



Isaaka Advocates v China Qingjian International Group (K) & 3 others (Civil Suit E026 of 2022) [2022] KEHC 11945 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E026 OF 2022
A MABEYA, J
AUGUST 12, 2022**

BETWEEN

ISAACA ADVOCATES APPLICANT

AND

CHINA QINGJIAN INTERNATIONAL GROUP (K) 1ST RESPONDENT

XU YANDONG 2ND RESPONDENT

ENZYNE CREATIONS LTD 3RD RESPONDENT

JOHDON LIMITED 4TH RESPONDENT

RULING

1. Before court is a Chamber Summons application dated 4/4/2022 filed together with a memorandum of appeal of even date. The application is brought under Order 49 rule 7(2) and (3) of the [Civil Procedure Rules](#), and sections 3A of the [Civil Procedure Act](#).
2. The application sought orders that the proceedings and orders of 30/3/2022 by the Hon. Deputy Registrar dismissing the applicant's request for interlocutory judgment dated 4/3/2022 be set aside.
3. It also sought orders that interlocutory judgment be entered in the counterclaim against the plaintiff who had failed to enter defense for the sum of Kshs. 59,000,000/=. The memorandum of appeal sought a similar order.
4. The application was supported by the affidavit of Marsden Osioma sworn on 4/4/2022. The grounds thereof were that; the plaintiff/1st respondent instituted the instant suit against the defendants *vide* a plaint dated 28/1/2022 for breach of a fiduciary duty by the 1st defendant and special damages against the defendants jointly.



5. The 1st and 2nd defendants raised preliminary objections on grounds that the suit was not properly before Court as the plaintiff lacked authority to file the suit on behalf of the company, and that the matter was *sub judice*.
6. That the 4th defendant/applicant entered appearance and filed its statement of defence and counter claim dated 14/2/2022 claiming payment of legal services rendered. That the plaintiff failed to respond to the counterclaim within the prescribed period thereby prompting the applicant to request for interlocutory judgment. That the counter-claim was for a liquidated claim and ought not to proceed to formal proof.
7. That when the matter came up for mention on 30/3/2022, the Deputy Registrar failed to acknowledge that the counterclaim was an independent suit and declined to issue judgment in default. In both the application and memorandum of appeal, it was contended that the Deputy Registrar erred in law and fact by failing to appreciate the provisions of Order 7 of the Civil Procedure Rules that a counterclaim was an independent suit on its own without awaiting the determination of the preliminary objection raised in the main suit.
8. That the registrar therefore erred in directing that the entering of interlocutory judgment should await the determination of the preliminary objection. That she also erred in holding that she lacked jurisdiction to enter interlocutory judgment before the determination of the aforesaid objection.
9. The 1st respondent opposed the application vide the replying affidavit of Qu Gaolei sworn on 12/4/2022. It was admitted that the applicant filed a defense and counterclaim on 14/2/2022 and requested for interlocutory judgment on 4/3/2022.
10. It was however contended that, at the time of filing the request, the applicant who was the advocate for the 3rd respondent had filed a preliminary objection dated 8/2/2022 objecting to the jurisdiction of the Court on the basis of existence of an arbitral clause in the agreement in the contracts signed by the 3rd respondent.
11. That the applicant had commenced arbitration with reference to the said contract before the 1st respondent filed this suit. That the request was filed prematurely. That the 1st respondent's plaint challenged the legality of various contracts entered into between the 1st respondent, the applicant, and other respondents inclusive of the above-mentioned contract hence the counterclaim formed and/or created a duplicity of issues hence this Court was *sub judice*.
12. That allowing the interlocutory judgment would have denied the 1st respondent an opportunity to interrogate real issues and that this Court lacked jurisdiction to enter judgment in a matter where the subject of the plaint and counter-claim were considered indivisible.
13. It was further contended that the 1st respondent had filed its reply to the 4th defendant's defence and counterclaim *vide* a reply dated 31/3/2022. That the 1st respondent's statement of defence to the counterclaim raised triable issues and that the 1st respondent ought to have been given an opportunity to defend the counter-claim on merit and would suffer prejudice and irreparable substantial loss if the same proceeded undefended.
14. The application was heard orally on 5/5/2022. I have considered the pleadings and evidence on record as well as the oral submissions by the Learned Counsel. The issue for determination is whether the Deputy Registrar's order of 30/3/2022 should to be set aside.



15. The application was brought under Order 49 Rule 7 (2) and (3) which provides;
- “ (2) An appeal from a decision of the registrar under the Orders referred to in subrule (1) shall be to a judge in chambers.
- (3) The memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the registrar.
16. The decision of the Deputy Registrar that is appealed against was made on 30/3/2022. The memorandum of appeal was filed on 4/4/2022, five days after the decision was given, hence the same met the timeline provided for the rules.
17. The memorandum of appeal challenged the Deputy Registrars’ decision on grounds of Order 7 of the *Civil Procedure Rules*. It was submitted that the registrar erred in failing to acknowledge that by virtue of that Order, a counterclaim was an independent suit and stood on its own that therefore the counterclaim in this suit did not require to await the determination of the preliminary objection.
18. Order 7 rule 3 of the *Civil Procedure Rules* provides: -
- “ A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof.”
19. The applicant challenges the registrar’s decision to strike out its request for interlocutory judgment on the ground that the respondent had not responded to its counterclaim. It is not in dispute that as at the time the applicant requested for judgment, there was no defence to the counterclaim on record.
20. The independence of a counterclaim from the main suit is well buttressed by Rule 13 of Order 7. The same provides as follows: -
- “ If, in any, case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with”.
21. To this Court’s mind, the counterclaim had nothing to do with the preliminary objection. What was being objected to was the suit and not the counterclaim. There was no preliminary objection to the counterclaim that was pending. The fact that the jurisdiction of the Court to hear the suit was under challenge, that did not affect the counterclaim as the latter was a separate and distinct claim.
22. I say so because, looking at the objection that had been raised by the defendants in the suit, they were two-fold, that the issues raised in the suit were already before an arbitral tribunal and that the verifying affidavit to the plaint had been sworn by a person without authority. There was no allegation that the claim in the counterclaim was before the tribunal or at all. The counterclaim was in respect of legal fees that was being claimed on a written contract.
23. In view thereof, I hold that the Deputy Registrar was wrong to postpone acting on a valid request for judgment that was before her and I accordingly set aside her order of 30/3/2022.



24. The Court however, notes that the plaintiff has since filed a reply and defence to counterclaim. There was no prayer to exclude those pleadings. I think the matter may now be proceeded in accordance with the rules.
25. Accordingly, the application dated 4/4/2022 and memorandum of appeal of even date are meritorious and allowed in terms of 4 of the Summons with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 12th day of August, 2022.

A. MABEYA, FCI Arb

JUDGE

