



Tulla Reserve Supplies Limited v National Bank of Kenya Limited & another; National Bank of Kenya Limited (Plaintiff to the Counterclaim); Tulla Reserve Supplies Ltd & 4 others (Defendant to the Counterclaim) (Commercial Case 276 of 2016) [2022] KEHC 16896 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 276 OF 2016**

**DAS MAJANJA, J
DECEMBER 21, 2022**

BETWEEN

TULLA RESERVE SUPPLIES LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT

CENTRAL BANK OF KENYA 2ND DEFENDANT

AND

NATIONAL BANK OF KENYA LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

TULLA RESERVE SUPPLIES LTD DEFENDANT TO THE COUNTERCLAIM

DIBA HUSSEIN DADO DEFENDANT TO THE COUNTERCLAIM

NJIHIA MUOKA RASHID CO LTD . DEFENDANT TO THE COUNTERCLAIM

DOMINIC MULWA MUOKA DEFENDANT TO THE COUNTERCLAIM

JACKSON RERIANI DEFENDANT TO THE COUNTERCLAIM

RULING

1. There are two applications before the court seeking to review and or vary the orders of this court made on May 26, 2022 on the following terms:



- a. That the 3rd, 4th and 5th defendants to the counterclaim shall file and serve their witness statements and documents within 14 days in default the defence to the counterclaim shall be struck out with costs to the plaintiff and 1st defendant.
 - b. That thereafter the parties to agree on facts, issues and documents.
 - c. That matter is fixed for pre-trial directions on June 23, 2022 before the Deputy Registrar.
2. The 5th defendant to the counterclaim, Jackson Reriani, has filed the application dated August 24, 2022. It is supported by his own affidavit sworn on the same day and opposed by the 1st defendant through replying affidavit of its advocate, Aldrin Ojiambo, sworn on September 19, 2022.
 3. The 3rd and 4th defendants to the counterclaim, Njihia Muoka Rashid and Company Ltd and Dominic Mulwa Muoka, filed the application dated September 26, 2022. It is supported by the affidavit of the 4th defendant to the counterclaim on his own capacity and as a valuer and director of the 3rd defendant to the counterclaim sworn on the same date. It is opposed through replying affidavit of Aldrin Ojiambo sworn on October 13, 2022.
 4. I have considered the both applications and the issue I have to resolve is whether to set aside the default orders made following the failure of the applicants to comply with pre-trial directions. This suit was filed in 2016 and in order to set the suit down for hearing the court issued pre-trial directions in order to facilitate an orderly hearing in line with the overriding objective. Parties were required to agree on the facts, issues and documents so that trial can proceed without further delay.
 5. The applicants case is that failure to comply with pre-trial directions was a result of the mistake of their advocates who did not have full instructions at the time of filing the defence. In my view, the lack or otherwise of instructions to the advocate 6 years after the suit has been filed is not a good excuse and portends a lack of interest by the clients in their respective cases. The fact that the advocate was instructed by the insurer is also not a good excuse. Even so, the respondent has shown that the parties were in communication about the filing of documents.
 6. I have however looked at the totality of the circumstances, the fact that the parties have claims and cross-claims against each other which are interlinked, I think it would be in the interests of justice to give the parties an opportunity to be heard on the substance of their respective cases. In reaching this decision I am guided by article 159(2)(d) of the *Constitution* and sections 1A and 1B of the *Civil Procedure Act* which impose on this court the duty to render substantive justice and to achieve the just, efficient and expeditious disposal of cases. Further, since the hearing has not commenced I do not see any prejudice that cannot be assuaged by an award of costs by granting the orders sought.
 7. I will allow therefore allow the applications dated August 24, 2022 and dated September 26, 2022 on the following terms:
 - a. The order dated May 26, 2022 be and is hereby set aside.
 - b. The 5th defendant to the counterclaim is hereby granted leave to amend his statement of defence and file and serve the same within 14 days together with his witness statement(s) and list of documents.
 - c. The 3rd and 4th defendants to the counterclaims' amended defence, amended list of witness, list of documents and witness statement are hereby deemed as duly filed and served.



- d. The 5th defendant and the 3rd and 4th defendants shall pay to costs of the application assessed at Kshs 15,000.00 each to the 1st defendant/plaintiff to the counterclaim within 14 days from the date hereof.
- e. Parties may file any further relevant documents prior to date fixed for pre-trial directions before the Deputy Registrar.
- f. The parties are also directed to agree on facts, issue and documents before the matter is certified ready for trial.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ouma instructed by Oluoch Olunya and Company Advocates for the Plaintiff.

Mr Nyboma instructed by ACORN Law Advocates LLP for the Plaintiff in the Counterclaim.

Ms Aisha instructed by Amollo and Gachoka Advocates for the 2nd Defendant.

Mr Wamai instructed by Githara and Associates Advocates for the 3rd and 4th Defendants to the Counterclaim.

Mr Nderitu instructed by Macharia Nderitu and Company Advocates for the 5th Defendant to the Counterclaim.

