



**Boabab Development Group Limited v East African Mission for School & Orphanage & 2 others (Environment & Land Case 58 'B' of 2021) [2022] KEELC 15172 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15172 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 58 'B' OF 2021  
LA OMOLLO, J  
DECEMBER 6, 2022  
(FORMERLY MALINDI CMCC NO 284/2018)**

**BETWEEN**

**BOABAB DEVELOPMENT GROUP LIMITED ..... PLAINTIFF**

**AND**

**EAST AFRICAN MISSION FOR SCHOOL & ORPHANAGE .... 1<sup>ST</sup> DEFENDANT**

**SOINCORD LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**FRACTIONAL WAREHOUSE LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the plaintiff/applicant's notice of motion application dated February 22, 2022 which is expressed to be brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and order 2 rule 13, 15 (1), (b), (c) & (d) and order 51 rule 1 of the *Civil Procedure Rules 2010*.
2. The application seeks the following orders:
  - a. That this honorable court be pleased to strike out the defendants' statement of defence and counterclaim dated February 4, 2022.
  - b. That costs of this application be in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn on February 22, 2022 by one Boldt Andreas a director of the plaintiff.



## **Factual Background**

4. The plaintiff instituted this suit vide the plaint dated November 27, 2018 and filed on November 28, 2018.
5. The plaintiff seeks the following prayers:
  - a. A declaration that the conditional financing & purchase agreement dated the May 17, 2016 and the addendum to the conditional financing & purchase agreement on the August 29, 2016 is rescinded.
  - b. General damages for breach of contract.
  - c. Special damages in the sum of Kshs 18,991, 690.00 as particularized in paragraph 7 (i) (c) and 7(ii) (a), (b) & (c) of the plaint as at the date of filing suit and further damages to be ascertained.
  - d. Interest on (c) above at the prevailing commercial rates and for such period of time as this honorable court may deem fit to grant.
  - e. A permanent injunction restraining the defendants, their agents, servants or any of them from offering for sale and advertising for sale the 4 two bedroomed fully furnished villas christened Ziwa 1, Ziwa 2, Ziwa 3 and Ziwa 4 which were erected on portion No 14242/101 (original No 14242/10/9) IR 195919.
  - f. Costs of this suit together with interest thereon as such rate and for such period of time as this honorable court may deem fit to grant.
  - g. Any such order or further relief as this honorable court may deem appropriate.
6. The defendants filed a statement of defence dated December 6, 2018 on December 10, 2018 wherein they denied the averments made in the plaint.
7. The application first came up for hearing on February 28, 2022 but the defendants/respondents had not filed their responses to the application. Directions were given that the defendants/respondents file their responses and the application be canvassed by way of written submissions.
8. The matter was scheduled for mention on April 26, 2022 to confirm filing of written submissions on which date neither of the parties were present in court.
9. The matter was rescheduled to May 17, 2022 to confirm filing of submissions. The plaintiff/applicant intimated that its submissions had been filed but the court noted that the said submissions were not on the court record.
10. After several mentions for submission, parties were finally ready with their submissions on July 13, 2022 and the matter reserved for ruling.

## **The Plaintiff/Applicant's Contention**

11. The plaintiff/applicant's director contends that he is duly authorized to swear the affidavit on behalf of the company.
12. He further contends that he has the full knowledge and information concerning the suit herein which was formerly Malindi Chief Magistrate's Civil Suit No 384 of 2018 and he is therefore competent to swear the affidavit.



13. He also contends that on November 28, 2018 the plaintiff filed a suit against the defendant in Malindi Chief Magistrate's Court.
14. It is his contention that subsequently, the Defendants filed a statement of defence on December 10, 2018.
15. The plaintiff/applicant contends that the suit was transferred to this court pursuant to the orders issued by Hon Justice R Nyakundi on October 1, 2019 in Malindi High Court Misc Application No 27 of 2019.
16. He further contends that on September 30, 2021, parties appeared before this honorable court for pre-trial directions which were deferred to February 28, 2022.
17. He also contends that he is informed by Mr Mark Kotonya, an advocate of the High Court of Kenya for the plaintiff which information he believed to be true that on February 17, 2022, they were served with the defendants statement of defence and counterclaim.
18. It is his contention that he is also advised by Mr Mark Kotonya which advise he believes to be true that pleadings in this matter were closed fourteen days after December 10, 2018 when the defendants served the statement of defence dated December 6, 2018.
19. He contends that he is further advised that according to the court record, the defendants have filed two statements of defence and a counterclaim and that no leave was granted by the court for the defendants to file the statement of defence and counterclaim dated February 4, 2022.
20. He further contends that the defendants' statement of defence dated February 4, 2022 is frivolous, vexatious and is intended to prejudice and delay the fair trial of this action. The said statement of defence is otherwise an abuse of the process of court and should be struck out.
21. He also contends that unless the present application is heard and the orders sought herein issued, the plaintiff will suffer substantial harm, loss and damage.
22. He ends his deposition by stating that it is just and equitable in the circumstances of this matter that the defendants statement of defence and counterclaim dated February 4, 2022 be struck out.

### **The Defendants/Respondents Response**

23. The defendants/respondents filed a replying affidavit sworn by Ben Spinks their director on March 21, 2022 and filed on March 24, 2022.
24. He contends that he is authorized to swear the affidavit. It is his further contention that initially the plaintiff/applicant filed the suit at Malindi Chief Magistrate Civil Suit No 384 of 2018.
25. He also contends that the defendants/respondents being aggrieved by the pendency of the said suit in the Malindi Chief Magistrate's Court, which had no territorial or pecuniary jurisdiction to entertain it, they filed a Miscellaneous Application No 27 of 2019 seeking orders for withdrawal of the suit and the transfer and hearing of the same to the Environment and Land Court at Nakuru which has the requisite jurisdiction.
26. He also contends that on October 1, 2019, Justice R Nyakundi made an order that the said suit be withdrawn and the file transferred to the Environment and Land Court at Nakuru where it was to be mentioned on October 15, 2019.
27. It is his contention that the said suit was transferred to this court and mentioned for directions on September 30, 2021 wherein parties were directed to file their bundle of documents.



28. He contends that in compliance with the said directions, the plaintiff/applicant filed its bundle of documents and it was imperative that the defendants/respondents file a fresh written statement of defence incorporating a counter claim in the sum of Kshs 156,000,000 together with costs and interest which counterclaim they would not have filed at the Malindi Chief Magistrate's Court as it had no jurisdiction to entertain their claim contained in the counterclaim.
29. He also contends that the order of Justice R Nyakundi withdrew the claim in the Chief Magistrate's Court in Malindi together with their written statement of defence.
30. He further contends that the plaintiff/applicant cited order 2 rule 15 seeking that the said written statement of defence and counterclaim to be struck out on grounds that it discloses no reasonable cause of action, is scandalous, frivolous, vexatious, may prejudice, embarrass or delay the fair trial of the action or otherwise an abuse of the process of the court.
31. The defendants/respondents contends that their written statement of defence and counterclaim does not fall within any of the limbs enumerated above and does not prejudice the plaintiff/applicant as it has liberty to file a defence to the said counterclaim.
32. He ends his deposition by stating that at this stage of the trial is imperative that the pleadings define and identify the issues of controversy or in dispute between the parties and that therefore their written statement of defence and counterclaim is within the requirements of pleadings in law and is in order.

#### **Issues For Determination**

33. The plaintiff/applicant filed its submissions dated on May 23, 2022 while the defendants/respondents filed their submissions on April 27, 2022.
34. The plaintiff/applicant in its submissions gave the facts and background of the suit and identified one issue for determination; Whether the defendant's statement of defence and counterclaim dated February 22, 2022 is properly on record and if not, whether the same should be struck out.
35. The plaintiff/applicant relied on order 2 rule 13, order 8 rule 1(1) of the [Civil Procedure Rules 2010](#) and submitted that the defendants/respondents had filed a joint statement of defence on December 10, 2018. The same is dated December 6, 2018.
36. The defendants/respondents subsequently filed another statement of defence and counterclaim dated February 4, 2022. This meant that there are two statements of defence on record.
37. The plaintiff/applicant submits that pursuant to order 2 rule 13 of the [Civil Procedure Rules](#), the pleadings in this matter closed fourteen days after December 10, 2018 and therefore the defendants/respondents must seek leave before filing their statement of defence and counterclaim.
38. The plaintiff/applicant relied on the cases of [Boniface Mutinda Kabaka v David Mutua Kamonde Katua & 51 others](#) [2018] eKLR and [Ariho Emmanuel & Another v Centenary Rural Development Bank Limited & 2 others](#), Uganda HCC No 14 of 2016.
39. The plaintiff/applicant submitted that any pleading filed without leave is a nullity and is liable to be struck out and sought that the defendants/respondents statement of defence and counterclaim be struck out.
40. The defendants/respondents in their submissions identified one issue for determination; Whether the pleadings in a withdrawn suit survives the suit itself.



41. They have cited order 25 rule 1 of the *Civil Procedure Rules*, the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd & Kenya Bureau of Standards* [2021] eKLR and reiterate that they had initially filed their written statement of defence on December 10, 2018 at Malindi Chief Magistrate’s Court and upon the matter being fixed for pre-trial conference before this court, they naturally filed a fresh written statement of defence and counterclaim on December 4, 2022 since the earlier statement of defence stood withdrawn with the suit in the Chief Magistrate’s Court in Malindi.
42. The defendants/respondents also relied on the case of *D T Dobie & Company Limited vs Muchina* [1982] KLR and concluded their submissions by submitting that their statement of defence and counterclaim dated February 4, 2022 is properly on record and the plaintiff/applicant’s application has no merit.

### **Analysis And Determination**

43. I have considered the application, the replying affidavit and the submissions and two issue that arises for determination is:
  - a. Whether the defendants statement of defence and counterclaim dated February 4, 2022 ought to be struck out.
  - b. Who shall bear the cost of the application.
44. Order 2 rule 15(1) and (2) of the *Civil Procedure Rules* provides as follows:
  - (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
    - (a) it discloses no reasonable cause of action or defence in law; or
    - (b) it is scandalous, frivolous or vexatious; or
    - (c) it may prejudice, embarrass or delay the fair trial of the action; or
    - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
  - (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
45. The Court of Appeal in the case of *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) stated as follows:

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.
46. In the present matter the plaintiff/applicant seeks that the defendants/respondents statement of defence and counterclaim dated February 4, 2022 be struck out on the grounds that the defendants/respondents had earlier filed a statement of defence on December 10, 2018.



47. Further that the defendants/respondents did not seek leave to file the statement of defence and counterclaim dated February 4, 2022.
48. The defendants/respondents on the other hand argue that the matter was initially filed in Malindi Chief Magistrate's Court. Since the said court lacked jurisdiction to hear and determine the matter, they filed Misc Application No 27 of 2019 in the High court at Malindi. The learned judge gave orders of withdrawal of the suit from the subordinate court ie the Chief Magistrate's Court at Malindi and transfer of it to the Environment and Land Court Nakuru.
49. The defendants/respondents further argue that as a result, their statement of defence earlier filed was withdrawn and so they correctly filed their statement of defence and counterclaim dated February 4, 2020.
50. A perusal of the court record shows that there is a statement of defence dated December 6, 2018 and filed on December 10, 2018 where the defendants deny all of the averments in the plaint.
51. There is also another statement of defence and counterclaim dated February 4, 2022 and filed on February 16, 2022.
52. The order issued in Malindi Misc Application No 27 of 2019, which the defendants/respondents are relying on in support of the fact that filing of the subsequent statement of defence was within the law, is in the following terms;
  - a. That the Malindi Chief Magistrate's Court Civil Suit No 384 of 2018 (the suit now pending for hearing and determination before the Chief Magistrate's Court at Malindi be and is hereby withdrawn and transferred to the Environment and Land Court at the Nakuru for hearing and determination.
  - b. That the court file be and is hereby transferred to the District Registry of the Environment and Land Court of Kenya sitting at Nakuru.
  - c. That the matter be mentioned at Nakuru Environment and Land Court on October 15, 2019.
53. The said orders were granted pursuant to the provisions of section 18 of the *Civil Procedure Act*. The provisions of section 18 of the *Civil Procedure Act* are as follows:
  18. Power of high court to withdraw and transfer case instituted in subordinate court
    - (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the high court may at any stage—
      - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
      - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
        - (i) try or dispose of the same; or



- (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

54. Essentially, this matter was withdrawn from the Chief Magistrate’s Court Malindi and transferred to this court- The Environment and Land Court Nakuru. This does not mean that the suit was withdrawn.
55. If this were to be the interpretation of the order issued by the learned judge in Malindi, as the defendant/ respondent would want us to believe and adopt, then there was nothing left to be transferred.
56. Further, the plaintiff/applicant contends that pleadings closed fourteen days after the defendants/ respondents filed their statement of defence on December 10, 2018.
57. Order 2 rule 13 of the [Civil Procedure Rules](#) provides as follows:  
  
The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.
58. Consequently, as submitted by the plaintiff/applicant, the pleadings closed fourteen days after December 10, 2018 by which time the defendants/respondents had filed their statement of defence.
59. That being the case, the defendants/respondents ought to have sought leave to amend their statement of defence that was already on record rather than file another statement of defence and counterclaim.
60. Order 8 of the [Civil Procedure Rules](#) provides for the procedure for amendment of pleadings. That is the procedure the defendants/respondents ought to have followed.

### **B. Who Shall Bear The Costs Of This Application?**

61. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of section 27 of the [Civil Procedure Act](#) (cap 21).

### **Disposition**

62. In view of the foregoing, I find that the plaintiff/applicant’s application is merited. Consequently, I order as follows:
- a. The defendants/respondents statement of defence and counterclaim dated February 4, 2022 and filed in court on February 16, 2022 is irregular and is hereby struck out from the court record.
  - b. The costs of this application shall abide the outcome of the main suit.
63. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6TH DAY OF  
DECEMBER, 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Kotonya for the Plaintiff/Applicant.**

**Miss Mwaura for the Defendants/Respondents.**

**Court Assistant; Ms. Monica Wanjohi.**

