

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E004 OF 2024

DAVID KARIUKI NGARI:.....1ST PLAINTIFF/RESPONDENT

GAKUYO REAL ESTATE:.....2ND PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MUTUKU MUIA:.....1ST DEFENDANT/APPLICANT

CHRISTOPHER MUTUKU MUIA:.....2ND DEENDANT/APPLICANT

RULING

The application is dated 9th February 2026 and is brought under Order 8 Rule 3(1),5 (1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act CAP21 Laws of Kenya seeking the following orders;

1. THAT, this Honourable Court be pleased to grant leave to the Defendant/Applicant herein to amend the Defence and counter claim.
2. THAT, the annexed draft amended Defence and counter claim be deemed as duly filed upon payment of the requisite Court fees.
3. Cost of Application be in the cause.

It is based on the annexed affidavit of Joseph Mutuku Muia and on grounds that the Defendant/Applicant are desirous of amending the defence and counterclaim as provided in the draft amended defence herein. That leave of this Court is required for

such amendment to be affected. That the amendment sought is required to enable the Defendants to amend both the prayers in the counter claim and typographical errors on the face on the file defence and counterclaim. That the amendment sought are required to enable the Defendants to amend both the prayers in the counter claim and typographical errors on the face on the filed defence and counter claim which errors were occasioned by an oversight by our previous Advocate on record. That pretrial directions have not been taken and thus the amendments sought will not be prejudicial to the Plaintiffs in any manner whatsoever. That further no evidence has been tendered thus the proposed amendments will not occasion injustice to the Plaintiffs when the Orders so sought are granted. That no prejudice shall be occasioned upon the Respondents if the Orders sought are granted.

This court has considered the application and the submissions therein. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows;

(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.

Further, Order 8, Rule 5 gives the court the general power to amend.

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.

Section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

“1A (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.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

(1) 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 Respondents strongly opposed the application and pointed out that the amendments introduce claims of loss of user dating back to 2017, liquidated damages, issues of eviction and fresh particulars of alleged trespass which are substantive and prejudicial expansions. That they fundamentally alter the character of the case.

In the proposed amendment the Defendants state that the proposed amendments arise out of the same facts or substantially the same facts in respect of the relief

claimed by the Defendants in this counterclaim and as such will not alter the Plaintiff's cause of action.

In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

On the issue of amendment of pleadings in the case of AAT Holdings Limited vs Diamond Shields International Ltd (2014) eKLR, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 OF 1998 as shown below;

- (i) That are necessary for determining the real question in controversy.*
- (ii) To avoid multiplicity of suits provided there has been no undue delay.*
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.*

- (iv) *That no vested interest or accrued legal rights is affected; and*
- (v) *So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.*

It is quite clear from decided cases that the discretion of a trial court to allow amendments of a pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In the case of Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR the Court of Appeal had the following to say:

In MOI UNIVERSITY vs VISHVA BUILDERS LIMITED - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient –

see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

I have perused the said proposed draft amended defence and find that it introduces a counter claim of liquidated damages and in the alternative payment of the unpaid balance of the purchase price. The claims stem from the said sale agreement dated 9th September 2016. I find that this does not introduce a new cause of action and I find that the plaintiffs will have an opportunity to respond to the amendments and file further documents and evidence if need be. I find that this does not contravenes order 8 of the Civil Procedure Rules. I find that this application is merited and I grant the same. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF
APRIL 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL