

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCL NO. E211 OF 2023

ETHICS AND ANTI-CORRUPTION

COMMISSION

- PLAINTIFF/RESPONDENT

VS

NESCO SERVICES LIMITED

-1ST DEFENDANT/

APPLICANT

HARUN OSORO NYAMBOKI

-2ND DEFENDANT/

APPLICANT

JOEL JOSEPH MUSYIMI

-3 RD DEFENDANT

JOHN NYAGA MAUKI

- 4 TH DEFENDANT

AND

NATIONAL BANK OF KENYA

-INTERESTED PARTY

RULING

**(In respect of the 1st & 2nd Defendant's Application dated
19/11/2025)**

1. Before this Court for determination are the 1st and 2nd Defendants' application dated 19/11/2025, expressed to be brought under the provisions of Section 1A & 3 of the Civil Procedure Act and Order 8 Rule (2) & (6) of the Civil Procedure Rules. The Applicants pray for the following orders;
 - a. That the Honourable Court be pleased to strike out and/or disallow the amendment in the amended Plaint dated 6/11/2025.
 - b. The Plaintiff/Respondent do pay the costs of this application.

2. The application is, on its face, premised on the Affidavit of Harun Ogoro Nyamboki, the 2nd Defendant herein and a Director of the 1st Defendant/Applicant. The affidavit was sworn on 19/11/2025. The Deponent avers that the Plaintiff/Respondent filed an application dated 4/11/2024 seeking leave to amend the Plaint. The application was allowed vide the Ruling delivered on 9/10/2025.
3. He avers that the Plaintiff was required to file its amended plaint within 14 days in compliance with Order 8 Rule 6 of the Civil Procedure Rules. The last day for filing the amended plaint was 27/10/2025, due to the weekend and some days being declared public holidays.
4. The deponent avers that on 10/11/2025, their Advocate on record was served with a Plaint amended on 6/11/2025. He contends that the amendment was made outside the permitted period and is consequently irregular and improper. He asserts that the rules of procedure of the courts of law are vital to the administration of justice, hence the court should be keen to enforce them. He therefore prays that the application be allowed and that the amendment be disallowed.
5. The Plaintiff/Respondent filed an Affidavit in Reply, sworn on 26/11/2025, by Dedan Okwama, its Investigator. The deponent states that, in granting leave to amend the Plaint on 9/10/2025, the court granted the Defendants 15 days to amend their pleadings upon service of the amended Plaint. The amended Plaint was served on 10/11/2025. He avers that the

delay in filing and serving the amended Plaintiff was occasioned by the resignation of the lead Investigation Officer in the matter without notice and without a proper handover of the investigation files, as the lead Investigation Officer is the primary custodian of the investigation file.

6. He avers that the delay in complying with the timelines was caused by the transition from the previous investigator to him, and that the delay was not intentional. He argues that the suit herein relates to the recovery of public property, hence the public will suffer great prejudice if the amended plaintiff is struck out. He further argues that no prejudice will be occasioned to the Applicants if the application is not allowed. He states that there has been no inordinate delay in filing the amended plaintiff and that, pursuant to Article 159 (2) of the Constitution on the administration of justice without regard to procedural technicalities, it is in the interest of justice that the amended plaintiff be allowed to stand.
7. The Application was canvassed by way of written submissions. Both parties complied by filing their rival submissions. The Applicants' submissions are dated 5/12/2025, whereas the Plaintiff's submissions are dated 19/12/2025. I have perused the submissions and taken them into account in my determination.

Analysis and Determination

8. This court has perused through the application, supporting affidavit, filed submissions and the responses thereto. The issues for determination are:

- a. Whether the Amended Plaintiff should be struck out
- b. Who should bear cost of the application

9. The law with respect to striking out of pleadings is found in Order 2 Rule 15(1) of the Civil Procedure Rules. It stipulates:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

10. In *D. T. Dobie & Company (K) Ltd. vs Joseph Mbaria Muchina & Another* [1982] KLR1, Madan J. A. stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

11. The Court of Appeal in the case Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR restated these principles as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs

Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

12. The rationale for this is that striking out a pleading and the exercise of powers under the summary procedure are draconian, coercive and drastic, and therefore striking out a pleading must be done with great caution, because a litigant should never be driven from the seat of justice without being heard. See *Prafulla Enterprises Ltd v Norlake Investments Ltd*, Kisumu High Court Civil Case No. 145 of 1997; LLR 7412 (HCK).

The court must therefore exercise the powers to strike out a pleading or case with the greatest care and circumspection and only in the clearest of cases should the court strike out a pleading.

13. The Applicants seek to have the amended Plaintiff struck out on the grounds that it was filed out of time.

14. Article 159 (2) (d) of the Constitution mandates this court to administer justice without undue regard to procedural technicalities. It is indeed true that there was a delay by the Plaintiff/Respondent in filing the amended Plaint. The court, in its Ruling delivered on 9/10/2025, directed the Plaintiff to amend its plaint and granted the Respondents leave to amend their pleadings within 15 days of service. The Court further directed the parties to expeditiously list the matter for case management and eventual hearing on a priority basis.
15. Order 8 Rule 6 of the Civil Procedure Rules, 2010 provides that: -
- “Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or if not period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”
16. In deciding whether or not to exercise its discretion in favour of a party who has failed to file its amended pleadings within fourteen (14) days or a stipulated period, the court must consider the prejudice the opposing side would suffer or be likely to suffer and whether such prejudice could be compensated by way of costs.
17. The Plaintiff filed its Amended Plaint on 10/11/2025, a delay of about 16 days. I concur with the Applicants that the delay in filing the amended Plaint without leave of court is prejudicial to the Applicants. Despite the Plaintiff having a plausible

reason for the delay, it ought to have sought leave to extend the time for compliance.

18. Since the Applicants have yet to file their amended Defence and in view of the public interest element of this suit, I find that the Applicants will not be prejudiced to the extent that an award of costs would not be adequate to compensate them if the amended plaint is allowed to stand.
19. The Plaintiff's failure to comply with the court has inconvenienced both the court and the Applicants, as the parties would have been preparing for the expeditious trial of this matter.
20. The Plaintiff must bear responsibility for the delay and for preventing the Applicants from taking the necessary steps to prepare this matter for trial as directed by the court. The Plaintiff cannot be allowed to trample on the Applicants' rights or to go scot-free when it failed to adhere to court procedures couched in mandatory terms. Failure by the court to penalise the Plaintiff for its omission would be a grave miscarriage of justice against the Applicants.
21. It is for this reason that the court has no hesitation in ordering the Plaintiff to pay the Applicants' throwaway costs to compensate them for the prejudice and inconvenience they have suffered or will suffer as a result of the court allowing the amended Plaint to stand.

22. Accordingly, the upshot of this court's ruling is that the amended Plaintiff shall stand and shall not be struck out. However, the Plaintiff is hereby directed to pay the Applicants' throw away costs in the sum of Kshs 30,000/= within fourteen (14) days of the date hereof.
23. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS
19TH DAY OF FEBRUARY 2026 VIA MICROSOFT
TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered Online in the presence of:

1. N/A for the Plaintiff
2. Mr Manyara HB for Mr Oyugi for the 1st & 2nd Defendants
3. N/A 3rd and 4th Defendants
4. CA- Ms Yvette Njoroge