



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna & another (Suing as the administrators of the Estate of the Late David Ng'ang'a Njuguna - Deceased) v Karanja & 4 others (Environment & Land Case 390 of 2016) [2023] KEELC 83 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 83 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**ENVIRONMENT & LAND CASE 390 OF 2016**  
**FM NJOROGE, J**  
**JANUARY 19, 2023**

**BETWEEN**

**JACQUELINE NJERI NJUGUNA ..... 1<sup>ST</sup> PLAINTIFF**  
**JUDY WAIRIMU NJUGUNA ..... 2<sup>ND</sup> PLAINTIFF**  
**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE DAVID**  
**NG'ANG'A NJUGUNA - DECEASED**

**AND**

**MBUGUA KARANJA ..... 1<sup>ST</sup> DEFENDANT**  
**MARY WANJIKU MUNGA ..... 2<sup>ND</sup> DEFENDANT**  
**TABITHA NJERI NJENGA ..... 3<sup>RD</sup> DEFENDANT**  
**DAVID NJOROGE NJENGA ..... 4<sup>TH</sup> DEFENDANT**  
**JOHN MBUGUA WACHIRA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the 4<sup>th</sup> defendants notice of motion dated April 19, 2022 which seeks the following orders:
  - a. That this Honourable Court grants leave to the 4<sup>th</sup> Defendant/Applicant herein to amend his defence.
  - b. That the 4<sup>th</sup> Defendant/Applicant be allowed to file an additional list of documents as attached in the supporting affidavit.
  - c. Costs be in the cause.



2. The application is supported by the affidavit sworn by David Njoroge, the 4<sup>th</sup> Defendant herein, where he deposed that there is need to incorporate a counterclaim against the Plaintiffs in order to ensure that his defence is heard fairly and conclusively; that the said defence is inadequate in that it does not incorporate any claim against the estate of David Ng'ang'a Njuguna (deceased); that the amendment would save on judicial time and a multiplicity of suits would be avoided; that he has come across some crucial documents that would help in the ultimate determination of this suit; that it is in the interest of justice to have the instant application allowed.

### Response

3. The Plaintiff in response to the application filed its Replying Affidavit dated 1/05/2022 sworn by Judy Wairimu Njuguna, the 2<sup>nd</sup> Plaintiff herein, wherein she deposed that the court gave its ruling on 10/03/2021 re-opening the Defendant's case for hearing. She further deposed that the Plaintiff's case has been heard and closed and the evidence took into account the Defendant's already filed Defence, List of Witnesses and Documents.
4. She deposed that the Plaintiffs' shall be highly prejudiced and the orders if granted shall also be contrary to article 50(1) (b) (c) and (k) of the Constitution of Kenya. The Plaintiff averred that by allowing the application it would have the effect of denying the Plaintiffs right to challenge the counterclaim and to challenge the newly introduced additional documents. She deposed that when they gave evidence all they had was the Defendant's documents which were on record then.

### Submissions

5. The 4<sup>th</sup> Defendant filed his submissions dated October 21, 2022 on October 24, 2022 the same day while the Plaintiffs' filed their submissions dated November 11, 2022 on November 14, 2022.
6. The 4<sup>th</sup> Defendant relied on Order 8 Rule 3 (1) of the Civil Procedure Rules and the Supreme Court case of Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR where the court laid out the guidelines on admission of additional evidence and also the case of Hangover Kaakwacha Hotel Ltd v Philip Adundo & another T/A Hangover Kaakwacha Hotel Ltd Civil Case No E008 of 2021
7. The 4<sup>th</sup> Defendant urges the court to allow his application to have his counter claim heard and further that the documents he seeks to introduce are well within the knowledge of the Plaintiffs.
8. The Plaintiffs relied on the case of ELC Civil Case No 105 of 2020 George Kimani Njuki v National Lands Commission, The Chief Land Registrar & the Attorney General and urges the court to disallow the 4<sup>th</sup> Defendant's application. They contend that there needs to be a level playing ground where the 4<sup>th</sup> Defendant should only be allowed to testify on the basis of his original statement and rely on the document originally filed lest the Plaintiffs shall be prejudiced.

### Analysis And Determination

9. This court has considered the application, replying affidavit and Submissions and the main issue for determination is whether the 4<sup>th</sup> Defendant/Applicant is entitled to the orders as sought in his application.
10. Order 7 rule 5 of the *Civil Procedure Rules* provides for documents to be filed by the Defendant before the trial conference. After the trial conference, the matter is set down for hearing. It would be expected that at the trial conference, all the parties will have made full disclosure so that either party knows the case that they will face at the trial.



11. This court is cognizant of the fact that even after the trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of order 18 rule 10 and section 146 of the Evidence Act, is intended to ensure that each party is afforded a fair trial guaranteed under article 50 (1) of the Constitution. Article 159(2)(b) of the Constitution provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in sections 1A and 1B of the Civil Procedure Act.
12. In the present case, the Defendant's case is yet to commence and therefore whatever evidence he will tender, the Plaintiffs' will have an opportunity to rebut it during cross-examination in the defence case.
13. Prayer (1) by the 4<sup>th</sup> Defendant to amend its defence and include a counter-claim has been brought quite late in the proceedings as the case has since advanced and the Plaintiffs' already closed their case. In any event the 4<sup>th</sup> defendant has failed to comply with one cardinal rule of practice in that he has failed to attach a draft amended defence showing the proposed amendments for consideration by the court. Where leave of court is required to amend a pleading, the court and the other parties in any dispute are entitled to peruse the proposed amendments but in the instant application that is not possible.
14. In view of the foregoing, this court grants prayer (2) of the 4<sup>th</sup> Defendant's application and the 4<sup>th</sup> Defendant is thereby allowed to introduce the additional documents they seek to introduce. To that end he shall therefore file and serve a supplementary list of documents and bundle of documents duly indexed and paginated within 14 days of this order. The suit shall be mentioned on 8/2/2023 for further directions.
15. Each party shall bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

