



**Kassim (Suing Through His Attorney and Agent, Iftikar Omar Faraj) v fadhil & another
(Being Legal Representatives of the Estate of Mohamed Omar - Deceased) (Environment
& Land Case 275 of 2014) [2024] KEELC 495 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 275 OF 2014
SM KIBUNJA, J
FEBRUARY 7, 2024**

BETWEEN

**MOHAMED ABDULRAHMAN KASSIM (SUING THROUGH HIS ATTORNEY
AND AGENT, IFTIKAR OMAR FARAJ) PLAINTIFF**

AND

SUAD SALIM FADHIL 1ST DEFENDANT

OMAR MOHAMED OMER 2ND DEFENDANT

**BEING LEGAL REPRESENTATIVES OF THE ESTATE OF MOHAMED OMAR -
DECEASED**

RULING

[Plaintiff's Preliminary Objection Dated The 16th August 2023]

1. The plaintiff commenced this suit against Mohamed Omar, deceased, through the plaint dated the 13th October 2014 seeking for among others:
 - a. An order of specific performance to compel defendant to transfer a portion of land measuring 60 by 40 feet from Plot No 70/Section 11/MN CR. No 1316 to the plaintiff.
 - b. And or alternatively, the Deputy Registrar to execute the transfer documents on behalf of the defendant to effect the said transfer.
 - c. Costs.
2. The defendant opposed the plaintiff's claim through their defence dated the 2nd December 2014 as amended on 30th January 2023 to among others, add a counterclaim. The defendants sought for the



plaintiff's suit to be dismissed with costs and judgement entered against the plaintiff in terms of their counterclaim for;

- a. Kshs 2,594,600.
 - b. Interests at courts rate from 21st April 2017 until payment in full.
 - c. Exemplary damages for disregarding a consent order.
 - d. Costs.
3. The plaintiff opposed the counterclaim through the defence to the counterclaim dated the 9th August 2023, inter alia averring that the plaintiff's suit was compromised through a consent and the defendant transferred the land to the plaintiff on the 15th November 2016. That construction contract portion of the consent was however not complied with after the defendant failed or declined to prepare the agreement within the time agreed and was therefore discharged. That the defendant has not explained how the loss of Kshs 2,594,600 claimed through the counterclaim was sustained through the failure to have the construction contract executed. That claim does not relate to the environment and land disputes but is of a commercial nature and this court is without jurisdiction on the counterclaim.
4. The plaintiff then filed the notice of preliminary objection dated the 16th August 2023 raising two (2) grounds that:
- a. The court is without jurisdiction on the counterclaim over compensation of Kshs 2,594,600 with costs and interests as it was a civil claim unrelated with environment, use, occupation or title to land.
 - b. The counterclaim dated the 30th April 2023 is incurably bad and defective and should be struck out in limine with costs.
5. The court gave directions on the 26th October 2023 on filing and exchanging submissions on the preliminary objection. The learned counsel for the plaintiff and defendant filed their submissions dated the 26th November 2023 and 4th December 2023, which the court has considered.
6. The following are the issues for determinations by the court:
- a. Whether the court has jurisdiction in the issues raised in the counterclaim.
 - b. Whether the counterclaim as phrased is bad in law and defective.
 - c. Who pays the costs in the preliminary objection?
7. The court has carefully considered the grounds on the preliminary objection, submissions by the two learned counsel, superior courts decisions cited thereon, the pleadings filed and come to the following findings:
- a. This suit was commenced by the plaintiff against the defendant through the plaint dated the 13th October 2014 seeking for primarily, an order of specific performance to compel the defendant transfer a 60 by 40 feet portion of land to him out of Plot No 70 Section 11/MN CR No 1316. The plaintiff had averred inter alia that the defendant had failed to comply with his obligations under their sale of land agreement of 19th January 2009 despite receiving the full purchase price. The defendant opposed the plaintiff's suit through his statement of defence dated the 2nd December 2014 and amended on the 30th January 2023. The defendant inter alia admitted entering into the said agreement of sale of land and added that, it was subject to condition that "6. The purchaser shall contract the vendor to construct a building on the



property herein upon the purchaser paying the consideration in full and furnishing the vendor with the relevant building plan.” That defendant also filed a list of documents dated the 2nd December 2014 attaching what he called “Plaintiff’s Proposed Building plan.” It is therefore not true for the plaintiff to allege that the defendant never provided a building plan.

- b. The record confirms that on the 24th May 2016 the court adopted as order of the court a consent dated the 24th May 2016 settling the Plaintiff’s suit. The matter was then set down for mention and on the 20th April 2017, the court was informed that the transfer of the land to the plaintiff had been effected, and that the parties were negotiating on the building contract. They could not have engaged in such negotiations if the building plan had not been provided.
- c. Then on the 24th January 2018, the court was informed that the parties were negotiating on the quotation provided by the defendant. It appears no settlement on the building contract aspect was arrived at and hence the defendant’s counterclaim, to which the plaintiff has raised preliminary objection over.
- d. The learned counsel for the plaintiff has cited several superior courts decisions including the case of *Susanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR, where the plaintiffs had performed their obligations under the parties’ agreement but the defendants were in breach. The plaintiffs were inter alia seeking for damages, mesne profits, interests and costs. The 1st defendant had raised a preliminary objection on jurisdiction of the High Court. The court addressed itself to the predominant issue question and among others held that:

“41. In my view, therefore, it appears that the parties intended that their contract involved two distinct parts- one for the sale of land and, the other, for construction of townhouses and ancillary infrastructure. It is also my finding, based on the above analysis, that the parties also intended the contract to be dynamic in nature where the pre-dominant purpose of the contract would change over the contractual period: while the contract was predominantly for sale of land at the inception, it evolved, in its present contractual form to become one for construction of townhouses and ancillary infrastructure. It is, finally, my finding that the Land Acquisition Price having been paid (as it is undisputed from the pleadings), and the title to the properties having been registered in the name of the plaintiffs, there is no dispute as to ownership of the land- the only contest being whether there has been a breach of the Construction Contract between the parties, and if so which party is in breach and what consequences for the breach are. Consequently, it is my finding and holding that the dispute between the plaintiffs and the defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this court has jurisdiction to hear the suit.”

The facts in that case are definitely different from those in the instant suit. Unlike in that case where the suit filed in court was over the construction contract and nothing to do with land, this instant suit was filed primarily as a claim over land. That claim was settled through a consent after the suit had been filed. What remained unsettled is what the defendant has sought through the counterclaim.

- e. The foregoing clearly shows that the building contract clause, under which the counterclaim is based, was so intertwined with the agreement for sale of the land that it would be unjust, if not unfair, and more expensive to separate the two as different and independent agreements whose breach would require to be prosecuted in two different suits. In view of the provision



of Article 162(2)(b) & 159(2)(b) of the Constitution and section 13(2)(d) &13(7)(c) of the Environment and Land Court Act No 19 of 2011, this court is with jurisdiction to hear and determine the issues raised through the defendants' counterclaim. The plaintiff's preliminary objection is therefore without merit.

- f. That in view of the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya that costs follow the events unless otherwise for good cause ordered by the court, I award the defendants the costs in the preliminary objection.
8. The upshot of the foregoing determinations on the plaintiff's preliminary objections commends the issuance of the following orders:
- a. That the plaintiff's preliminary objections dated the 16th August 2023 is without merit.
- b. The said preliminary objection is hereby rejected.
- c. The plaintiff to pay the defendants' costs in the preliminary objection.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 7TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence of:

Plaintiff: None.

Defendants: None.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

