



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**

**ELC NO. 40 OF 2018**

**MOSES MBOGO GACHANGO.....1<sup>ST</sup> PLAINTIFF /APPLICANT**

**ANNAH WANGUI GASANGO (suing as the personal representative Of**

**JOSIAH GACHANGO MWANGI, (deceased).....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VS**

**RUTH WANJIRU NGANGA.....1<sup>ST</sup> DEFENDANTS /RESPONDENTS**

**SIMON GITHUKU NGANGA.....2<sup>ND</sup> DEFENDANTS/RESPONDENTS**

**RULING**

1. This is a ruling in respect to the Notice of Motion application dated 8/5/2019 filed by the Plaintiffs /Applicants seeking for orders inter alia to strike out the Defendant's Defence and Counterclaim dated 24/04/2019 and costs of the application to be awarded to the Plaintiffs.
2. The application is premised on the following grounds;
  - a. There are two statements of Defence on record by the Defendants/ Respondents; one is the amended Defence dated 9/1/2019 and the other is the Defence and Counterclaim dated 24/4/2019.
  - b. That it is irregular for there to be two statements of Defence on record in the same matter.
  - c. That the Defendants/ Respondents did not seek leave of Court before filing the latter statement of Defence dated 24/4/2019 and filed on the same date.
  - d. That it is only fair that the latter Defence and Counterclaim be struck of the record in order to regularize the same.
3. The Counsel in conduct of the matter on behalf of the Plaintiffs' swore an affidavit in support of the application on 8/5/2019 in which he reiterates the grounds on the face of the application.
4. The Defendants/ Respondents did not proffer a reply to the application but did file a letter dated 14/5/ 2019 and filed on even date in which they expressed their wish to withdraw their Defence filed on 23/01/2019 through the firm of Kirubi Mwangi Ben & Co. advocates and proceed with the Defence and Counterclaim filed on 24/4/2019.
5. Parties to the suit made oral submissions when the Applicants pointed out that the Respondents had not filed any response to the application and urged the Court to consider it as unopposed. The Respondents on their part argued that their response was in the letter dated 14/4/2019 and filed on record.
6. The instant application seeks to strike out one of the statements of Defence by the Respondents on record pointing out that it is irregular for the Respondents to have two statements of Defence on record and that the later statement of Defence and Counterclaim of 24/4/2019 was filed without leave of the Court. The Applicants particularly seek to strike out the latter statement of Defence. The Respondents on the other hand through their letter which they informed the Court is their response to the application indicated their wish to withdraw their initial Defence of 23/1/2019 and proceed with the latter Defence of 24/4/2019
7. I have looked at the both the statement of Defence and Counterclaim dated 24/4/2019 and the letter to the Deputy Registrar dated

14/5/2019 and note that both of them were done and filed by the Respondents in person before they obtained representation through Counsel from kituo cha sheria and having withdrawn instructions from the firm of Mwangi Ben & Co Advocates. I have also noted that the Defence and Counterclaim is substantially different from the earlier filed amended Defence and Counterclaim.

8. The law on amendments of pleadings and the elaborate procedure to be followed by either party to a suit who wishes to amend their pleadings are properly set out under Order 8 of the Civil Procedure Rules thus;

“(1) A party may, without the leave of the Court, amend any of his pleadings once at any time before the pleadings are closed,

3. (1) Subject to Order 1, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

7. (1) Every pleading and other documents amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made. (2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words. (3) Colours other than red shall be used for further amendments to the same document.

8. The Court may hear and determine an oral application made under this Order.”

9. It is trite law that while the law gives wide room for parties to amend their pleadings from time to time in the course of the proceedings, the Civil Procedure Rules give a guide on how the amendments shall be done. The amendments may be done at any time before the close of the pleadings without leave as per Order 8 Rule 1 and any amendments thereafter can only be done with leave of the Court. After the close of pleadings, the amendments may be done on the Courts own motion or upon an application being made by either party. The application by a party may be done either orally or through a formal application.

10. In the instant case I note that the Defendants have duly exercised their right to amend their pleadings through their amended statement of Defence dated 09/01/2019 following the amendment of the plaint with leave of the Court granted on 28/11/2018. The amendment of their Defence and including the Counterclaim would therefore be a second amendment to their pleadings which is well allowable within the law upon following the correct procedure. The Respondents however did not follow due process before filing the amended Defence and Counterclaim of the 24/4/2019 for failing to seek leave of the Courts required in law being an amendment done after close of pleadings. Due to that failure on the part of the Respondents, the amended Defence and Counterclaim filed on 24/4/2019 irregular and a victim for striking out. A casual look at the said amended Defence and Counterclaim of the 24/4/2019 as filed it also shows that the Respondents have also failed to comply with the rules of how to amend a pleading as set out under Order 8 Rule 7 here above thus causing the said pleading to be defective. I have also looked at the letter by the Respondents dated 14/5/2019 which they adopted at the hearing hereof as their opposition to the instant application, the letter does not disclose the reasons if any why the Respondents though unrepresented at the time of filing the amended Defence and Counterclaim flouted the laid down rules on amendments of pleadings. The said letter as filed after the instant application had already been filed and served on the Respondents.

11. Unless expressly provided for in law, a party who wishes to amend his pleadings may do so with leave of the Court. In the case of **The Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others HCCP No 71 of 2013 [2014] eKLR** it was stated as follows:

“[17] The issue of amendment of pleadings is not novel and has been the subject of numerous Court decisions, the common denominator being that as a general principle, Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago CA Civil Appeal Number 149 of 1991*, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.”

12. In the case of **Boniface Mutinda Kabaka vs. David Mutua Kamonde Katua & 51 Others [2018] eKLR**, the trial judge expressed:

“28. ....Having filed the Amended Defence and Counterclaim without the leave of the Court, I find that the Amended Defence and Counterclaim dated 10/5/2016 and filed on the same day is a nullity.”

13. In the case of **Ariho Emmanuel & another vs. Centenary Rural Development Bank Limited & 2 others, Uganda HCCC No. 14 of 2016**, the trial judge expressed as follows:

“The Amended pleadings were without leave of Court filed on the 10/06/2016 which is clearly beyond the 14 days allowed under the Rule. The Amended Plaint and Chamber Summons are thus incorrectly on the Court record and are hereby struck off the record as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.”

14. In view of the above, I am therefore unable to grant the wishes of the Respondents as per the letter. I agree with the submissions by

counsel for the Applicant and find that the amended Defence and Counterclaim dated 24/4/2019 and filed same day by the Respondents is irregular the same is hereby struck off the record.

15. The Notice of motion application dated 8/5/2019 thus succeeds with costs to the Applicants.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25<sup>TH</sup> DAY OF JULY 2019.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants – Absent

Defendants/Respondents: 1 – Present in person

2 – Present in person

Irene and Njeri, Court Assistants