



**Mackroscar Aegnya Limited v Goodhope Christian Church, Kasarani & 12 others
(Environment and Land Case 107 of 2010) [2025] KEELC 5437 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 107 OF 2010**

**AA OMOLLO, J
JULY 17, 2025**

BETWEEN

MACKROSCAR AEGNYA LIMITED PLAINTIFF

AND

GOODHOPE CHRISTIAN CHURCH, KASARANI 1ST DEFENDANT

RAVIURE OF REVOLUTION CENTRE 2ND DEFENDANT

VTCENT JACK OCHUODHO 3RD DEFENDANT

STEPHEN N.KIOKO 4TH DEFENDANT

SAMUEL WACHIRA KAMAU 5TH DEFENDANT

JOHN MUNGAI 6TH DEFENDANT

STEPHEN CHEGE KARIGI 7TH DEFENDANT

TERESIA WANJIRU KAMAU 8TH DEFENDANT

HANNAH NYAGUTHI WAWERU 9TH DEFENDANT

JUMA NGORONGO 10TH DEFENDANT

GITAU NOORONGO 11TH DEFENDANT

JOHN NJENGA 12TH DEFENDANT

**DAVID MUTUA MASAKU, SOLOMON NDUNGU NGARI, SEDEKIA ODAGO
OBERA (SUED ON BEHALF MACHARIA MACHARIA NJUGUNA -
DCD) 13TH DEFENDANT**



RULING

1. The 13th Defendant/Applicant filed chamber summons dated 28th January 2025 supported by an affidavit sworn by David Mutua Masaku on the same date seeking for the following orders;
 - a. That the 13th Defendants be granted leave to amend their defence in terms of the draft defence and counterclaim annexed to the Application herein.
 - b. That leave be granted to the 13th Defendants /Applicants to amend their statement of Defence in accordance with the draft amended statement of defence and counterclaim annexed hereto.
 - c. That the draft amended statement of defence and counter claim be deemed as duly-filed upon payment of requisite filing fees.
 - d. That the costs be in the cause.
2. The application was based on the grounds that the Applicants filed an application on 11th July 2023 to be substituted in place of the late Macharia Njuguna (formerly the 13th Defendant), which request was allowed by the court.
3. That following this, the court granted leave to amend their defence however, they had included a counterclaim without obtaining leave, as noted in the ruling dated 26th September 2024. Therefore, this court struck out the counterclaim filed on 19th September 2023 for being improperly on record.
4. The Applicants stated that they now have moved the court seeking leave to amend their Defence dated 1st September 2023 to properly include the counterclaim arguing that no prejudice will be caused to the Plaintiff if the application is granted.

Plaintiff's Preliminary Objection:

5. The Plaintiff/Respondent filed a preliminary objection dated 28th February 2025 on the grounds that the application herein is Res Judicata as the issues raised therein were decided on merit vide two Rulings made by this Court on the 4th of October 2011 and on the 26th of September 2024.
6. That the Ruling dated 4th October 2011 dismissed the Applicants' application dated 17th March 2011 which had sought leave to file a defence out of time and the Ruling dated 26th September 2024 struck out the Applicants' counter-claim for being improperly on record thus the court has no jurisdiction to entertain this application herein.

Plaintiff's Replying Affidavit

7. The Plaintiff also filed a replying affidavit sworn on 28th March 2025 by Irene Sonia Mumbi, its Managing director in opposition of the application. She deposed that the application is incompetent, res judicata, and an abuse of court process. That a similar application was filed in 2011 and dismissed, and the current application attempts to reintroduce a counterclaim after the close of the Plaintiff's case.
8. The Plaintiff contends that despite a ruling on 26/9/2024 and a review application granted on 24/9/2024, the Applicants continue filing repetitive applications causing undue delay, prejudice, and is contrary to the principle that amendments should be made before trial. The Plaintiff stated that the new counterclaim introduces fresh facts and seeks adverse possession, which the Plaintiff says is unfair this late in proceedings.



Applicants' further affidavit

9. In response, the Applicants filed a further affidavit sworn by David Mutua Masaku on 25th April 2025 stating that the ruling of 4th October 2011 was set aside, and they were allowed to file a Defence dated 24th April 2013. That following the death of Macharia Njuguna, the 13th Defendant appointed a different Advocate and the subsequent application filed was necessary due to the substitution and not a delay tactic.
10. They disputed the Plaintiff's claim that a review was allowed, asserting that the court did not grant review, but instead struck out the counterclaim for being improperly on record, per paragraph 10 of the ruling dated 26th September 2024. That they now seek proper leave to file the counterclaim, arguing that it is in good faith and does not prejudice the Plaintiff, especially since both parties had agreed to start the case de novo in January 2024.
11. They assert that amendments can be allowed at any stage of the proceedings under Order 8 Rule 5(1), Rule 3, and Section 100 of the *Civil Procedure Act*. They deny that the counterclaim has introduced new facts but reiterates facts already in their defence specifically, that they were in possession of the land as early as 1993.
12. The Applicants dated 24th April 2025 in support of the Application and those in opposition thereof by the Plaintiff/Respondent dated 14th April 2025 and 15th May 2025. I have read and considered the submissions filed.

Determination:

13. The first issue for determination is whether the P.O by the Plaintiffs is merited. In the present case, the PO is premised on the main ground that the instant suit is res judicata. The principle of res judicata is embedded under Section 7 of the *Civil Procedure Act* which provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
14. In this case, the Plaintiff/Respondent contend that the issues raised by the Applicants herein were dealt with in the rulings dated 4/10/2011 and 26/9/2024. That this court already struck out the Applicants' amended counter claim vide ruling dated 26/9/2024 for being improperly on record. The Plaintiff has referenced Notice of motion dated 17th March 2011 whereby the Defendants sought for unconditional leave to file their defence out of time and that the draft defence herein be deemed to be duly filed upon payment of requisite court fees.
15. It is noteworthy that seeking for leave to file a pleading out of time is different from seeking leave to amend a pleading. Therefore, leave having been granted and a statement of defence file would not bar any party to move the court where sufficient cause is shown for amendment. This is supported by the provisions of order 8 of the Civil Procedure Rules that allow amendment at any stage before judgement is entered.
16. Further, the Plaintiff have referenced the ruling dated 26/9/2024 which dealt with the application dated 11th July 2023 brought by the applicants seeking among other orders that if the defence of 13th Defendants' herein abated, the same be revived. I find that the issue on seeking leave to amend the



Defence was yet to be raised and that is why the filed amended defence and counter claim was struck out because it had been slipped in without leave of the court. An order of striking out is not a bar to any subsequent filings.

17. On the merit of the application, the Applicants stated that having substituted the late Macharia Njuguna (formerly the 13th Defendant) as permitted by the court, they included a counterclaim without obtaining leave which was struck out thus seek leave to have it properly on record. That the counter-claim is not raising any new issue as their stay on the land was already pleaded. One of the prayers sought in the plaint is an order of eviction.
18. In any event, whether occupation by the Defendants is as trespassers and or adverse possessors are not new facts. Guided by the provision on Order 8 Rule 3(5) of the Civil Procedure, the relief of adverse possession sought by the Applicants in their draft defence and counter claim, arises substantially from the same facts as the Plaintiff's cause of action against the Defendants and in respect of the already filed defence.
19. The Defence case is yet to commence therefore any prejudice the Plaintiff is likely to suffer can be cured by being granted leave and also costs. It is imperative to give parties opportunity to present their claim to avoid multiplicity of suits. I have perused the court file and noted mentions of previous suits relating to the same subject matter and so allowing the amendment is necessary to avoid filing of other suits.
20. In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the court considered the rationale behind the court's power to allow amendment of pleadings:

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others v. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

21. In the case of *Central Kenya Limited v Trust Bank Limited & 5 Others* [200]eKLR the Court of Appeal (Gicheru, Bosire & Owuor, JJA) whilst referring to commentaries on the Indian Civil Procedure Code by Chittaley and Rao stated as follows with regards to the settled rule to amendment of pleadings:

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested



interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

Their Lordships went on to state that;

“It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend 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 (see, *Beoco Ltd v Alfa Laval Co. Ltd* [1994]4 ALL ER. 464).”

22. Accordingly, having taken into consideration the facts presented in support of and against the application as well as the law, I hold that the application is for allowing. The same is granted on terms that:
- a. That leave be and is hereby granted to the 13th Defendants /Applicants to amend their statement of Defence in accordance with the draft amended statement of defence and counterclaim annexed hereto.
 - b. The amended defence and counter-claimed be filed and served within 7 days hereof.
 - c. The Plaintiff is awarded costs of Kshs 15000 payable within 45 days hereof. In default, they are at liberty to executed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2025.

A. OMOLLO

JUDGE

