



Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party) (Environment & Land Case 4 of 2021) [2023] KEELC 19303 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19303 (KLR)

FORMERLY THIKA ELC CASE NO.115 OF 2019

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2021**

**JO MBOYA, J
JULY 25, 2023**

BETWEEN

MARRIOT AFRICA INTERNATIONAL LIMITED PLAINTIFF

AND

MARGARET NYAKINYUA MURIGU 1ST DEFENDANT

MARY WANJIKU KANYOTU 2ND DEFENDANT

WILLY KIHARA 3RD DEFENDANT

KANGAITA COFFEE ESTATES LIMITED 4TH DEFENDANT

AND

UKOMBOZI HOLDINGS LTD INTERESTED PARTY

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 14th July 2023; the 1st Defendant/Applicant in the Counter-claim has approached the Honorable court seeking for the following reliefs;
 - i. (Spent)
 - ii. That this Application and the Notice of Preliminary Objection accompanying same be heard first and disposed of before hearing of the main suit.
 - iii. That this Honorable court be pleased to order that the Counter-claim as crafted by the 4th Defendant in this suit, Kangaita Coffee Estate Ltd; be struck out in Limine for being misconceived, incompetent and irregular and also for being fraudulent, malicious and illegal.



- iv. That this Honorable court be further pleased to strike out the purported Counter-claim by the 4th Defendant in the main suit and do order that the name of the 1st Defendant in the Counter-claim, Trendsetters Investment Limited; be struck out in Limine from being a party to this suit for the reasons that the purported inclusion of the said Party and the addition of the said company as a Party to this suit amounts to flagrant and blatant abuse of the Due process of this Honorable court.
 - v. This Honorable court be pleased to strike out the purported Counterclaim in this suit in Limine for failure to disclose under which law and procedure the 4th Defendant in the main suit derives authority and legality to introduce and include a new Party in a counterclaim and hence on grounds that the purported counterclaim is grossly incompetent, fatal flawed and incurably defective.
 - vi. This Honorable court be pleased to declare that the action of the 4th Defendant in this suit, Kangaita Coffee Estate Limited; in attempting to include more than 1002 title Deeds to land in this suit without due diligence of such and declaration of the individual holders of the said land titles and owners of the properties in question; is illegal as it will amount to condemning unknown persons by making orders against them without opportunity of hearing them; in violation of the Provisions of *the Constitution* 2010; and all the laws related to ownership of property and hence contrary to law and Jurisprudence of the Republic of Kenya.
 - vii. That this Honorable court be pleased to order that this Application be heard and determined on priority and before the hearing of the Main suit as filed herein.
 - viii. Such further or other orders be made as the Interests of Justice may demand.
 - ix. The costs of and incidental to this Application be provided for and be paid by the 4th Defendant to the main suit, namely, Kangaita Coffee Estate Limited.
2. The subject Application is premised and anchored on various albeit numerous grounds which have been enumerated in the body thereof. Besides, the Application is supported by the affidavit sworn by the Abhimanyu Garhwal on the 14th July 2014.
 3. Other than the Application herein, the 1st Defendant to the Counterclaim/Applicant has also filed a Notice of Preliminary objection dated the 14th July 2023 and in respect of which same has essentially reproduced the reliefs contained in the body of the Application. For good measure, the Applicant has thereafter sought to have the Notice of Preliminary objection to be heard alongside the Application herein.
 4. It is instructive to state and underscore that though the Application is dated the 14th July 2023; same was however not filed up to and including the 20th July 2023 being approximately 4 days or less, prior to and before the scheduled hearing of the main suit.
 5. Be that as it may, the court proceeded to and certified the application as urgent and thereafter directed that same be served on the adverse Parties on or before close of business 20th July 2023. Further and in addition, the Honourable court directed the adverse party to respond to the Application, if at all, on or before the 24th July 2023.
 6. Notably, the 3rd Defendant/Respondent duly proceeded to and indeed filed a Replying affidavit sworn on the 21st July 2023; and in respect of which same opposed both the Application and the Notice of Preliminary objection.



7. On the other hand, the rest of the Parties were unable to file their responses owing to time constraints. Nevertheless, the rest of the Parties were granted liberty to canvass and ventilate their responses to the application, albeit on issues of law.
8. Additionally, it is appropriate to state and underscore that the instant Application came up for hearing and was indeed heard on the 24th July 2023 vide oral submissions, so as to facilitate the delivery/rendition of the Ruling, on priority basis and any event; prior to the next scheduled Date for Hearing.

Submissions by the Parties

a. Applicant's Submissions:

9. Learned counsel for the Applicant herein adopted and reiterated the grounds contained at the foot of the Application as well as the contents of the supporting affidavit sworn on the 14th July 2023.
10. Further and in addition, Learned counsel for the Applicant also adopted and reiterated the contents of the Notice of Preliminary objection and thereafter implored the Honourable court to deal with both the Application and the Notice of Preliminary objection simultaneously.
11. Secondly, Learned counsel for the Applicant submitted that counterclaim by the 4th Defendant to the main suit has impleaded and joined various Parties, inter-alia, the Applicant herein, who was hitherto not a Party to the main suit. In addition, Learned counsel has contended that the joinder of the Applicant herein, who was never a Party to the main suit was carried out and/or undertaken without leave of the Honourable court or at all.
12. Thirdly, Learned counsel for the Applicant has submitted that the impugned counterclaim by the 4th Defendant has also referred to various titles numbering approximately 1, 002, but whose owners have neither been named nor sued in the counterclaim.
13. Consequently and in the premises, learned counsel for the Applicant has submitted that the impugned counterclaim is therefore intended to obtain and procure orders which would affect Parties who have neither been sued nor otherwise, contrary to and in contravention of the provisions of Article 50 of *The Constitution* 2010.
14. Fourthly, Learned counsel for the Applicant has submitted that even though the impugned counterclaim by the 4th Defendant was filed in the year 2020, same was however not served upon the Applicant until January 2023. Nevertheless, counsel pointed out that upon being served, with the Counter-claim; the Applicant herein proceeded to and indeed filed her Statement of Defense in answer to the contents at the foot of the impugned counterclaim.
15. Finally, Learned counsel for the Applicant has submitted that the impugned counterclaim has also impleaded the 4th and 5th Defendants to the Counterclaim, albeit without prior issuance and service of the requisite Notice of Intention to file a suit in line with the provisions of Section 13 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya.
16. Based on the foregoing submissions, Learned counsel for the Applicant has therefore submitted that the impugned counterclaim filed by and on behalf of the 4th Defendant is not only misconceived, but is bad in law and constitutes an abuse of the Due process of the Honourable court.
17. Consequently and in this regard, Learned counsel has implored the Honourable court to strike out the offensive counterclaim filed by and on behalf of the Fourth Defendant herein, with costs.



b. Plaintiff's Submissions

18. Learned counsel for the Plaintiff supported the Application by and on behalf of the Applicant and raised two salient issues for consideration by the Honourable court.
19. Firstly, Learned counsel for the Plaintiff has submitted that even though a Party to the main suit, the 4th Defendant not excepted, is allowed to file/mount a counterclaim; such a counterclaim ought not to raise issues which at variance with the substantive cause of action ventilated by the Plaintiff.
20. Furthermore, Learned counsel for the Plaintiff has submitted that in respect of the instant matter; the impugned counterclaim by the 4th Defendant, raises distinct and separate cause of action, which at are variance with the ones impleaded by the Plaintiff.
21. Secondly, Learned counsel for the Plaintiff has submitted that as a result of the issues which have been adverted to in the counterclaim by the 4th Defendant, the Plaintiff has been put in a very awkward position and thereby deprived of the requisite latitude to answer the claims objectively and in a manner capable of protecting the Plaintiff's Interests.

c. Interested Party's Submissions

22. Learned counsel for the Interested Party also signaled his intention to support the Application by the Applicant and further contended that the counterclaim by the 4th Defendant is muddled- up and thus ought not to be canvassed alongside the main suit.
23. Premised on the foregoing, Learned counsel for the Interested Party has joined the Applicant in ventilating the position that the counterclaim by the 4th Defendant is misconceived and thus ought to be struck out.

d. 4th Defendant's Submissions

24. Learned counsel for the 4th Defendant conceded that same had not filed any Replying affidavit or Grounds of opposition, but nevertheless sought to adopt and rely on the Replying affidavit filed by and on behalf of the 3rd Defendant.
25. Having adopted and relied on the contents of the Replying affidavit sworn by the 3rd Defendant, Learned counsel for the 4th Defendant has therefore submitted that the 4th Defendant was at liberty to file and mount the counterclaim and to join such other Parties, even if same were hitherto not Parties to the suit from the onset. In this regard, Learned counsel pointed out that the joinder of the additional Parties of the counterclaim did not require leave of the Honorable court, either as claimed or otherwise.
26. Secondly, Learned counsel for the 4th Defendant has submitted that the additional Parties, who are contended to have been joined vide the counterclaim are actually Parties who have been mentioned and alluded to in the Plaint filed before the Honorable court. In this respect, Learned counsel has contended that the averments being propagated by the Applicant before the court are misleading and otherwise incorrect.
27. Thirdly, Learned counsel for the 4th Defendant has submitted that the persons who are being stated to own and or hold titles over and in respect of the suit property are persons whose titles have not been verified and/or confirmed.
28. Fourthly, Learned counsel has further contended that in any event; the persons who are alleged to own title are persons who purported to purchase the impugned plots despite the existence of a prohibitory



order which was procured and obtained vide the Succession Court and thereafter duly registered at the Land Registry.

29. Fifthly, Learned counsel has submitted that despite the contention that the cause of action which has been impleaded and/ or raised by the 4th Defendant is separate and distinct from the one impleaded by the Plaintiff; however counsel has pointed out that there is no deviation from the main cause of action and/or the substratum of the Plaintiff's suit.
30. In the premises, Learned counsel for the 4th Defendant has submitted that the current Application and the Preliminary objection are clearly intended to defeat the scheduled hearing of the main suit and thereafter delay the finalization of the matter, which the court ought not to sanction and/ or countenance, whatsoever.

e. 1st Defendant's Submissions:

31. Learned counsel for the 1st Defendant has submitted that the Application by and on behalf of the Applicant herein and which seeks to strike out the counterclaim by the 4th Defendant is misconceived and otherwise legally untenable.
32. Furthermore, Learned counsel has submitted that the Jurisdiction of the Honourable court to strike out a suit and in this case, the counterclaim is one to be exercised sparingly and only in the clearest of cases.
33. Nevertheless, Learned Counsel has pointed out that in respect of the subject matter, it cannot be said that the counterclaim before the Honourable court does not raise any cause of action to warrant same being struck out.
34. Secondly, Learned counsel for the 1st Defendant has submitted that the Parties who own the alleged titles, which have been alluded to by the Applicant, can very well be joined by the Honorable court into the proceedings by dint of Order 1 Rule 10(2) of The Civil Procedure Rules 2010, if and when deemed appropriate and/ or necessary.
35. Finally, Learned counsel for the 1st Defendant has submitted that the issues alluded to and contained at the foot of the Application by Applicant are substantive questions, of Law, replete with facts and which can only be dealt with in the plenary hearing and not otherwise.

f. Submissions by the 3rd Defendant:

36. Learned counsel for the 3rd Defendant has adopted and reiterated the contents of the Replying affidavit sworn on the 21st July 2023; and thereafter invited the Honourable court to adopt and rely on the contents thereof.
37. Secondly, Learned counsel for the 3rd Defendant has also submitted that the issues that have been raised and canvassed at the foot of the current application and the preliminary objection are the same as the issues raised in the Defense to the Counter-claim. In this respect, Learned counsel for the 3rd Defendant has therefore submitted that the raising of the issues at this juncture therefore constitutes an abuse of the Due process of the court.
38. Lastly, Learned counsel has submitted that the true import of the current Application and the Preliminary objection is to defeat and or delay the hearing and disposal of the instant suit, which is scheduled for Hearing on the 24th day of July 2023; and the 26/07/2023, both days inclusive.



39. Consequently and based on the foregoing, Learned counsel has implored the Honourable court to decline to afford the Applicant the latitude to frustrate the hearing of the suit.

g. Submissions by the 4th and 5th Defendants' to the Counterclaim:

40. Learned counsel for the 4th and 5th Defendants to the counterclaim has submitted that the application to strike out the counterclaim by the 4th Defendant to the main suit, touches on and/or concerns exercise of discretion. In this regard, Learned counsel has therefore implored the Honourable court to be slow in striking out a suit, unless the suit itself is irredeemably bad in law, which is not the case herein.
41. Secondly, Learned counsel has invited the Honourable court to take cognizance of the provisions of Order 7 Rule 3 and 8 of the Civil Procedure Rules, 2010, which essentially allow a Defendant in the main suit the liberty to file a counterclaim and also to implead any other Party, who was hitherto not a Party in the main suit.
42. Instructively, Learned counsel has contended that whenever such a counterclaim impleads a Party who was hitherto not a Party in the main suit, no Leave of the Honourable court is required beforehand or at all.
43. Thirdly, Learned counsel has submitted that the provisions of Section 13 of the Government proceedings Act, relating to issuance and service of a notice of intention to sue was declared unconstitutional and therefore same was rendered redundant. In this respect, Learned counsel has invited the Honourable court to take cognizance of the decision in the case of Kenya Bus Service versus The Minister for Transport & Another (2012)eKLR, where the Declaratory order was made.
44. Lastly, Learned counsel has submitted that the current Application and the Preliminary objection, which have been raised and canvassed by the Applicant do not meet the threshold for purposes of striking out a suit/counterclaim or at all. For good measure, Learned Counsel for the named Parties has thereafter referred the Honourable Court to the dictum in the Case of D. T Dobie Limited versus Muchina (1982) eKLR.
45. Premised on the foregoing, Learned counsel has thus implored the Honourable court to find and hold that the impugned Application is not only misconceived, but bad in law and ought to be dismissed.

Issues for Determination

46. Having reviewed the Application dated the 14th July 2023; and the Notice of Preliminary objection of even date and upon taking into account the Responses filed; and finally upon consideration of the oral submissions that were ventilated by and on behalf of the Parties, the following issues do arise and are thus worthy of determination;
- a. Whether the instant Application which seeks to strike out the counterclaim by the 4th Defendant accords with the provisions of Order 7 Rule 12 of the Civil Procedure Rules 2010.
 - b. Whether the 4th Defendant required Leave of the Court prior to and before impleading the 1st Defendant to the counterclaim.
 - c. Whether the issues raised at the foot of the Application and the Preliminary Objection are pure issues of law that are capable of being ventilated and canvassed in a summary manner or otherwise.
 - d. Whether the 4th Defendant was obligated to issue and serve Notice of Institution of suit to the Attorney General or otherwise.



Analysis and Determination

Issue Number 1

Whether the instant Application which seeks to strike out the counterclaim by the 4th Defendant accords with the provisions of Order 7 Rule 12 of the Civil Procedure Rules 2010.

47. During the hearing of both the Application and the Notice of Preliminary objection, Learned counsel for the Applicant intimated to the Honourable court that the counterclaim by and on behalf of the 4th Defendant was filed in the year 2020. However, counsel added that even though same was filed in the year 2020, the Applicant herein was only served with the impugned counterclaim in January 2023.
48. Further and in addition, Learned counsel for the Applicant has submitted that upon being served with the impugned counterclaim, the Applicant proceeded to and indeed entered appearance and thereafter filed a Statement of Defense/Response to the counterclaim by the 4th Defendant.
49. From the submissions rendered and ventilated by the Applicant herein, it is common ground that upon being served with the counterclaim by the 4th Defendant, which is the subject of the instant Application; the Applicant proceeded to and filed a Statement of Defense.
50. Further and in addition, there is also no gainsaying that the Statement of Defense was filed earlier than the current Application. For good measure, the Application herein was only filed on the 20th July 2023.
51. Having taken into account the foregoing observations, it is now appropriate to venture forward and to consider the import/ tenor of Order 7 Rules 12 of The Civil Procedure Rules 2010.
52. For ease of reference, the provisions herein are reproduced has hereunder;

Where a defendant sets up a counterclaim, if the plaintiff or any other person named in the manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just.
53. My reading and understanding of the foregoing provision drives me to the conclusion that any Party, the Applicant herein, not excepted, who has been impleaded in a counterclaim and who desires to have the counterclaim not to be disposed of alongside the main claim, but as an independent suit; is called upon to make the requisite application albeit at any time before filing the reply (read defense) to the counterclaim and not otherwise.
54. In respect of the instant matter, I have already pointed out that the Applicant herein upon being served with the counterclaim by and on behalf of the 4th Defendant proceeded to and indeed filed a Defense to the counterclaim, together with the requisite Documents and witness statements.
55. Suffice it to point out, that having filed the Statement of Defense to the counterclaim and the consequential documents; the Applicant herein thereafter woke up from siesta and filed the instant Application.
56. Consequently and in view of the foregoing, the question that merits deliberation is whether or not the current Application is legally tenable and accords with the clear terms of the named provisions of the law. See Order 7 Rule 12 of the Civil Procedure Rules, 2010.



57. To my mind, the Applicant herein was enjoined to comply with and or adhere to the clear provisions of the law and not otherwise. However, in this respect, the Applicant has chosen to disregard the law and thus approached the Honourable court without regard to the express dictates of the law.
58. Instructively, it behooves the Applicant herein, if at all same was keen to mount the current Application to first and foremost procure and obtain extension of time within which to file the instant Application and not otherwise.
59. Be that as it may, I beg to point out that the Rules of Procedure were never made in vain and hence a Party, the Applicant not excepted, cannot chose to disregard same with abandon and expect the court to shut his/her eyes, to such flagrant disregard.
60. On my part, I beg to point out that unless certain Rules of Procedure which regulates timelines for taking certain actions and filing pleadings/applications, are complied with; then the entire edifice of the law will come crumbling down and thereafter what shall remain would be a state of anarchy and self-help, which shall not good for the Rule of law and General Administration of Justice.
61. Without belaboring the point, it is appropriate and worthy to take cognizance of the dictum of the Court of Appeal in the case of *Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others* [2013] eKLR, where the court held thus;

“A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

62. Additionally, the significance of the Rules of Procedure and the necessity to comply with same and more particularly where the Rules of procedure are intertwined with the substance of the matter before the court, was also elaborated upon by the Supreme Court in the case of *Moses Mwigigi & 14 others versus Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, where the court stated and held as hereunder;

“(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

63. Arising from the foregoing, I surmise that the instant Application which seeks to strike out and expunge the counterclaim by and on behalf of the 4th Defendant herein; is not only premature, but is incompetent and legally untenable, for want of compliance with the express provisions of the law, details which have been highlighted in the preceding paragraphs.



64. Consequently and in view of the foregoing, the Application dated the 14th July 2023; is a candidate for striking out. Instructively, I am obliged to proceed and do so.

Issue Number 2

Whether the 4th Defendant required Leave of the Honourable prior to and before impleading the 1st Defendant to the counterclaim.

65. Other than the question that the instant Application was filed and/or mounted without due regard of the import and tenor of the provisions of Order 7 Rules 12 of the Civil Procedure Rules, (whose details have been discussed elsewhere); the Applicant herein has also contended that same was joined and impleaded in the counterclaim by the 4th Defendant, albeit without leave of the court.

66. For good measure, what I hear the Applicant to be stating is that insofar as same was not a Party to the main suit from the onset, then same (Applicant) could not have been joined/impleaded in the counterclaim without leave of the Honourable court having been sought for and obtained beforehand.

67. Essentially, the Applicant contends that his joinder into the counterclaim by the 4th Defendant, albeit without Leave of the Honourable court, therefore renders his presence in the suit a nullity and thus the necessity to strike out the 4th Defendant's counterclaim as against the Applicant.

68. Despite the foregoing submissions by the Applicant, it is instructive to state and underscore that where a Defendant to a suit seeks to file a counterclaim not only against a Party who is already in the suit, but also any other Party; such a Defendant does not require to seek leave of the court beforehand.

69. For coherence, it is imperative to underscore that the provisions of Order 7 Rule 8 of The Civil Procedure Rules are explicit, crystal clear and paramount. Instructively, the provisions of Order 7 Rules 8 provides and stipulates as hereunder;

“Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

70. From the foregoing reproduction, what is evident and apparent is that no leave of the court was required by the 4th Defendant to, inter-alia, implead and join the Applicant herein alongside the rest of the Defendants to the counterclaim.

71. Owing to the forgoing, I do come to the conclusion that the contention that the 4th Defendant needed Leave of the Honourable Court before impleading the Applicant herein in the counterclaim, was made per-in curium.



Issue Number 3

Whether the issues raised at the foot of the Application and the Preliminary Objection are pure issues of law that are capable of being ventilated and canvassed in a summary manner or otherwise.

72. The current Application as well as the Notice of Preliminary objection have been anchored on various, albeit numerous grounds, inter-alia the contention that the impugned counterclaim filed by the 4th Defendant is not only fraudulent but malicious and illegal.
73. On the other hand, Learned counsel for the Applicant has also contended that the impugned counterclaim seeks to invalidate title of more than 1, 002 persons, who have however not been impleaded. In this regard, Learned counsel for the Applicant has thus contended that if the counterclaim by the 4th Defendant is proceeded with then the court may be called upon to issue orders which would be harmful to Parties contrary to and in violation of the provisions of *the Constitution*.
74. Further and in addition, Learned counsel for the Applicant has also contended that even though the 4th Defendant filed the impugned counterclaim; same did not carry out and or undertake due diligence to ascertain the correct details of the Title holders.
75. Notably, I have identified and itemized the foregoing issues, merely to show and illustrate that same are not strictly pure issues of law, which can be canvassed and ventilated in limine.
76. To the contrary and for good measure, the issues that have been alluded to by and on behalf of the Applicant are substantially issues of mixed law and facts, which would require production of evidence and examination of witnesses, prior to and before the concerned Parties can thereafter venture forward and render submissions.
77. However, it is not lost on the court that at this juncture, no evidence have been tendered and or ventilated before the court and yet the Applicant is seeking to have the Honourable court pronounce itself on, inter-alia, questions of fraud and illegality, which ipso facto must not only be pleaded but must be proven to an intermediate standard (the standard above balance of probabilities but below the standard of beyond reasonable doubt).
78. Further and in any event, where any issue that is being ventilated require interrogation of facts and evidence, before a court of law can form an opinion thereof and apply the law thereto; then such a situation does not warrant the invocation and ventilation of a preliminary objection.
79. As pertains to the foregoing position, I can do no better than to cite and quote the ratio decidendi in the case of Oraro versus Mbaja (2004)eKLR, where the court stated and held thus;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.
80. Other than the fact that the issues raised at the foot of the Application and the preliminary objection allude to mix law and facts, Learned counsel for the Applicant has also sought to invite the Honourable



court to engage with a plethora of documents and thereafter undertake minute/ detailed analysis/ examination thereof, prior to and before exercising summary procedure.

81. Clearly and to my mind, what the Applicant is endeavoring to do is to invite the Honourable court to undertake a mini-trial, under the guise of striking out. Instructively, such a process is unwarranted and inimical to the Due process of the law.
82. In this respect, I am minded to and do hereby draw the attention of Learned counsel for the Applicant to the ratio decidendi in the case of Industrial and Commercial Development Corporation versus Daber Enterprises Limited [2000] eKLR, where the court stated as hereunder;

“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination - see the case of *Wenlock v. Moloney and Others*, [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.”

83. Having pointed out the foregoing, it is instructive to underscore that the counterclaim by the 4th Defendant and in particular; the issues raised therein can only be addressed and interrogated during a Plenary hearing and thereafter the Honourable court would be in a position to discern whether same is fraudulent or otherwise.
84. Furthermore, if it turns out that the counterclaim by the 4th Defendant has sought for reliefs, if any, against a Party who has not been impleaded, then no doubt the 4th Defendant will suffer the misfortune of having any such claims/relief, which would affect a non-Party, being struck out and or be dismissed.
85. However and for good measure, the question as to whether any Third Parties are likely to be affected or otherwise, is one of evidence and must await the plenary hearing, wherein the details of the Third Party, if any and the nature of their Interests, will be disseminated.

Issue Number 4

Whether the 4th Defendant was obligated to issue and serve Notice of Institution of suit to the Attorney General or otherwise.

86. The Learned counsel for the Applicant herein had also contended that the counterclaim by and on behalf of the 4th Defendant was also incompetent and thus deserving of being struck out insofar as the 4th Defendant has impleaded and joined the 4th and 5th Defendants to the counterclaim, albeit without having issued and served the requisite Notice of Intention to commence suit against the Honourable Attorney General.
87. Interestingly, though the Applicant herein is complaining about non-issuance of the Notice of institution of suit in accordance with the provisions of Section 13 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya; it is worthy to point out and underscore that the Applicant herein is not the Honorable Attorney General and therefore same would have not been entitled to any such notice



in the first place. In this regard, the complaints by the Applicant can very well be equated to one (read, a Neighbour) who is morning louder than the bereaved.

88. Secondly, there is no gainsaying that the Honorable Attorney General who would have been entitled to service of the Notice of the intention to sue, if at all, has neither generated nor ventilated any such objection. Indeed, the Honorable Attorney General has not ventilated any such objection for good measure.
89. Lastly and most importantly, it is worthy to recall that the provisions of Section 13(a) of the [Government Proceedings Act](#), which hitherto underscored the necessity to issue and serve a Notice of intention to sue upon the Honourable Attorney General, prior to and before filing the suit against the Government or government Department was indeed declared unconstitutional.
90. Consequently and in the premises, though the provision of Section 13(a) of the [Government Proceedings Act](#), may continue to grace the statute; same was however rendered redundant and otiose. In this regard, the Section in question is dead and buried.
91. To my mind, the objection the 4th Defendant's counterclaim, on the basis of non-compliance with the provisions of Section 13(a) of the [Government Proceedings Act](#), was with humility, a red-herring.
92. Before departing from the issue herein, it is appropriate to revisit the holding in the case of Kenya Bus Services versus The Minster for Transport & Another (2012)eKLR, where the court dealt with the question of the constitutionality of Section 13(a) of the [Government Proceedings Act](#), and stated as hereunder;
 47. Viewed against the prism of [the Constitution](#), it also becomes evident that section 13A of the GPA provides on impediment to access to justice. Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that section 13A of the [Government Proceedings Act](#) as a mandatory requirement violates the provisions of the Article 48.
93. In a nutshell, even the invocation and reliance on the Provisions of Section 13(a) of the [Government Proceedings Act](#), does not help the Applicant's case whatsoever and/ or howsoever.

Final Disposition

94. Having addressed and deliberated upon the thematic issues arising from the Application dated the 14th July 2023; as well as the Notice of Preliminary objection of even date, it is crystal clear that both the Application and the Notice of Preliminary objection, are clearly misconceived and legally untenable.
95. Consequently and in the premises, the Application and the Preliminary Objection, respectively, be and are hereby Dismissed with costs to the 1st, 3rd and 4th Defendants to the main suit; as well as the 4th and 5th Defendants to the Counterclaim.
96. Finally, the instant matter had been scheduled for full hearing on the 24th July 2023; and 26th July 2023, both days inclusive. However, the hearing which was scheduled for the 24th July 2023, aborted on the basis of the current Application.
97. Nevertheless and be that as it may, it is now ordered that the current suit shall proceed for hearing on the return date, namely, the 26th July 2023.



98. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Mrs Wangui Koech for the Plaintiff.

Ms. Ndunge h/b for Mr Theuri for the 1st Defendant.

Mr. Ruiru Njoroge for the 3rd Defendant.

Mrs. Akedi for the 4th Defendant.

Ms. Gikonyo h/b for Mr. Thuita for the Interested Party.

Mr. Allan Kamau for the 3rd and 4th Defendants to the Counter-claim.

N/A for the 2nd Defendant.

