



**Kahuthia & 6 others v Kiiru s/o Gachuiga aka Joseph Kiiru Gachuiga  
Substituted By Sammy Maina Kiiiru (Environment & Land Miscellaneous  
Case E2 of 2021) [2024] KEELC 5347 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5347 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E2 OF 2021**

**JO OLOLA, J  
JULY 19, 2024**

**BETWEEN**

**DANIEL IRUNGU KAHUTHIA ..... 1<sup>ST</sup> PLAINTIFF  
MARGARET RUGURU KAHUTHIA ..... 2<sup>ND</sup> PLAINTIFF  
TERESIAH WANJIRA MAKUNDI ..... 3<sup>RD</sup> PLAINTIFF  
TERESH THOGORI KARIUKI ..... 4<sup>TH</sup> PLAINTIFF  
JOHN MAINA MUKUNDI ..... 5<sup>TH</sup> PLAINTIFF  
JAMES MUKUNDI KAHUTHIA ..... 6<sup>TH</sup> PLAINTIFF  
JECINTA KIRIGO MUKUNDI ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**KIIRU S/O GACHUIGA AKA JOSEPH KIIRU GACHUIGA SUBSTITUTED BY  
SAMMY MAINA KIIIRU ..... DEFENDANT**

**RULING**

1. By the Notice of Motion dated 15<sup>th</sup> September 2023, Sammy Maina Kiiru (the Defendant) prays for orders:-
  - b). That the substituted Defendant/Applicant be granted leave to extend time to file an Amended Defence and the draft Amended Defence attached to the Supporting Affidavit be deemed as the Defence filed upon payment of the requisite court fees;
  - c). That an order does issue that the list of witnesses, Witness Statement by Sammy Maina Kiiru and List of Documents dated 17<sup>th</sup> May 2020 filed in Othaya ELC Case No. 249 of 2015 attached to the Affidavit in Support of the application be deemed to be (the) List of Witnesses,



Witness Statement and List of Documents by the Defendant to be relied upon by the said Defendant and the court does grant leave to the Defendant to put in a further Statement as per the attached Statement; and

- d). That the costs be in the cause.
2. The application which is supported by an Affidavit sworn by the Defendant's counsel Muhoho Gichimu is premised on the grounds:-
    - i). That the Plaintiff filed an Amended Plaintiff and the Defendant was granted 14 days within which to file an Amended Defence but due to an oversight, the Amended Defence was never filed;
    - ii). That the List of Documents, the Witness Statement by the Defendant and List of Documents though forming part of the record in the Lower Court file have never been formally filed in the suit herein; and
    - iii). That it is only mete and just that the orders sought be granted since no party will suffer any prejudice.
  3. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Plaintiffs are opposed to the application. In a Replying Affidavit sworn on their behalf by Teresiah Wanjira Mukundi (the 3<sup>rd</sup> Plaintiff), they aver that on 12<sup>th</sup> June 2023, this court granted the Defendant 14 days within which to respond to the Amended Plaintiff and that the said period lapsed on 25<sup>th</sup> June 2023.
  4. The Plaintiffs further aver that on 30<sup>th</sup> July 2023, this court granted both parties 30 days within which to file and exchange their witness statements and the documents they wish to rely on but the Defendant failed to do so. It is the Plaintiffs' case that there is no plausible and/or candid reason given by the Defendant as to why they failed to comply with the court's directions and that the application is therefore void of merit, incompetent and only calculated to cause undue delay in the settlement of this matter.
  5. I have carefully perused and considered the Defendant's application as well as the response thereto by the Plaintiffs. I have similarly perused and considered the submissions placed before me by the Learned Advocate representing the Defendant herein and the Plaintiffs in person.
  6. By this application the Defendant urges the court to allow him to file an Amended Defence, a Witness Statement and List of Documents outside the time that had initially been granted by the court to do so. The Plaintiffs are opposed to the application on the main ground that the Defendant has not offered any plausible reason why he had failed to comply with the original timelines. It is further the Plaintiff's case that the draft Amended Defence attached to the application does not disclose any triable issues.
  7. In regard to the issues of amendment of pleadings, Section 100 of the [Civil Procedure Act](#) provides as follows:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issues raised by or depending on the proceedings.”



8. In addition, Order 8 Rule 5 (1) of the [Civil Procedure Rules](#) provides as follows:-

“(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.”

9. Considering the above provision in *Eastern Bakery –vs- Castelino* [1958] 1 EA 461, the Court of Appeal stated as follows:-

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs..... the court will not refuse to allow an amendment simply because it introduces a new case, but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit ... the court will refuse leave to amend where the amendment would change the action into one of a substantially different character....or when the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the writ..... The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

10. In the matter before me, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Plaintiffs are opposed to the application on the grounds that the Defendant had been given sufficient time to comply and that he had failed without any sufficient reason to do so.

11. From a perusal of the record herein, it is indeed true that the Defendant had been granted two opportunities to be able to file the amended Statement of Defence, his Witness Statement and List of Documents. From the Supporting Affidavit of counsel for the Defendant it would appear that the Defendant had always availed the necessary documents and instructions to his counsel and that it was the said counsel who due to what he attributes to an oversight, failed to act on the same.

12. As Mativo J (as he then was) stated in [Wachira Karani –vs- Bildad Wachira](#) [2016] eKLR:-

“Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocate’s default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions.”

13. In the circumstances herein, I am not persuaded that it would be in the interest of Justice to deny the Defendant a chance to amend his pleadings and to file his statement and the documents he wishes to rely on at the trial.

14. Accordingly I allow the Motion dated 15<sup>th</sup> September 2015 and hereby grant the Defendant 14 days within which to file and serve the Amended Statement of Defence, his Witness Statement and List of Documents.

15. The costs of this application shall be to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Plaintiffs in any event.



16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 19<sup>TH</sup> DAY OF JULY, 2024.**

.....

**J. O. OLOLA**

**JUDGE**

