



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muriithi & 2 others (Suing in His Capacity as the Administrator of the Estate of the Late Joseph Maingi Muriithi) v Karungo & 3 others; Muriithi & 122 others (Interested Parties) (Environment and Land Case Civil Suit 7 of 2012 & Environment & Land Case 814 & 430 of 2013 & 256 of 2021 (Consolidated)) [2024] KEELC 5721 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5721 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND CASE CIVIL SUIT 7 OF 2012 & ENVIRONMENT  
& LAND CASE 814 & 430 OF 2013 & 256 OF 2021 (CONSOLIDATED)**

**JO MBOYA, J**

**JULY 29, 2024**

**BETWEEN**

**BENSON RITHO MURIITHI ..... PLAINTIFF  
SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF  
THE LATE JOSEPH MAINGI MURIITHI**

**AND**

**GEROGE NGUGI KARUNGO ..... 1<sup>ST</sup> DEFENDANT  
GEORGE OGALO ONER ..... 2<sup>ND</sup> DEFENDANT  
GEONER SYSTEMIS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**STEPHEN MAINGI MURIITHI ..... INTERESTED PARTY  
JANE HIUKO MURIITHI ..... INTERESTED PARTY  
CHARLES MUGAMBI GITHENYA ..... INTERESTED PARTY  
REBECCA WANJIRU MURIITHI ..... INTERESTED PARTY  
ELVIS MUREITHI WAMAE ..... INTERESTED PARTY  
SAMUEL KAMAU WAMAE ..... INTERESTED PARTY  
STANLEY GATHURA NJENGA ..... INTERESTED PARTY  
LEONARD KAMENWA MBURU & 106 OTHERS ..... INTERESTED PARTY  
JACINTA NYAWIRA KINGI ..... INTERESTED PARTY  
HON.FERDINAND WAITITU ..... INTERESTED PARTY**



WILKA GENERAL MERCHANTS LTD ..... INTERESTED PARTY  
RECHO NJOKI WAINAINA ..... INTERESTED PARTY  
SUSAN NJOROGE ..... INTERESTED PARTY  
DAVID MWAURA ..... INTERESTED PARTY  
JOHN W. WANJOHI ..... INTERESTED PARTY  
WILSON NDUNGU KAMOMOE ..... INTERESTED PARTY  
ZACHARY GATHOGA NDUNGU & 106 OTHERS ..... INTERESTED PARTY

AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 430 OF 2013

BETWEEN

JACINTA NYAWIRA KINGI ..... PLAINTIFF

AND

GEORGE OGALO ONER ..... DEFENDANT

AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 256 OF 2021

BETWEEN

KENT ESTATES LIMITED ..... PLAINTIFF

AND

ZACHARIA GATHOGA NDUNG'U ..... DEFENDANT

RULING

**Introduction And Background:**

1. The Plaintiff/Applicant herein has approached the court vide Notice of Motion Application dated the 6<sup>th</sup> March 2024 brought pursuant to the provisions of Order 8 Rules 1, 2, 3 and 8 of the Civil Procedure Rules, 2010 and in respect of which the Applicant has sought for the following reliefs [verbatim]:
  - i. That that the Amended Defence and Counterclaim of the 1<sup>st</sup> Defendant, George Ngugi Karungo, more particularly amendments in paragraph 58, and 58(f), 96A, 96B, 96C, 96D,96E,96L of 1st Defendant's Amended Defence and Counterclaim dated 31st October 2023and filed in ELC Case No. 7 of 2012 be declined and/or struck off the Court record.
  - ii. That the Amended Plaint of the Plaintiff, Kent Estates Limited dated 2<sup>nd</sup> November 2023entirety.
2. The instant Application on behalf of the Applicant is premised on numerous grounds which have been highlighted in the body therefore. Furthermore, the Application beforehand is supported by the



Affidavit of one Benson Ritho Mureithi [Plaintiff/Applicant] sworn on the 6<sup>th</sup> March 2024 and to which the deponent annexed five [5] documents.

3. Upon being served with the Application beforehand, the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit sworn on 3<sup>rd</sup> May 2024 and in respect of which same [deponent] has contended that the subject Application by the Applicant is inter alia calculated to mislead the Court as well as to obstruct the expeditious hearing and determination of the dispute.
4. The subject Application came up for hearing on 11<sup>th</sup> June 2024, whereupon the advocates for the parties [principally the advocate for the Applicant and the 1<sup>st</sup> Defendant/Respondent] covenanted to canvass and dispose the Application by way of written submissions.
5. Pursuant to and in line with the agreement by the designated advocates, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. Instructively, the Plaintiff/Applicant thereafter proceeded to and filed written submissions dated 3<sup>rd</sup> July 2024 whereas the 1<sup>st</sup> Defendant/Respondent filed written submissions dated the 11<sup>th</sup> July 2024.
6. For coherence, the two [2] sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court.

### **Parties' Submissions:**

#### **A. Applicant's Submissions:**

7. The Applicant herein filed written submissions dated 3<sup>rd</sup> July 2024 and wherein same [Applicant] has adopted the grounds enumerated in the body of the Application as well as the averments contained in the Supporting Affidavit. Furthermore, the Applicant has thereafter raised and highlighted four [4] pertinent issues for due consideration and determination by the court.
8. Firstly, learned counsel for the Applicant has submitted that the amendment contained in the body of the Amended Statement of Defence and Counterclaim filed by and on behalf of the 1<sup>st</sup> Defendant in respect of ELC No. 7 of 2012, are such that same [amendments] have altered and changed the character of the Defence and Counterclaim by and on behalf of the said 1<sup>st</sup> Defendant.
9. Additionally, learned counsel for the Applicant has contended that the said amendments which are complained of have introduced an additional party, namely, an interested party by the name of Stephen Maingi Mureithi, who is being contended to have been the original beneficial owner of some of the properties in dispute. Nevertheless, counsel has posited that the contention pertaining to and concerning the said Stephen Maingi Mureithi, is being introduced for the very first time at the foot of the Amended Counterclaim.
10. Owing to the foregoing, learned counsel for the Applicant has submitted that the introduction of the said Stephen Maingi Mureithi into the picture brings forth a new cause of action, which had hitherto not been impleaded by the 1<sup>st</sup> Defendant/Respondent. Consequently, counsel has added that the impugned introduction of the said interested party and the new cause of action, will unduly prejudice the Applicant herein.
11. Secondly, learned counsel for the Applicant has submitted that the introduction of the said Stephen Maingi Mureithi constitutes an afterthought by and on behalf of the 1<sup>st</sup> Defendant/Respondent and same is intended to convolute the issues in dispute. In any event, learned counsel has posited that the said Stephen Maingi Mureithi has since passed on and hence the Applicant herein would not be able to test the veracity of the allegations adverted to by and on behalf of the 1<sup>st</sup> Defendant/Respondent.



12. Thirdly, learned counsel for the Applicant has also submitted that the 1<sup>st</sup> Defendant herein had hitherto stated and indeed conceded that the Plaintiff/Applicant was the original beneficial owner of the various properties under dispute and that pursuant to the position that was taken by the 1<sup>st</sup> Defendant/Respondent, the parties herein proceeded to and engaged in mediation, which culminated into a partial settlement.
13. Nevertheless, it has been contended that the contention which is now being introduced by and on behalf of the 1<sup>st</sup> Defendant/Respondent at the foot of the Amended Statement of Defence and Counterclaim is contrary to the position hitherto taken and thus same amounts to approbation and reprobation on the part of the 1<sup>st</sup> Defendant/Respondent, which same contends ought not to be allowed.
14. Fourthly, learned counsel for the Applicant has also submitted that the Amended Plaint in respect of ELC No. E256 of 2021 also ought to be struck out, insofar as it is contended that same [Amended Plaint] was filed without leave of the court.
15. Other than the foregoing, learned counsel for the Applicant has also contended that assuming that the Amended Plaint vide ELC No. E256 of 2021 was amended with leave attendant to the Order of the Court made on the 25<sup>th</sup> July 2023 then the amendments contained in the body of the Amended Plaint have [sic] exceeded the scope of the Order by the Court by inter alia introducing a new cause of action.
16. Arising from the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the impugned amendments, namely the amendment at the foot of the Amended Statement of Defence and Counterclaim vide ELC No. 7 of 2012 and Amended Plaint vide ELC NO. E256 of 2021, ought to be struck out and expunged from the record of the court.
17. In support of the foregoing submissions, which essentially gravitates around the necessity to strike out and expunge the amended pleadings filed by the 1st Defendant/Respondent in ELC No. 7 of 2012; and Plaintiff in ELC No. E256 of 2021, learned counsel for the Applicant has cited and referenced inter alia the holding in the case of Daniel Ngétich & Another v K-Rep Bank Ltd [2013]eKLR, Bosire Ogero v Royal Media Services [2015]eKLR, Institute for Social Accountability & Another v Parliament of Kenya & 2 Others; Commission for the Implementation of *the Constitution* [Interested Party] [2014 KEHC 7356 KLR] and Edds Designers Ltd United Credit Ltd; Joseth M Gokonyo & Another [2022]eKLR.
18. In a nutshell, learned counsel for the Applicant has implored the Court to find and hold that the Application beforehand is meritorious and thus ought to be allowed in terms of the prayers sought thereunder.

**B. 1<sup>st</sup> Defendant/respondent's Submissions:**

19. The 1<sup>st</sup> Defendant/Respondent filed written submission dated 11<sup>th</sup> July 2024 and in respect of which same [1<sup>st</sup> Defendant] has adopted and reiterated the averments contained at the foot of the Replying Affidavit sworn by George Ngugi Karungo on 3<sup>rd</sup> May 2024.
20. Other than the contents of the Replying Affidavit which have been highlighted in the body of the written submissions, the 1<sup>st</sup> Defendant/Respondent has raised and canvassed three [3] salient issues for consideration by the court.
21. First and foremost, learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the Amended Statement of Defence and Counterclaim which is the subject of the current Application



was filed in response to an Amended Plaintiff filed and served by the Plaintiff/Applicant pursuant to and in line with the Order of the Court issued on 27<sup>th</sup> March 2023.

22. Furthermore, learned counsel for the 1<sup>st</sup> Defendant/Respondent has contended that the Amended Statement of Defence and Counterclaim has responded to the issues raised vide the Amended Plaintiff and hence the Applicants herein cannot now be heard to turn around and seek to guide the 1<sup>st</sup> Defendant/Respondent pertaining to the manner in which same [1<sup>st</sup> Defendant/Respondent] should respond to the Amended Plaintiff.
23. Secondly, learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the paragraphs of the Amended Statement of Defence and Counterclaim which have been impugned by the Applicant herein have not introduced any new issues or at all. For good measure, learned counsel has contended that the aspects of the amendment being complained of have indeed traced the history and factual background pertaining to ownership of the suit properties, which background is material and paramount to the determination of the issues in dispute.
24. Thirdly, learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that the Plaintiff/Applicant herein has hitherto adopted and deployed tactics aimed at delaying, obstructing and/or otherwise defeating the hearing and determination of the dispute herein. Furthermore, it has been contended that the current Application is yet another tactic being deployed by the Plaintiff/Applicant to defeat the expeditious hearing and determination of the matter.
25. Other than the foregoing, learned counsel for the 1<sup>st</sup> Defendant/Respondent has also submitted that the instant application also adverts to and seeks to strike out the Amended Plaintiff vide ELC No. E256 of 2021, yet the said suit, [ELC E256 of 2021], has not been consolidated with the instant suit. In this regard, learned counsel for the 1<sup>st</sup> Defendant/Respondent has posited that the current Application, as far as same touches on ELC E256 of 2021, is premature and misconceived.
26. Premised on the foregoing, learned counsel for the 1<sup>st</sup> Defendant/Respondent has implored the Court to find and hold that the current Application is not only misconceived, but same constitutes an abuse of the due process of the court. Consequently, learned counsel for the 1<sup>st</sup> Defendant/Respondent has submitted that same [Application] ought to be dismissed.

#### **Issues For Determination:**

27. Having reviewed the Application beforehand and the response thereto and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues do crystalize[emerge] and are thus germane for determination;
  - i. Whether the Honourable Court is seized of jurisdiction to strike out the Amended Statement of Defence and Counterclaim in the manner sought or whether such an endeavour shall constitute an appeal against the orders of the court made/issued on the 27<sup>th</sup> March 2023.
  - ii. Whether the Amended Statement of Defence and Counterclaim has introduced any new issue and/or cause of action, either in the manner adverted to or otherwise.
  - iii. Whether the Honourable Court ought to strike out the Amended Plaintiff vide ELC No. E256 of 2021.
  - iv. Whether the Application beforehand constitutes and/or amounts to an abuse of the due process of the court.



## Analysis And Determination

### **Issue Number 1 Whether the Honourable Court is seized of jurisdiction to strike out the Amended Statement of Defence and Counterclaim in the manner sought or whether such an endeavour shall constitute an appeal against the orders of the court made/issued on the 27<sup>th</sup> March 2023.**

28. It is common ground that the Plaintiff/Applicant herein sought for and obtained leave of the Court to file and serve an Amended Plaintiff. For clarity, the Court proceeded to and directed that the Plaintiff/Applicant herein does file and serve the Amended Plaintiff on all the parties within 7 days from the date of the Order.
29. Pursuant to and in line with the Orders of the Court, the Plaintiff/Applicant herein proceeded to and indeed filed an Amended Plaintiff and wherein same Plaintiff/Applicant adverted to and highlighted various issues that same [Plaintiff/Applicant] sought to canvass and ventilate before the court.
30. Suffice it to point out that upon being served with the Amended Plaintiff dated 10<sup>th</sup> April 2023, the 1<sup>st</sup> Defendant/Respondent deemed it appropriate, just and expedient to file and serve an Amended Statement of Defence and Counterclaim. For good measure, the Amended Statement of Defence and Counterclaim is dated 31<sup>st</sup> October 2023.
31. Instructively, it is the said Amended Statement of Defence and Counterclaim that is now being sought to be struck out by and on behalf of the Plaintiff/Applicant on the basis inter alia that the said Amended Statement of Defence and Counterclaim has introduced a new third party [namely interested party] as well as introduced a new cause of action, which is contrary to and in contradiction of the position hitherto taken and canvassed by the 1<sup>st</sup> Defendant/Respondent.
32. As pertains to the contention that the Amended Statement of Defence and Counterclaim has raised and canvassed a new cause of action, the 1<sup>st</sup> Defendant/Respondent has indeed filed an elaborate Replying Affidavit sworn on 3<sup>rd</sup> May 2024. For coherence, the import of the Replying Affidavit herein shall be adverted to and referenced whilst dealing with issue number two.
33. Be that as it may, the question that the Court must now grapple with relates to whether the Court is seized of the jurisdiction to strike out the Amended Statement of Defence and Counterclaim either in the manner sought or otherwise. Firstly, there is no gainsaying that the Applicant herein sought for and obtained leave to file and serve an Amended Plaintiff and which Amended Plaintiff was thereafter filed and served.
34. Having filed and served the Amended Plaintiff pursuant to and in accordance with leave of the court, instructively, the adverse parties accrued and attracted corresponding leave and liberty to file and serve amended pleadings in response to the Amended Plaintiff filed. [See Order 8 Rule 1[2] of the Civil Procedure Rules, 2010].
35. To my mind, the 1<sup>st</sup> Defendant/Respondent herein accrued and earned a legitimate right to file and serve the Amended Statement of Defence and Counterclaim, once same was served with an Amended Plaintiff on behalf of the Plaintiff/Applicant.
36. Notably, the filing and service of the Amended Statement of Defence and Counterclaim by the 1<sup>st</sup> Defendant/Respondent is a right conferred and vested upon the 1<sup>st</sup> Defendant/Respondent by law and hence the Court has no jurisdiction to interfere with such a right, unless the amendment in question infringes upon and or violates some known provisions of the law, which is not the case herein.



37. Secondly, the filing and service of the Amended Statement of Defence and Counterclaim was informed by the Orders of the Court issued on 19<sup>th</sup> April 2023 and which orders were explicit. For coherence, the Court ordered and directed inter alia that the Defendants are hereby granted leave to file their responses to the Amended Plaintiff within 14 days.
38. In my humble view, for as long as the orders of the Court issued on 27<sup>th</sup> March 2023 and 19<sup>th</sup> April 2024 remain in situ, the current Application is and constitute an endeavour to invite this court to sit on appeal on the decision and/or orders of a court of a coordinate jurisdiction. Quite clearly, such an invitation is antithetical to the rule of law and shall amount to an absurdity.
39. Arising from the foregoing, my answer to issue number one [1] is twofold. Firstly, the filing and serving of the Amended Statement of Defence and Counterclaim by the 1<sup>st</sup> Defendant/Respondent arose as a matter of right and is underpinned by clear and explicit provisions of the Civil procedure Rules, 2010.
40. Secondly, the filing and serving of the Amended Statement of Defence and Counterclaim is indeed anchored on the Orders of the Court made on 19<sup>th</sup> April 2023 and which orders have neither been reviewed nor set aside.
41. Consequently, any endeavour to strike out and/or expunge the Amended Statement of Defence and Counterclaim will be tantamount to sitting on appeal on the decision of a court of coordinate jurisdiction, which process/endeavour must be eschewed by a conscientious court of law. [See the decision in *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018)* [2018] KECA 330 (KLR) (21 September 2018) (Judgment)].

**Issue Number 2 Whether the Amended Statement of Defence and Counterclaim has introduced any new issue and/or cause of action, either in the manner adverted to or otherwise.**

42. Other than the position which has been highlighted and discussed in terms of the preceding paragraphs, the Applicant herein has underpinned the Application beforehand on the basis that the Amended Statement of Defence and Counterclaim has introduced a new third party [Stephen Mainge Mureithi] and also introduced a new cause of action.
43. In response, the 1<sup>st</sup> Defendant/Respondent has filed an elaborate Replying Affidavit sworn on 3<sup>rd</sup> May 2024 and in respect of which same [1<sup>st</sup> Defendant/Respondent] has averred that the amendments complained of have not introduced any new issue, either as contended by the Applicant or otherwise.
44. Furthermore, the 1<sup>st</sup> Defendant/Respondent has also averred that the aspect of the Amended Statement of Defence and Counterclaim, which are being impugned constitutes responses to various allegations that have been brought forth vide the Amended Plaintiff filed on behalf of the Plaintiff/Applicant.
45. To my mind, what I hear the 1<sup>st</sup> Defendant/Respondent to be stating is that the contents of the Amended Statement of Defence and Counterclaim are couched in a manner to respond to and address the issues that have been generated by the Plaintiff/Applicant. Besides, the 1<sup>st</sup> Defendant/Respondent also posits that the averments being challenged relates to facts that are attendant to the dispute touching on and or concerning ownership of the suit properties.
46. Notwithstanding the fact that the 1<sup>st</sup> Defendant/Respondent filed an elaborate Replying Affidavit and wherein same has endeavoured to demonstrate that the issues being challenged by the Applicant are not new issues, but are related to the question of ownership of the suit properties, the Applicant herein



has neither found it fit nor apposite to file a Further Affidavit to controvert the averments highlighted in the body of the Replying Affidavit.

47. In my humble view, the averments at the foot of the Replying Affidavit ought to have attracted a Further/Supplementary Affidavit in response thereto. However, in the absence of a Further Affidavit by and on behalf of the Plaintiff/Applicant herein, it suffices to point out that the averments at the foot of the Replying Affidavit are deemed to be reflective of the correct and obtaining factual position.
48. At any rate, where the contents of the Replying Affidavit are not controverted by the adverse party, [in this case the Plaintiff/Applicant], the legal position is to the effect that the contents of such an affidavit are deemed to be admitted and/or conceded to. [See Mohammed and another v Haidara [1972] 1 EA 166 (CAN)].
49. Consequently, and in this regard, I find and hold that the contents of the Replying Affidavit, which have not been controverted, represent the correct position and in particular, that the contents of the Amended Statement of Defence and Counterclaim are merely responding to the Amended Plaint and furthermore, are in respect of the facts pertinent to the determination of the dispute beforehand. [See Daniel Kibet Mutai & 9 Others v The Attorney General [2019] eKLR].
50. Additionally, it is also worthy to point out that the Application by and on behalf of the Plaintiff/Applicant herein is calculated to invite the Court to undertake minute interrogation and examination of the facts in controversy in the matter vide the interlocutory application and thereafter to [sic] arrive at a decision as to whether they are new facts that have been introduced.
51. Be that as it may, I beg to point out and underscore that the question of factual controversy cannot be entertained and interrogated by the court in a summary manner and worse still, on the basis of an interlocutory application. In this regard, I would also come to the conclusion that the Application to strike out the Amended Statement of Defence and Counterclaim is misconceived.

**Issue Number 3 Whether the Honourable Court ought to strike out the Amended Plaint vide ELC No. E256 of 2021.**

52. The Plaintiff/Applicant has also sought to strike out and expunge the Amended Plaint vide ELC E256 of 2021 on the basis that the Amended Plaint was filed without leave.
53. On the other hand, the same Plaintiff/Applicant is also on record as stating that the Plaintiff in respect of ELC E256 of 2021 filed an application wherein same sought for leave to join the Plaintiff in respect of ELC No. 7 of 2012 as an interested party. For good measure, learned counsel for the Applicant has thereafter posited that same indeed conceded to the Application for Joinder which was made in respect of ELC No. E256 of 2021.
54. Arising from the foregoing, it is difficult to understand and appreciate the gist/substratum of the Applicant's submissions when same contends that the Amended Plaint vide ELC No. E256 of 2021 was amended without leave.
55. In my humble view, it behooves learned counsel for the Plaintiff/Applicant to be truthful and forthright with the Court. At any rate, counsel cannot adopt an omnibus approach wherein on one hand same adverts to leave having been granted for joinder of a party, which automatically culminates into an amendment whilst on the other hand contending that no leave was ever granted.
56. Pertinently, what becomes apparent from the position adopted by learned counsel for the Applicant is an endeavour to convolute the issues and by extension confuse the court, which posture ought to be frowned upon, by all and sundry.



57. Be that as it may and taking into account, the contents of ground[s] 5, 6 and 7 of the Application, it is my finding and holding that leave was indeed granted to the Plaintiff in ELC E256 of 2021 to amend the Plaint and inter alia join an interested party thereto.
58. Secondly, learned counsel for the Plaintiff/Applicant confirms and indeed concedes that same consented to an amendment of the Plaint vide ELC No. E256 of 2021. However, the only borne of contention is to the effect that the amendment has introduced new issues and thereby altered the character of the case that was hitherto pleaded.
59. Nevertheless, I beg to point out that at the point in time when the application for joinder and by extension an amendment, was filed, there was no Draft Amended Plaint filed and hence the liberty granted by the court for purposes of amendment was not circumscribed or otherwise.
60. At any rate, if the Plaintiff/Applicant herein was desirous to discern the nature and scope of amendment that was to be filed, then same [Plaintiff/Applicant] ought to have demanded that a Draft Amended Plaint be filed prior to the orders on amendment, if same, was of the mindset that such an endeavour was necessary and apposite.
61. To my mind the order for joinder having been granted without any limitation and/or restriction, the Plaintiff in ELC E256 of 2021 was therefore at liberty to file and serve the Amended Plaint. Consequently, the Amended Plaint under reference cannot now be the subject of an application for striking out.
62. Lastly, I also hold the view that having participated in the proceedings culminated into the liberty to amend the Plaint in respect of ELC No. E256 of 2021, in the manner adverted to in terms of grounds 5, 6, 7, 9 and 16[d] of the Application herein, the Applicant herein cannot now be heard to seek to strike out the Amended Plaint yet the orders granting such liberty [ and which Orders which issued by Consent] have neither been reviewed nor discharged.
63. In a nutshell, my answer to issue number three [3] is to the effect that the Amended Plaint vide ELC E256 of 2021 was lawfully filed in accordance with the lawful orders of the court. Furthermore, the Amended Plaint which is sought to be impeached is also fortified by the provisions of Order 1 Rule 10[4] of the Civil Procedure Rules 2010.
64. Nevertheless and before departing from the issue herein, it suffices to cite and reference the holding of the Court of Appeal in the case of Pravin Bowry versus John Ward [2015] eKLR, where the Court had occasion to consider the import and tenor of the provision[s] of Order 1 Rule 10[2] and [4] of the Civil Procedure Rules, 2010.
65. For coherence, the Court held and stated thus:

“The addition of a party will result in the amendment of pleadings to effect the joinder allowing the parties to either lay a claim of right or defend themselves against any claim made by the added party. This leeway to the amendment of pleadings is acceptable only to the extent that it does not cause any prejudice or injustice which cannot be compensated by costs”.



**Issue Number 4 Whether the Application beforehand constitutes and/or amounts to an abuse of the due process of the court.**

66. It is common ground that the Plaintiff/Applicant herein is the one who first sought for and obtained leave to file and serve an Amended Plaintiff. Furthermore, upon being granted leave, same [Plaintiff/Applicant] indeed filed and served the Amended Plaintiff.
67. Pertinently, upon being served with the Amended Plaintiff, the adverse parties inter alia the 1<sup>st</sup> Defendant/Respondent automatically accrued the right to file and serve an Amended Statement of Defence and Counterclaim, if any. In this respect, it suffices to underscore that the 1<sup>st</sup> Defendant/Respondent indeed filed and served an Amended Statement of Defence and Counterclaim.
68. To my mind, the filing and service of the Amended Statement of Defence and Counterclaim was in exercise of a lawful right provided for under the law. Consequently, an application like the one beforehand which is directed to striking out the amended statement of defence and counterclaim, which is filed as a matter of right, must no doubt be informed by mala fides and thus constitutes an abuse of the due process of the court.
69. Secondly, it is also important to underscore that the Amended Statement of Defence and Counterclaim which is sought to be struck out was filed on 31<sup>st</sup> October 2023 and yet the current Application was not filed until 6<sup>th</sup> March 2024.
70. Suffice it to underscore that the duration that was taken by the Plaintiff/Applicant to file the current Application, is indeed unreasonable and inordinate. In this regard, one would have expected the Applicant to account for or justify the delay, which is not the case.
71. To my mind, the amount of time taken prior to and before the filing of the current Application is also a pointer to lack of bona fides in the Application before hand. Quite clearly, the Plaintiff/Applicant herein appears to be intent on using the current Application to delay and/or obstruct the hearing and determination of the dispute beforehand, which dates back to the year 2012.
72. Arising from the foregoing observations [details highlighted in the preceding paragraph], I come to the conclusion that the Application beforehand has not been made in good faith and same [Application] reeks of mala fides. In short, the Application constitutes and amounts to an abuse of the due process of the court.
73. Before departing from the issue herein, it suffices to adopt and reiterate the decision of the Supreme Court of Kenya [the apex court] in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling), where the Court highlighted and discussed the concept of abuse of the due process of the court.
74. For coherence, the Court stated and held thus:
27. In Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012 [2012] eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:
- “The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...” ....Beyond



that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

75. In short, it is my humble view that the Application beforehand fits within the parameters of what constitutes and amounts to an abuse of the due process of the court. [See also *Satya Bharna v Director of Public Prosecution* [2018] eKLR].

**Conclusion:**

76. Flowing from the discussion highlighted in the body of the Ruling, it is evident and apparent that the Application beforehand, which essentially seeks to strike out the various pleadings alluded to thereunder, is not only misconceived, but same also constitutes an abuse of the due process of the court.
77. Furthermore, it is not lost on this Court, that striking out of a pleading, the ones at the foot of the current Application not excepted, is a drastic and draconian measure, which ought to be adopted and resorted to only in the clearest of cases and not otherwise..Besides, striking out of a pleading [ suit] ought to be exercised sparingly and as a matter of last resort. [See *D.T Dobbie & Co Ltd v Muchina* [1982] eKLR].

**Final Disposition:**

78. In a nutshell, it is my finding and holding that the Application dated 6<sup>th</sup> March 2024, is devoid and bereft of merits. Consequently, same be and is hereby dismissed with costs to the 1<sup>st</sup> Defendant/ Respondent in ELC No. 7 of 2012 and the Plaintiff/Respondent in ELC No. E256 of 2021.
79. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF JULY 2024.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of:

Benson – Court Assistant

Mr. Daniel Amalemba for the Plaintiff/Applicant.

Mr. Peter Kimani for the 1st Defendant/Respondent and Plaintiff in ELC No. E256 of 2021.

Mr. Nyangweso for the 2nd and 3rd Defendants/Respondents.

Mr. Wanjohi for the 12th Interested Party.

Ms. Faith Mbirwe h/b for Mr. AGN Kamau for the 9th Interested Party.

Ms. Waitere for the 13th and 14th Interested parties.

Mr. David Murunga for the 107th Interested Party.

