



**Hadi v Diamond Trust Bank (K) Limited; Diamond Trust Bank (K) Limited
(Plaintiff); Siyama Company Limited & 4 others (Defendant) (Environment &
Land Case 102 of 2019) [2023] KEELC 21831 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 102 OF 2019
SM KIBUNJA, J
NOVEMBER 29, 2023**

BETWEEN

FATMA HASSAN HADI PLAINTIFF

AND

DIAMOND TRUST BANK (K) LIMITED DEFENDANT

AND

DIAMOND TRUST BANK (K) LIMITED PLAINTIFF

AND

SIYAMA COMPANY LIMITED DEFENDANT

KHALIL HUD MOHAMED DEFENDANT

FATMA HASSAN HADI DEFENDANT

FEIZA BREK SAID DEFENDANT

GODFREY MUTUBIA DEFENDANT

RULING

1. Godfrey Mutubia, the 5th defendant in the counterclaim filed by Diamond Trust Bank (K) Limited, the plaintiff, filed the notice of preliminary objection dated the 29th June 2022 seeking to have the counterclaim struck out with costs to him on two grounds that:
 - a. The court lacks jurisdiction to hear and determine the counterclaim by dint of the provisions of Article 162 of *the Constitution*, section 13 of the *Environment and Land Court Act* and section 150 of the *Land Act* 2012.



- b. That the counterclaim relates to a commercial dispute and contract and this court is without the statutory jurisdiction to hear and determine the same.
2. The court issued directions on filing and exchanging submissions on the 25th July 2023 and the learned counsel for the 5th defendant filed their submissions dated the 13th September 2023, which the court has considered.
3. From the two grounds on the preliminary objection, the only issue that commends itself for determination is whether or not the court is with jurisdiction to hear and determine the counterclaim.
4. The court has carefully considered the grounds on the notice of preliminary objection, pleadings filed herein, submissions by the learned counsel, superior courts decisions thereon and come to the following determinations:
 - a. That this suit had been commenced by Fatma Hassan Hadi, the plaintiff in the main suit and 3rd defendant in the counterclaim, through her plaint dated 13th June 2019, against Diamond Trust Bank Kenya Limited, defendant in the main suit and plaintiff in the counterclaim, seeking for the defendant's action of advertising the suit property that her husband had charged as security for sale by public auction in exercise of its power of sale declared illegal, null and void ab ignition. She also sought for permanent injunction to restrain the defendant from auctioning, selling, transferring, disposing of or dealing with the suit property. That pursuant to an application by the plaintiff, the court delivered a ruling on the 13th November 2019 restraining the defendant from exercising its power of sale pending the hearing and determination of the suit. The defendant was aggrieved with the said ruling and filed an appeal being Malindi Court of Appeal Civil Appeal No. 18 of 2020, raising among others the ground of the court's jurisdiction. The Court of Appeal delivered its judgement on the 24th June 2022 allowing the defendant's appeal inter alia on the ground that this court was without jurisdiction. The plaintiff's suit against the defendant was consequently struck out with costs.
 - b. The counterclaim herein had been filed through the defendant's statement of defence dated the 17th September 2020 and inter alia seeks for declaratory orders that the charge over the suit property is binding and it is entitled to exercise its statutory power of sale and indemnity; payment of some stated amount of money; sale of the suit property and costs. The 5th defendant filed a statement of defence dated 29th October 2020 denying inter alia the claim and the court's jurisdiction. It is therefore clear that by the time the Court of Appeal was delivering its judgement striking out the main suit for being filed in the court without jurisdiction, the counterclaim was already pending before this court. That the foundation of the claim in the counterclaim is no different from that of the main suit which the Court of Appeal, whose decision is binding on this court, has through the judgement of 24th June 2022 declared the court is without jurisdiction in, for it is a commercial transaction.
 - c. That as submitted by the learned counsel for the 5th defendant in the counterclaim, the said Court of Appeal decision applies to the counterclaim, and hence his preliminary objection on jurisdiction. The court finds that the 5th defendants preliminary objection has merit and is upheld.
 - d. The 5th defendant having succeeded in his preliminary objection is under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya that provides that costs follow the events unless otherwise directed by the court for good cause, entitled to costs.
5. Flowing from the foregoing, the court finds and orders as follows:



- a. That the 5th defendant's preliminary objection dated the 29th June 2022 on the counterclaim has merit and is hereby upheld.
- b. That the counterclaim dated the 17th September 2020 is hereby struck out with costs to the 5th defendant.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 29TH DAY OF NOVEMBER, 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF: Mr. Janjo.

DEFENDANTS: M/s Juma for Ananda.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

