



**Gitari (Suing as the Legal Representative of the Estate of the Late Felix  
Gitari Mbiuki) v Machakos County Assembly Service Board & another  
(Cause E957 of 2022) [2026] KEELRC 875 (KLR) (24 March 2026) (Ruling)**

Neutral citation: [2026] KEELRC 875 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E957 OF 2022  
SC RUTTO, J  
MARCH 24, 2026**

**BETWEEN**

**MUTEMBEI GITARI (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF THE LATE FELIX GITARI MBIUKI) ..... CLAIMANT**

**AND**

**MACHAKOS COUNTY ASSEMBLY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH LABAN (AKA JL) MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By way of a Notice of Motion dated 10<sup>th</sup> November 2025, the Respondents/Applicants seek leave to amend their Statement of Defence and Counterclaim dated 6<sup>th</sup> February 2023. The Motion is supported by the grounds set out on its face and the supporting affidavit sworn by Felix Muuo, Counsel on record for the Applicants.
2. The grounds in support of the Motion are that the Claimant filed an Amended Memorandum of Claim on 6<sup>th</sup> November 2024, following the demise of the original Claimant and the subsequent substitution of parties. The Applicants contend that the amendment materially altered the identity of the party on record and slightly modified the underlying factual matrix, thereby necessitating corresponding amendments to their pleadings.
3. The Applicants further aver that the financial figures pleaded in the original Counterclaim have since changed, as the Claimant's loan repayments ceased in September 2023. Consequently, the outstanding loan balance, together with the accrued interest, has increased.
4. It is further averred by the Applicants that the proposed amendments are intended to update the figures to reflect the accurate position as at the year 2025. The Applicants maintain that these changes merely



constitute factual updates occasioned by the passage of time and the continued default, and do not introduce any new causes of action.

5. Further, the Applicants state that the intended amendments are aimed at refining and clarifying the Defence and Counterclaim so as to align them with the Amended Memorandum of Claim. They contend that the amendments do not alter the nature or structure of their case but are intended to ensure that all material facts are properly placed before the Court.
6. According to the Applicants, the amendments are necessary for the just and complete determination of the issues in dispute and will assist the Court in determining the real questions between the parties on their merits.
7. In his Supporting Affidavit, Mr. Muuo deposes that apart from the updates to the financial figures, the remainder of the Respondents' pleadings remains substantially unchanged, and the proposed amendments do not introduce any new cause of action or otherwise alter the nature of the Defence and Counterclaim.
8. The Claimant, Charles Mutembei Gitari, opposed the Notice of Motion through a Replying Affidavit sworn on 21<sup>st</sup> November 2025. Mr. Mutembei deposes that he has been advised by his advocate on record that if the Respondents intended to amend their Defence and Counterclaim, Order 8 Rule 1 afforded them a window of 14 days from the date of the Claimant's amendment within which to do so. He avers that the Respondents failed to utilize that opportunity and the same has since lapsed.
9. He further avers that the Respondents' second counsel came on record on 15<sup>th</sup> March 2023, approximately four (4) months prior to the demise of the original Claimant and eight (8) months before the amendment to the Claimant's Memorandum of Claim. According to Mr. Mutembei, the Applicants now seek to amend their pleadings nearly three (3) years after the amendment to the Claimant's pleadings, which amendment, in his view, did not materially alter the claim. He contends that the delay of three (3) years is inordinate and that the Respondents are employing dilatory tactics aimed at stalling the expeditious determination of the dispute, thereby hampering his right of access to justice.
10. Mr. Mutembei avers that the Respondents have deliberately sought to slow down the progress of the matter, noting that they have at all material times been represented in the proceedings and have attended court without raising any intention to file the present application. He states that the parties have attended court on numerous occasions, taken hearing dates together, participated in pre-trial conferences, and the matter has already been certified ready for hearing.
11. In his view, the present application is an afterthought intended to occasion delay and is therefore contrary to the principle that justice ought to be administered expeditiously. He further avers that he will suffer prejudice as the matter has been pending for nearly four (4) years since its filing on 22<sup>nd</sup> December 2022.
12. Mr. Mutembei further states that the substituted Claimant had consistently serviced the loan charge facility prior to his demise on 18<sup>th</sup> July 2023. He deposes, on the advice of his counsel, that any claim relating to alleged default in servicing the loan facility after the death of the substituted Claimant ought properly to be directed against the administrator of the estate of the deceased and not against him. He states that his role is limited to that of a substituted Claimant tasked with continuing the conduct of the present suit and does not extend to administering or distributing the estate.
13. Mr. Mutembei further avers that the estate of the substituted Claimant, Felix Gitari Mbiuki, has been gazetted in Kenya Gazette Notice No. 10625 dated 1<sup>st</sup> August 2025 for the issuance of Letters of



Administration Intestate to the widow, Beatrice Ciamutegi Gitari. He adds that an administrator of the estate is yet to be formally appointed, as an objection has been lodged against the issuance of the said Grant of Letters of Administration Intestate.

14. Mr. Mutembei further avers that in the original Counterclaim, the Respondents had pleaded that the loan charge facility was repayable within 15 years or upon retirement. However, the proposed amendments now seek to plead that the loan is subject to immediate recovery, together with revised interest rates increasing from 3% per annum to commercial interest rates of 14.65%, effective December 2023.
15. He states that he has been advised by his advocates that such amendments, particularly those relating to alleged defaults occurring after the death of the substituted Claimant, would fundamentally alter the nature of the claim by introducing a substantially different cause of action. According to him, this would deprive the estate of the substituted Claimant of the opportunity to properly defend the claim.
16. Mr. Mutembei further avers that a perusal of the Draft Amended Statement of Defence and Counterclaim does not reveal any material issues that would assist the Court in determining the dispute. Instead, he contends that the Applicants seek to introduce a new cause of action against him.
17. He further deposes that the 2<sup>nd</sup> Respondent advanced a Loan Charge Facility to the substituted Claimant pursuant to a Charge Instrument executed on 27<sup>th</sup> March 2017. The facility was extended following the recommendation of the Salaries and Remuneration Commission (SRC) through Circular Ref. No. SRC/ADM/CIR/3/1/13 Vol. IV dated 17<sup>th</sup> December 2014, together with the attendant regulations.
18. Mr. Mutembei contends that the regulation of the loan facility, including matters relating to default, which he denies, and the applicable interest rates, is governed strictly by the SRC Circular and the attendant regulations. In his view, there is therefore no necessity for the Respondents to amend their pleadings, as such amendments would not assist the Court in determining the real issues in controversy.
19. He maintains that if the Application were to be allowed, it would occasion prejudice to his case and deprive him of the opportunity to adequately defend the claim.

### **Submissions**

20. Pursuant to the directions issued by the Court on 27<sup>th</sup> November 2025, the instant Notice of Motion was canvassed by way of written submissions. Both parties complied, and the court has considered their respective submissions.

### **Analysis and Determination**

21. Evidently, the central issue for determination by this Court is whether the Respondents/Applicants should be granted leave to amend their Statement of Defence and Counterclaim.
22. The applicable provision is Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2024, which permits parties to amend their pleadings before the close of pleadings and thereafter only with the leave of the Court. Where such leave is granted, the opposing party should likewise be accorded a corresponding right to amend its pleadings.
23. The legal principles governing the amendment of pleadings are well settled and were clearly articulated by the Court of Appeal in *Joseph Ochieng & 2 Others t/a Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, as follows: –



- a. the power of the Court to allow amendments is intended to determine the true substantive merits of the case;
  - b. the amendments should be timeously applied for;
  - c. power to amend can be exercised by the Court at any stage of the proceedings; and
  - d. that as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.
24. The general principle is that Courts have a wide discretion to permit parties to amend their pleadings at any stage of the proceedings, provided that such amendments do not occasion prejudice or injustice to the opposing party.
25. In the present matter, it is clear from the record that the Respondents/Applicants seek leave to amend their Statement of Defence and Counterclaim nearly one (1) year after the filing of the Amended Memorandum of Claim, which followed the substitution of the original Claimant. Clearly, this delay cannot be regarded as timely.
26. With that being said, the Court is mindful that the grant of leave to amend is a discretionary power to be exercised where there is justifiable cause and in furtherance of the ends of justice, with the overarching aim of promoting substantive justice.
27. In support of the Motion, the Applicants aver that the amendment of the Memorandum of Claim slightly modified the underlying factual circumstances, making it necessary for them to correspondingly amend their pleadings. They further aver that the financial figures pleaded in the original Counterclaim have evolved, as the Claimant's loan repayments ceased in September 2023, resulting in an increased loan balance and accrued interest. They aver that the intended amendments are therefore aimed at updating the figures to reflect the correct position as at 2025.
28. Opposing the Motion, the Claimant avers that any alleged default on servicing the loan charge facility occurring after the death of the substituted Claimant should properly lie against the Administrator of the estate, and not him, whose role is limited to acting as a substituted Claimant and continuing the suit without powers to administer or distribute the estate.
29. He further deposes that an administrator for the estate of the substituted Claimant has not yet been appointed, due to an objection lodged against the issuance of the Grant of Letters of Administration Intestate.
30. The Claimant also contends that the Respondents' original Counterclaim provided that the Loan Charge Facility was repayable within 15 years or upon retirement. He contends that the proposed amendments, however, now seek to plead that the loan is subject to immediate recovery, with interest revised from 3% per annum to commercial rates of 14.65%, effective December 2023. He asserts that these amendments, particularly those relating to alleged defaults after the death of the substituted Claimant, would alter the nature of the claim, thereby departing from the original cause of action and depriving the estate of the substituted Claimant of the right to defend.
31. The Court has reviewed the Draft Amended Statement of Defence and Counterclaim annexed to the Supporting Affidavit of Felix Muuo and notes that the proposed amendments reflect an adjusted figure of Kshs 18,984,532.39, up from Kshs 15,331,410.98 claimed in the original Counterclaim.
32. It is also notable that in the proposed amendments, the Applicants allege that from October 2023, the Claimant materially breached the loan agreement by failing to remit monthly installments. They



contend that the Claimant's continued default has triggered immediate recovery of the outstanding loan balance and the application of commercial interest rates.

33. It is apparent from the proposed amendments that the fundamental character of the Applicants' case remains unchanged, specifically, that the original Claimant was granted a mortgage facility, has committed breach and that he is liable to repay the loan in full to the 2<sup>nd</sup> Respondent.
34. Accordingly, the Court finds that the proposed amendments are closely connected to the issues already raised in the initial Statement of Defence and Counterclaim. The Court does not discern any new issues or facts that would fundamentally depart from the initial Defence and Counterclaim.
35. Regarding the Claimant's contention that the alleged default on servicing the loan charge facility after the death of the substituted Claimant should lie against the Administrator of the estate of the Substituted Claimant and not him, the Court notes that this line of defence can still be raised by the Claimant in the Defence to the Counterclaim.
36. Further, this argument must be weighed against the principles of justice and fairness to both parties. Denying the Application would prejudice the Applicants by preventing them from presenting their case fully from their factual standpoint.
37. On the other hand, if the application to amend is granted, the Claimant will, under the Court's rules, have the right to amend his Defence to the Counterclaim. In this context, the Applicants stand to suffer greater prejudice if the application is refused.
38. Over and above, as a general principle, amendments may be allowed at any stage prior to judgment. Therefore, while the timing in the instant application is late, it remains within the permissible window under the law.
39. In light of the foregoing, the Court is inclined to grant the Respondents'/Applicants' Notice of Motion dated 10<sup>th</sup> November 2025, on the following terms:
  - a. The Respondents/Applicants are granted leave to amend their Statement of Defence and Counterclaim.
  - b. The Amended Statement of Defence and Counterclaim shall be filed and served upon the Claimant within seven (7) days from the date of this Ruling.
  - c. The Claimant is granted leave to amend, file, and serve their Reply to the Statement of Defence and Counterclaim within fourteen (14) days from the date of service.
  - d. The Respondents/Applicants shall bear the costs of this Application, having failed to move the Court in a timely manner.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF MARCH 2026.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant/Respondent Mr. Ngwele

For the Respondents/Applicants Mr. Muuo

Court Assistant Ndati



## Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

