



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 315 OF 2000

BAJABER LIMITED PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY..... DEFENDANT

COMMISSIONER OF LANDS THIRD PARTY

AND IN COUNTERCLAIM

KENYA REVENUE AUTHORITY..... PLAINTIFF IN COUNTERCLAIM

VERSUS

SWALEH ABUBEKER AHMED..... 1ST DEFENDANT IN COUNTERCLAIM

SALIM AHMED TAIB2ND DEFENDANT IN COUNTERCLAIM

BAJABER LIMITED.....3RD DEFENDANT IN COUNTERCLAIM

BANK OF AFRICA KENYA LIMITED.....4TH DEFENDANT IN COUNTERCLAIM

RULING

(Application to strike out defence and counterclaim; respondent having been given leave to amend defence and introduce a counterclaim; respondent proceeding to file amended pleadings that had been rejected in an earlier application and not the pleadings for which leave was granted; no basis upon which the respondent could file disparate pleadings from those for which leave was granted; application allowed; amended defence and counterclaim struck out with costs)

1. The application before me is that dated 29 October 2019 filed by the 1st defendant to the counterclaim. The application seeks orders to have struck out the defence and counterclaim filed by the defendant in the main suit and the plaintiff in the counterclaim. The application is opposed.

2. To put matters into context, this suit was commenced by way of a plaint which was filed on 11 July 2000. The plaintiff is Bajaber Limited and the defendant is Kenya Revenue Authority (the respondent in this application). In the plaint, the plaintiff pleaded to be the leasehold owner of the land parcels 9592/Section I/Mainland North and 9593/Section I/Mainland North (the suit properties). It pleaded that the respondent had illegally entered into the suit properties and commenced construction of a wall and building. In the plaint, the plaintiff has asked for orders to have the respondent permanently restrained from the suit properties and to demolish its structures.

3. The respondent filed defence on 14 August 2000 where it basically pleaded that its entry into the suit properties was lawful as the properties belonged to her. The matter proceeded for hearing before Odero J, on 21 October 2009, when one witness testified for the plaintiff. Subsequently, the respondent filed an application dated 1 December 2009 seeking to amend the defence to introduce a counterclaim against the plaintiff and its directors, and against Bank of Africa Kenya Limited. The basis of that amendment was that when the matter proceeded for hearing, it was revealed that one of the suit properties had been charged to Bank of Africa Kenya Limited. To the said application, the respondent annexed a draft amended defence and counterclaim, demonstrating how she wished to amend if leave was granted. That draft shows that the respondent proposed to have Swaleh Abubeker Ahmed, Salim Ahmed Taib, Bajaber Limited (plaintiff) and Bank of Africa Kenya Limited, as the 1st, 2nd, 3rd and 4th defendants respectively, to the counterclaim.

4. That application was heard and dismissed by Odero J through a ruling delivered on 26 April 2010.

5. There followed another application by the respondent, dated 13 October 2010, still seeking to amend the defence to introduce a counterclaim. To that application was annexed a draft amended defence and counterclaim showing how the respondent would amend if leave was granted. That application was allowed on 18 November 2011 by Odero J. In that ruling, the following orders were made :-*“The defendant to file and serve its Amended Defence and counter-claim within 14 days of today’s (sic) date. The plaintiffs are at liberty to file and serve their reply within 14 days of such service and the defendants to have 14 days to file and serve their reply to any defence to the counter-claim.”*

6. An amended defence and counterclaim dated 15 December 2011 was subsequently filed. In the present application, the applicant wishes to have struck out this amended defence and counterclaim on the following grounds :-

i. That the amended statement of defence and counterclaim herein was filed without the leave of the Court.

ii. That the leave granted on 18th November 2011 to the plaintiff in the counterclaim was to file and serve an amended statement of defence and introduce a counterclaim against the plaintiff in the original suit only.

iii. That further, the amended statement of defence and counterclaim was filed and served way after the 14 days ordered by the Honourable Court had lapsed.

iv. That in the present circumstances, the filed amended statement of defence and counterclaim is therefore fatally defective, a nullity, amounts to an abuse of the court process and is scandalous, frivolous and vexatious.

v. That it is in the interest of justice that the prayers sought herein be allowed.

7. The application is supported by the affidavit of Swaleh Abubakar Ahmed. He has annexed the relevant applications and rulings.

8. The respondent has opposed the application by filing Grounds of Opposition. Inter alia, it is stated that the applicant is clutching at technicalities; that the application has been filed after inordinate delay; that if the application is allowed it will deprive the respondent the right to be heard under Article 50 of the constitution.

9. Counsel filed written submissions which I have considered before arriving at my decision. My decision will be brief, because to me, the facts are very clear and there is no point of belabouring the same.

10. What the respondent filed as an amended defence and counterclaim was pursuant to the Court’s ruling of 18 November 2011. That ruling followed the application dated 13 October 2010 seeking leave to amend. In that application, the respondent annexed a draft amended defence and counterclaim which did not introduce any new parties. Indeed, in her ruling, Odero J, noted that the parties to the suit would remain the same. It follows that what the respondent filed as an amended defence and counterclaim was not what the court granted leave to the respondent to file. What the respondent filed was the draft amended defence and counterclaim which the court declined to grant leave to the respondent through the court’s ruling of 26 April 2010. In other words, the respondent proceeded to file a pleading which the court had rejected. If the respondent’s pleadings were to remain on record, then they would be pleadings filed without the leave of the court, which would be irregular.

11. Moreover, if what the respondent has filed is allowed to stand, it will be akin to circumventing the ruling of 26 April 2010 which will bring the administration of justice into serious disrepute.

12. The respondent cannot attempt to state that its right to present its case has been curtailed. If the respondent was not happy with the ruling of 26 April 2010, it had the right to appeal, but no appeal was filed. It could not proceed to file the amended defence and counterclaim for which leave had been denied. In other words, when a party has been granted leave to file an amended pleading, what is filed must be in line with what the court has granted leave to file. A party cannot depart and file pleadings that are disparate from that for which leave was granted. Whichever way you look at it, there is no basis upon which the respondent’s amended defence and counterclaim dated 15 December 2011, can be allowed to stand for no leave was given to file the same. Leave was given for a completely different pleading.

13. The respondent has attempted to allege that the present application has been filed after inordinate delay, but on this, the respondent is certainly clutching at straws. In fact, if there is a party that has been guilty of tardiness, it is the respondent. The respondent was granted 14 days from 18 November 2011 to file her amended defence and counterclaim but the same was filed on 15 December 2011 or thereafter, which was out of time, forget for a moment that what was filed was not what leave was given for. Court timelines are not given in vain especially where one is riding on the discretion of the court. Aside from that, service of the amended pleadings on the applicant was not done until 28 November 2018, about 8 years since leave to amend was given. The applicant entered appearance under protest on 31 October 2019 and simultaneously filed this application. Where is the claimed inordinate delay on the part of the applicant ? And even assuming that there was delay, that would still not excuse the respondent for filing a pleading that was not in line with the leave given by court.

14. There is merit in this application and the same must succeed. I proceed to strike out the purported amended defence and counterclaim dated 15 December 2011 with costs to all the four named defendants to the counterclaim. The 1st defendant to the counterclaim, who is the applicant herein, will also have the costs of this application.

15. Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA