



Mackroscar Kenya Limited v Goodhope Christian Church, Kasarani & 12 others (Environment & Land Case 107 of 2010) [2024] KEELC 6454 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 107 OF 2010
AA OMOLLO, J
SEPTEMBER 26, 2024**

BETWEEN

MACKROSCAR KENYA LIMITED PLAINTIFF

AND

**GOODHOPE CHRISTIAN CHURCH, KASARANI & 12 OTHERS & 12
OTHERS & 12 OTHERS & 12 OTHERS RESPONDENT**

RULING

1. The Plaintiff has brought the Notice of Motion dated March 4, 2024 premised majorly of section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. It is seeking for orders;
 - a. That the Honourable Court be pleased to review and set-aside its orders that allowed the 13th Defendants/Respondent application dated July 11, 2023 and all the consequential orders.
 - b. That the costs of this application be provided for.
 - c. Any other orders that this Honourable Court may deem just and fit.
2. The application is based on the following grounds;
 1. The 13th Defendant's application dated the 11th day of July, 2023 sought leave to revive the 13th Defendant's defence and substitute him with the administrators of his estate, which prayer was granted.
 2. That it has come to the Plaintiff/Applicant's knowledge that a similar application was made vide a Notice of Motion application dated 17th day of March, 2011 that sought leave to file a defence out of time.
 3. That the honourable Court Vide a Court Order dated 4th October, 2011 dismissed the application with costs to the Plaintiff.



4. That 13th Defendant's application falls within res-judicata and an abuse of the court process and the orders granted allowing the 13th Defendant application ought to be reviewed and set aside.
5. That the Honourable Court is fuctus officio and should not entertain a similar application.
6. It is the interests of justice that this Honourable Court grants the orders prayed herein.
3. Further the application is supported by the affidavit of Irene Sonia Mumbi sworn on the same date of 4th March, 2024. She deposed inter alia that the 13th Defendant's application dated 11th July, 2023 seeking leave to file defence out of time was res judicata the application dated 4th October, 2011 which had been dismissed. That clearly there is mistake/error on the face of the record. Ms. Mumbi annexed copies of pleadings and order in respect to the Motion dated 4th October, 2011 in support of her averments.
4. Sedekia Odago Obera swore a replying affidavit on 19th April, 2024 on behalf of the 13th defendant and in opposition to the application. He deposed that the application dated 11th July, 2023 sought for substitution of the 13th Defendant and leave to amend the defence and the Applicant's advocate on record then did not oppose the said application when the matter came up on 11th July, 2023. That the plaintiff was also granted leave to file a defence to the counter-claim which they have since filed. Hence the plaintiff should not be allowed to blow hot and cold. He urged the court to dismiss the current application with costs.
5. The application dated 11th July, 2023 which the Applicant wants reviewed sought the following orders;
 - a. That if the defence of 13th Defendant's herein abated, the same be revived.
 - b. That this Honourable Court be pleased to extend the time for the Applicants herein to be substituted in place of the 13th Defendant Macharia Njuguna who is shown to have died during the pendency of this proceedings.
 - c. That subject to granting prayer 1 & 2 herein above, this Honourable Court be pleased to substitute the 13th Defendant Macharia Njuguna who is shown to have died during the pendency of these proceedings with David Mutua Masaku, Solomon Ndungu Ngari & Sedekia Odago Obera the Applicants herein be deemed to be the 13th Defendant in their capacity as his legal representative.
 - d. Any other orders and/or direction as this Honourable Court deems just and appropriate.
 - e. That the costs of this application be in the cause.
6. When the application came up for hearing, it was not opposed and I granted orders that the amendment of the defence was limited to the substitution of the deceased defendant who by virtue of the substitution would have his defence revived. On the face of the motion under review, there is no mention of leave to amend to introduce a counter-claim. The introduction of a counter-claim is a major amendment that requires leave to be formally sought with the applicant demonstrating to the court the basis to grant such permission and the Respondent getting opportunity to defend the application in any case.
7. The Respondent deposed that the 13th Defendant was granted leave to amend the defence and in any event the Plaintiff/Applicant was also granted leave to file a defence to the counter-claim. The Respondent is not being candid as there was no mention of the counter-claim for which the Plaintiff would be granted leave to defend. It is trite law that parties are bound by their pleadings which principle



is to prevent trial by ambush. The Supreme Court in the case of Nickolas Kiptoo arap Korir Salat v IEBC & 7 Others [2014]eKLR said thus;

“To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

8. Thus, the fact of the Plaintiff filing a response to the amended defence and counter-claim does not legitimise a pleading irregularly filed. The application dated 11th July, 2023 did not annex a draft defence which 13th Defendant assumed allowed them to introduce the impugned counter-claim which has been filed without leave of the court.
9. The Applicant sought for review of orders on the ground that it allowed the amendment of defence and filing of the counter-claim. There is no problem of the orders as granted/issued since what was allowed was for amendment to substitute the deceased Macharia Njuguna who had been sued as the 13th Defendant and to revive the defence (which by law is deemed to have abated by death of that party). The Respondents were mischievous in slipping in the counter-claim without leave of the court.
10. Consequently, I will not grant the review orders sought in the present motion. Instead, in exercise of my discretionary powers under section 1A, 1B and 3A of the *Civil Procedure Act* and prayer (3) of the motion “any order the honourable court deems just to grant,” I hereby strike out the counter-claim dated September 1, 2023 and filed on September 19, 2023 for being improperly on record. Costs of the application to the plaintiff/applicant, for being hawk-eyed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024

A. OMOLLO

JUDGE

