



REPUBLIC OF KENYA



KENYA LAW
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Hadi & another v Diamond Trust Bank Kenya Limited & 5 others (Environment & Land Case 102 of 2019) [2023] KEELC 19019 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 102 OF 2019**

**SM KIBUNJA, J
JULY 25, 2023**

BETWEEN

FATMA HASSAN HADI 1ST PLAINTIFF

DIAMOND TRUST BANK KENYA LIMITED 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT

SIYAMA COMPANY LIMITED 2ND DEFENDANT

KHALIL HUD MOHAMED 3RD DEFENDANT

FATMA HASSAN HADI 4TH DEFENDANT

FAIDA BREK SAID 5TH DEFENDANT

GODFREY MUTUBIA 6TH DEFENDANT

RULING

1. The plaintiffs' application is dated March 7, 2023 and has been brought under Order 45 Rule 1 & 2, Order 51 Rule 1 of the *Civil Procedure Rules*, section 1A, 3, 3A, 27 and 80 of the *Civil Procedure Act* and section 3 of the *Environment and Land Court Act* 2012. The orders sought are:
 - a. That this honorable court be pleased to review, vary and/or set aside the order made and issued on November 2, 2022 directing that the file herein be closed on grounds of mistake or error apparent on the face of the record.
 - b. That costs of this application be provided for.

The application is premised on five (5) grounds on its face and supported by the affidavit of Manase Calbe Ananda advocate sworn on the March 8, 2023, in which he inter alia deposed that he is acting



for the 5th defendant in the counterclaim. That the suit herein was instituted by the plaintiff vide a plaint dated June 13, 2019. The plaintiff had also filed an application dated June 13, 2019 which sought injunctive orders, which were allowed vide a ruling dated November 13, 2019. Dissatisfied by the said ruling, Diamond Trust Bank Limited, the defendant, filed an appeal in the Court of Appeal, being CACA No. 18 of 2020 - Diamond Trust Bank Limited v Fatma Hassan Hadi. Before the appellate court delivered its ruling, the defendant, Diamond Trust Bank, filed its statement of defence and counterclaim dated September 17, 2020. The counterclaim was against the 1st to 5th defendants. The Court of Appeal in its ruling delivered on June 24, 2022, allowed the appeal and struck out the entire Plaintiff's suit against the defendant.

2. After the said ruling, the 5th defendant in the counterclaim filed his notice of preliminary objection dated June 29, 2022 seeking to strike out the bank's counterclaim on the ground of want of jurisdiction. When the suit came up for mention for directions on the said notice of preliminary objection on November 2, 2022 this court made an order that the matter be closed for reason of the Court of Appeal decision. The deponent is therefore seeking the court to review the orders issued on November 2, 2022 and restated on February 28, 2023, as the counterclaim was not addressed by the appellate court. The deponent argued that he is entitled to the costs of the counterclaim and further to that his notice of preliminary objection ought to be procedurally and substantively dealt with.
3. None of the other parties herein filed a response to the application and no submissions have been filed on the application either.
4. The issues for the court's determinations are as follows;
 - a. Whether the 5th defendant in the counterclaim has made a case for review of the said court order.
 - b. Whether the Court of Appeal ruling delivered on the June 24, 2022 affected the counterclaim filed by the defendant against the five defendants.
 - c. Whether the preliminary objection dated the June 29, 2022 by the 5th defendant in the counterclaim should be set down for hearing.
 - d. Who pays the costs in the instant application.
5. The court has carefully considered the grounds on the application, affidavit evidence, the record and come to the following determinations;
 - a. The court has power to review its orders within the framework of section 80 of the [Civil Procedure Act](#), which provides that;

“ 80. Any person who considers himself aggrieved-

 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the [Civil Procedure Rules](#) sets out the grounds for review and they include, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, without unreasonable delay.



The 5th defendant in the counterclaim seeks to review the orders issued on November 2, 2022 on the ground of mistake or error apparent on the face of the record.

- b. On November 2, 2022 the court ordered that the file be closed on the basis of the Court of Appeal Ruling in Civil Appeal No. 18 of 2020 and specifically paragraph 34 of the said ruling, which states, “The appeal succeeds. It is hereby allowed. The ruling of the ELC is hereby set aside and substituted with an order striking out the respondent’s application for injunction dated June 13, 2019. It follows that the respondent’s suit having been instituted in a court without jurisdiction, the same is hereby struck out with costs to the appellant.”

On that November 2, 2022, the matter was coming up for mention to confirm whether the appellant court had made a determination in CACA No. 18 of 2020. Mr. Ananda for the 5th defendant in the counterclaim informed the court that in view of the decision of the appellate court striking out the suit they sought costs against the plaintiff. The court proceeded to close the file on the basis that the suit was struck out by the appellate court.

- c. The 5th defendant argue that the court ought not to have closed the case since the issue of defendant’s counterclaim was not considered by the appellant court. That there was an error apparent on the face of record for the court to hold that the counterclaim had been struck out. The question the court must answer is whether the defendant’s counterclaim was subject of the Court of Appeal proceedings, and if not whether the court order to close the file was made in error or mistake. The Court of Appeal defined what an error apparent on the face of the record in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR it was held that,

“Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.”

The orders of court issued on November 2, 2022 were premised on the ruling of the appellate court which was delivered on June 24, 2022 which basically struck out the plaintiff’s suit. The Court of Appeal ruling did not at all address the counterclaim filed by the defendant in the suit that was struck out. A counterclaim filed by a defendant is in itself an independent suit that can go to hearing even where the plaintiff’s suit is determined one way or the other.

- d. The 5th defendant maintains that the Court of Appeal ruling struck out the plaintiff’s plaint and not the defendant’s counterclaim hence, the latter is still alive. That the order to close the file made on the November 2, 2022 need to reviewed and set aside to enable him prosecute



his preliminary objection to the counterclaim. The record confirms that while the appeal was pending before the appellate court, the defendant filed a defence and counterclaim on September 28, 2020. In the said counterclaim, the bank instituted the suit against the five defendants, among others maintaining that the charge dated November 16, 2012 was valid. The cause of action in the plaint was based on the said charge dated November 16, 2012. In the said counterclaim, the plaintiff (defendant in the main suit) prayed for inter alia a declaration that the charge was valid and binding onto the 1st and 2nd defendant and that it is entitled to exercise its statutory power of sale over the suit premises to recover the sums secured by the said charge.

- e. Counterclaims are provided for under Order 7 Rule 3 of the Civil Procedure Rules, and in Rule 13 thereof provides that where the plaintiff's suit is stayed, discontinued or dismissed, the counterclaim may be proceeded with. In my view, Rule 13 allows a defendant to continue with the counterclaim where the plaintiff's suit has been discontinued. Though the counterclaim herein is also based on the same charge that was the subject matter of the plaintiff's suit which the appellate court has already found this court is without jurisdiction to deal with, it is a fact that it is still pending before the court. The 5th defendant application for review has merit, as he has demonstrated to the court that the said counterclaim is still pending. The order to close the file made on 2nd November 2022 was made in error.
- f. That under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya costs should follow the events unless otherwise ordered by the court for good cause. The court is of the view that the costs in the instant application abide the outcome of the 5th defendant's preliminary objection to the defendant's counterclaim.
 1. That flowing from above, the court finds and orders as follows;
 - a. That the 5th defendant's notice of motion dated the March 7, 2023 for review has merit and the order of November 2, 2022 is hereby reviewed and set aside.
 - b. That the 5th defendant's notice of preliminary objection to the counterclaim by the defendant/plaintiff be set down for hearing.
 - c. The costs of the application to abide the outcome of the preliminary objection.

6 Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JULY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF : Mr Kahuthu Advocate.

DEFENDANTS : M/s Takah for Ananda for 5th Defendant.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

