



REPUBLIC OF KENYA



Agesa & 32 others v Exposure Interlink Agencies Ltd & 9 others (Environment & Land Case 66 of 2019) [2024] KEELC 5526 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 66 OF 2019**

A NYUKURI, J

JULY 25, 2024

BETWEEN

- JOHN ALICHULA AGESA 1ST PLAINTIFF**
DAVIS ONYANGO OPIYO 2ND PLAINTIFF
NICK OKOTH OGUTA 3RD PLAINTIFF
MAURICE KATHIOKI MUSAKUE 4TH PLAINTIFF
DOMITILAH KANINI NGUI 5TH PLAINTIFF
ERICK OBEGI MANDUKU 6TH PLAINTIFF
JAMES KABI MAINA 7TH PLAINTIFF
KENNETH MUTUGI 8TH PLAINTIFF
JOSEPHINE MUTONGOI MARTIN 9TH PLAINTIFF
HELLEN MUKAMI MWANGI 10TH PLAINTIFF
JONATHAN KIILU MWALUKO 11TH PLAINTIFF
SARAH NJERI WANJIKU 12TH PLAINTIFF
SALLY JEPKEMBOI KIMAIYO 13TH PLAINTIFF
BETTY MUTHONI NYAGA 14TH PLAINTIFF
JOSEPH KINYUA WAIGWA 15TH PLAINTIFF
CHARITY CHEROTICH KIMAIYO 16TH PLAINTIFF
OSCAR KIRUGA MAITHIA 17TH PLAINTIFF
PATRICK MUIRURI KARIUKI 18TH PLAINTIFF
ALICE WAHINYA MUKURIA 19TH PLAINTIFF



STEPHEN KIETI KYULE	20 TH PLAINTIFF
JONES KYULE MUNYAO	21 ST PLAINTIFF
JULIUS KITIVO	22 ND PLAINTIFF
JUDITH AKINYI OMONDI	23 RD PLAINTIFF
DANIEL OFERO OYUGI	24 TH PLAINTIFF
PETER MUTUA KIMATU	25 TH PLAINTIFF
MICHAEL CHEMOIYWO KIBARAR	26 TH PLAINTIFF
GEORGE MUGAMBI GITONGA	27 TH PLAINTIFF
SAMSON MAKORI	28 TH PLAINTIFF
CLAIRE TERIGIN	29 TH PLAINTIFF
JOHN NJIHIA	30 TH PLAINTIFF
CONSOLATA MUTINDI NZAMBU	31 ST PLAINTIFF
RICHARD GACHARIA GICHURU	32 ND PLAINTIFF
GEORGE GITONGA NDIRITU	33 RD PLAINTIFF

AND

EXPOSURE INTERLINK AGENCIES LTD	1 ST DEFENDANT
HELLEN WANZA KIOKO	2 ND DEFENDANT
KASINA MWOLOLO	3 RD DEFENDANT
FRANCIS MATHEKA	4 TH DEFENDANT
ALEX MUTUKU MBELENZI	5 TH DEFENDANT
MARK MUTUA MULEI	6 TH DEFENDANT
SAMWEL KALOVOTO SEKE	7 TH DEFENDANT
KITUMBI VENTURES LIMITED	8 TH DEFENDANT
THE LAND REGISTRAR MACHAKOS	9 TH DEFENDANT
THE ATTORNEY GENERAL	10 TH DEFENDANT

RULING

1. On January 31, 2024 when this matter came up for defence hearing, the 7th defendant, Mr. Samwel Kalovoto, took the witness stand, took oath, and in defence, proceeded to seek the leave of court to allow him to withdraw and or recant his statement of defence and witness statement. He stated that it is his advocate who filed the same as he was not privy to the contents thereof.
2. The application was opposed by the plaintiff on the basis that the plaintiffs had closed their case and evidence given took into account the 7th defendant's witness' statement and defence and that the 7th



defendant's evidence is pertinent to assisting the court arrive at a just decision as he was the original proprietor of the suit property. The counsel had no reservations on the withdrawal of the witness statement, but of the statement of defence. It was also counsel's opinion that the 7th defendant should testify to guide the court on his role in the transaction.

3. Similarly, counsel for the 1st defendant was not opposed to the withdrawal of the defence but opined that the witness's evidence was pertinent in assisting the court reach a just decision. Counsel for the 8th defendant held a similar view and added that since the plaintiff had already closed their case, the matter would be impacted if the 7th defendant changed their statement at this point and also that the defence was jointly filed with the 7th defendant being a key player in the matter.
4. In a rejoinder, the 7th defendant stated that he wanted to recant his pleadings and witness statement so that he can later obtain leave to file a fresh defence and witness statement.
5. Therefore this ruling is in respect to the 7th defendant's prayer for recanting defence and witness statement.
6. The statement of defence which the applicant wished to recant is dated August 1, 2019 and filed on August 6, 2019 by Messrs B. M. Mungata Advocates, counsel previously on record for the applicant. The witness statement that the applicant wishes to withdraw is dated April 12, 2021 and filed on May 10, 2021.

Analysis and determination

7. The court has carefully considered the matter and the issue is whether the court should allow the 7th defendant "recant" his defence and witness statement.
8. The *Black's Law Dictionary* defines "recant" as follows;

To withdraw or renounce (prior statements or testimony) formally or publicly
9. Therefore, recanting is renouncing one's testimony in a matter. Can a party recant their defence? The 7th Defendant did not cite any legal provisions underpinning their prayer, neither did the respondents. A defence is a pleading. Does the law allow "recanting" of pleadings? I do not think so.
10. Order 8 of the *Civil Procedure Rules* allows amendment of pleadings. *The Black's Law Dictionary 11th Edition* defines "amend" as "to correct, or make, usually small changes to something written or spoken); to rectify or make right. To change the wording of.... to formally alter (a statute, constitution, motion etc) by striking out, inserting or substituting words.
11. Therefore, to amend is to rectify a document, and a defence may be amended.
12. As for withdrawal of pleadings, under Order 25, it is the plaintiff who can withdraw their suit. This applies to a counterclaim. Can a defendant who has filed their defence without a counterclaim, like in this case, withdraw their defence in the manner suggested by the 7th defendant? It is apparent that there is no legal basis allowing withdrawal of a defence. However, the defendant can amend their defence if they so wish as discussed above.
13. For the above reasons, I decline to allow the application to recant the defence.
14. On recanting his witness statement, it is my view that the defence of the 7th defendant is his business and he can choose the manner in which he will present his testimony. However, having taken oath and stated in evidence that he is recanting his testimony contained in his witness statement, that too is a testimony, which is subject to cross examination and therefore, the 7th defendant is allowed to recant



his witness statement, and since he has done so on oath in support of his defence, he is subject to cross examination. In the premises, the 7th defendant's prayer to recant his witness statement is hereby allowed.

15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Andati for plaintiffs

Mr. Migele holding brief for Mr. Osero for 4th defendant

Ms. Mutua holding brief for Mr. Mutava for 7th & 8th defendants

No appearance for other defendants

Court assistant – Josephine

