Madeteni, Kibabamshe adjudication sections' disputes, borne of unfortunate governmental adjudicative and administrative misadventures that dogged them since the 1980s,

which were known to the applicant even 7 years ago when its defence was filed. Perhaps the only contrast to its somnolent past is that the applicant now has counsel who is able to dissect in very minuscule details the intestinal anatomy of that complexity with apparent aplomb, and for this Mr. Munyao is to be credited. However, he came into the scene rather late in the day after the plaintiffs had closed their respective cases and were awaiting the defence case. Incontrovertibly the orders sought, perchance granted, would backpedal the present litigation to the age of discovery and consequent recalibration of parties' respective claims and responses, rendering all recorded proceedings otiose in informing judgment in the case, ineluctably precipitating a *de novo* hearing. A d*e novo* hearing, as has been seen in the respondents' retorts to the application, is no source of amusement for every other party involved, and for the court in its quest to clear backlog for easier access to justice for other citizens. Thus, with such far reaching ramifications, the applicant's lack of any explanation for the immoderate delay is abhorrent, and it renders this court incapable of exercising any discretion in its favour to allow fresh amendments and filing of evidence, and its application is thus for dismissal on that ground.

36. While inordinate delay must be explained, there is no known cure in law for the past stained record of conduct of a party who wilfully obstructed justice in a matter; whatever acts and omissions are committed by such a party, as long as they have been adjudged as wilful hold fast to him like glue and tint every action that he subsequently takes. They influence an adverse perception of the motive behind such a party's every act and exact from him a heavy toll of requirement of absolute proof of *bona fides* of otherwise ordinary day to day applications or steps in litigation. In *Yooshin Engineering Corporation v Aia Architects Limited*

[2023] KECA 872 (KLR) the court, addressing discretion of court in a setting aside bid, observed that:

> "…The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

37. In determining this application, this court perceives that the contumacy, for which miscreance the applicant's director was recently chastised, may be symptomatic of a desire to infinitely protract the present litigation, which is impermissible. Viewed in that light, it dawns that deliberate delay was the motive for its neglect to put appropriate action into the preparation of the suit for its hearing and expeditious disposal on the applicant's part and for which no auxiliary penance needs be levied on the lackadaisical applicant by this court save the imperative compulsion to proceed to defence hearing with the pleadings and the evidence on record as is.

38. The upshot is that no scintilla of merit is locatable in the application dated 11th November 2025 and the same is hereby dismissed with costs. 26th February 2026 remains preserved for defence hearing in the suit.

Dated, signed and delivered at Malindi on this 17th February 2026.

MWANGI NJOROGE,

JUDGE, ELC, MALINDI.