



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO. 347 OF 2015**

**GRAIN BULK HANDLERS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JUJA COFFEE EXPORTERS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. For consideration is the Defendant's Notice of Motion dated 19<sup>th</sup> March, 2020 seeking to strike out the plaintiff's Defence to counter claim for disclosing no defence and for being vexatious, frivolous and an otherwise abuse of the court process. That upon such striking out, judgment to be entered in favour of the defendant as prayed in the counter claim. The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15(1), (a), (b), (c) and (d), Order 13 Rule 2 of the Civil Procedure Rules and all other enabling provisions of the Law under the inherent jurisdiction of the court. The application is based on the ground on the face of the application and supported by the affidavit of Tahir Sheikh Said sworn on 19<sup>th</sup> March, 2020.

2. The defendant states that the plaintiff filed the suit herein seeking among other reliefs, an order of specific performance of an alleged sale contract by the Defendant over the property known as Mombasa/Block 1/392 on the basis that the plaintiff had a legitimate expectation that the suit property was to be transferred to her in terms of the draft agreement. Vide a ruling dated 22<sup>nd</sup> September, 2017, the court (Omollo J) struck out the plaintiff's suit for being contra Section 38 (1) of the Land Act and Section 3(2) of the Law of Contract Act. That in response to the Defendant's counterclaim, the plaintiff has raised the same issues which had been raised in its plaint and that upon striking out of the plaint, the plaintiff has not amended its Defence to the counter-claim. Therefore the Defendant argues that the plaintiff has no triable defence to the Defendant's counter-claim.

3. The application is opposed by the plaintiff vide a Replying Affidavit sworn by Joseph Mwella on 15<sup>th</sup> February, 2020. It is the plaintiff's position that the ruling by Hon. Omollo J. dated 22<sup>nd</sup> September, 2017 disposed off not only the plaintiff's suit, but the counterclaim as well and that there are no valid proceedings before court. Further, the plaintiff argues that the application is fatally defective and untenable as the same abuses the express provisions of Order 2 Rule 15 under which it is allegedly brought, and thus the prayers sought therein are not for granting. It is the plaintiff's contention that the grounds set out in the motion do not meet the threshold set out by law for striking out the defence lodged herein. The plaintiff further contends that the defence lodged herein to the counterclaim is not a regurgitation of the since struck off plaint, but consists of a plethora of triable issues and thus the instant application for striking out is pre-mature and does not meet the requisite legal thresholds.

4. In his submissions, Mr. Gikandi, learned counsel for the Defendant submitted that the plaintiff's response must be rejected summarily for being the epitome of a litigant approbating and reprobating. The defendant's counsel relied on the case of **Fursys (Kenya) Limited –vs- Southern Credit Banking Corporation Limited [2015] eKLR**. It was further submitted that there has never been any application for the striking out of the counter claim and that the court has not delivered any ruling with regard to the striking out of the counterclaim. The defendant position is that the court determined the preliminary objection dated 23<sup>rd</sup> December, 2015 hereby on 22<sup>nd</sup> September, 2017 the court ordered that the plaintiff's suit could not stand and was struck out. That it is therefore not possible for the plaintiff to use that ruling and insist that the counterclaim was also struck out by the said ruling. That if the court decided to strike out the counterclaim, the court could have said so in clear and categorical terms. The defendant's submission is that the invitation to render an application with regard to the said ruling amounts to an abuse of the process of the court. That had the plaintiff ever intended to have the counterclaim struck out, the plaintiff should have filed an application in that regard, and not ride on the defendant's application and somehow obtain a drastic order of striking out the defendant's counterclaim when the plaintiff has never applied for such an order.

Mr. Gikandi relied on the case of **Julius Mutuma –vs- Stanley Mbogori & Another [2007] eKLR** where it was held that.

***“A counter-claim is therefore a cross action and although brought in a suit, is a separate action capable of being pursued independently of the main suit. Order 8 Rule 12 shows this independence.”***

It was submitted that unless and until a specific order is made dismissing the counterclaim, it cannot be dismissed by implication as the plaintiff wants it to be.

5. Regarding the plaintiff's argument that the application is omnibus and fatally defective, the defendant's counsel submitted that the application is compliant with the law and is hugely merited and is for allowing. The defendant's counsel argued that the case of **Olympic Escort international Co. Ltd & 2 Others –vs- Paraminder Sing Samdull & Another [2009] eKLR** relied on concerned on application for summary judgment under Order 35 now 36. Mr. Gikandi relied on the case of **Margaret Njeri Mbugua –vs- Kirk Mweya Nyaga [2016] eKLR and Taj Villas Management Limited –v- Taj Mall Limited [2018]eKLR**.

6. On their part, the advocate for the plaintiff submitted that the Replying Affidavit by Mr. Mwella neither approbates nor reprobates on the issues averred to therein, and that its complexion is necessitated by the directions issued by the court on 2<sup>nd</sup> February 2021 as regards the Respondent's substantive response to the application subject herein to cover not only the matter of interpretation of Hon. Omollo J. ruling delivered on 22<sup>nd</sup> September 2017, but also to interrogate the merits of the instant application. While citing paragraph 9 of the learned Judge's ruling of 22<sup>nd</sup> September 2017, the plaintiff submitted that the effect of that ruling disposed off both the main suit and the Defendant's counter-claim and that there is nothing left of the suit. The plaintiff's counsel urged the court to apply a purposeful interpretation of the subject ruling, noting that since the preliminary objection subject of that ruling was lodged earlier than the counter-claim and that once the same was canvassed and ruling issued thereof, there was not substratum upon which a counter-claim could be anchored.

7. Further, it was submitted that once the preliminary objection was disposed off and a ruling thereof delivered in the Defendant's favour, no suit was left capable of supporting a counter-claim, as at law, a counter-claim is made by the Defendants to a civil proceeding against a plaintiff in response to allegations in a plaint and are typically filed as part of a Defendant's answer to a plaint. It is the plaintiff's interpretation of the concluding paragraph 9 of the said ruling that in the learned Judge's mind, at the time of striking out the plaint pursuant to the preliminary objection, it was as though the amended defence and counter-claim had not been lodged and thus, the total effect of the ruling was to obliterate all the proceedings with each party ordered to bear their own costs thereof. The plaintiff's counsel urged the court to find that to be the correct position.

8. It was further the plaintiff's submissions that the instant application is fatally defective and the prayers sought therein are not for granting. The plaintiff's counsel pointed out that the application is brought inter alia, under the provisions of order 2 Rule 15(1) a, b, c and d of the Civil Procedure Rules and submitted that on an application to strike out a defence under sub-rule (1) (a) on the ground that it discloses no reasonable cause of action/defence, the truth of the allegations contained in the pleading is assumed and evidence to the contrary is inadmissible.

That under the aforesaid sub-rule, the court is obliged not to look at any evidence, affidavit or otherwise, in considering whether or not a plaint or pleading raises a cause of action. The plaintiff's counsel relied on the case of **Jeraj Shariff and Company –vs- Chotai Fancy Stores [1960] EA 374** and submitted that the court must look at the pleadings only and no more, and that once the court admits evidence, then the aim of the rule, which is to dispose off unnecessary and baseless litigation speedily will be defeated. It is submitted that going by the decision in the Jeraj Shariff & Company case (supra), the instant application, in so far as the same is backed by affidavit evidence makes the same fatally defective and untenable at law, and that the prayer sought ought not to be granted in the circumstances.

9. In addition, it was plaintiff's submission that the application is omnibus in nature and is a mish-mash of all the provisions of the Order 2 Rule 15(1) (a), (b), (c) and (d) thus making it incapable of proper adjudication. That in moving the court to strike out a pleading under sub-rule 1, the party must specifically elect whether they are invoking part (a), (b), (c) and (d) as circumstances under which they may be applied are different and not contingent to each other with the result that lumping them together is embarrassing as drawn as the case the opposite party has to meet at trial is not clear. That in order for a pleading to be struck out under Sub rule 1 (a), (b), (c) and (d), the court has to consider different regiments of the law as the reasoning applied thereof is not uniform but will depend on the particular ground cited or invoked. The plaintiff's counsel relied on the case of **Mpaka Road Development Ltd –vs- Kana (2001) EA. 468; Olympic Escort International Co. Ltd & 2 Others –vs- Parminder Singh Saudhu & Another [2009] eKLR**, and **Aviation & Allied workers Union of Kenya –v- Kenya Airways Limited & 3 Others [2015] eKLR**.

10. The plaintiff further submitted that the application herein does not meet the legal threshold and principles set out at law and in decided precedents for granting of an order for striking out a pleading. They relied on the case of **Abubakar Zein Ahmed –vs- Premier Savings and Finance Company Ltd [2007] eKLR; Nitin properties Ltd-vs- Jajir Singh Kalsi & Another (1995-1998) 2 EA 257 CAK, and D.T Dobie & Company (Kenya) Ltd –vs- Mudina (1982) KLRI**. It is the plaintiff's submission that the Defence to the counterclaim is not a mere regurgitation of the averments that were set out in the since struck off plaint, but distinct both in matters of fact and law as averred therein and contains a plethora of triable issues. The plaintiff gave an example of paragraphs 3 which averred and contested that the sum of kshs. 550,750/= was the monthly rent payable with the Defendant put to strict proof thereof. That this issue alone goes to the root of the counterclaim herein and cannot be resolved through summary process but ought to be ventilated through a hearing on merits. It is submitted that it is trite law that a Defendant ought only to show that the defence is arguable and that it raises a triable issue without necessarily showing that the same will succeed at the main trial. The plaintiff's counsel relied on the case of **InterCountries Importers & Exporters Ltd –vs- Nairobi City Council [2002] IKLR 209** where the court held that when a defendant's defence discloses a reasonable cause of defence and it is articulated in a manner which does not offend any of the rules of pleading, it cannot be said to be an abuse of the process of court. The plaintiff reiterated their submissions that the Honourable Omollo J. ruling delivered on 22<sup>nd</sup> September 2017 pursuant to the Defendant's preliminary objection dated 23<sup>rd</sup> December, 2015 disposed of the entire proceedings herein, including the Defendant's counterclaim dated 31<sup>st</sup> October, 2016 and urged the court to find so.

11. I have considered the application and the submissions made. The issues for determination by the court are –

**i. An interpretation as to whether the ruling by Hon. Omollo J. as delivered on 22<sup>nd</sup> September, 2017 disposed off the plaintiff's case as well as the Defendant's counterclaim.**

**ii. Whether the application herein is omnibus in nature and fatally defective.**

**iii. Whether the application meets the threshold set out under the law to warrant striking out a pleading.**

12. By a Notice of Preliminary objection dated 23<sup>rd</sup> December, 2015, the Defendant raised a preliminary objection on point of law against the plaintiff's Notice of Motion dated 18<sup>th</sup> December, 2015 and the entire suit on the grounds that:

**i. The Honourable court is denied jurisdiction to entertain the suit by virtue of Section 38(1) of the Land Act No. 6 of 2012 and Section 3(2) of the Law of Contract Act Cap 23 Laws of Kenya.**

**ii. The remedies sought in the suit cannot be granted in light of the provisions of 59 of the Land Registration Act No. 3 of 2012 and Section 87 of the Land Act No. 6 of 2012.**

**iii. The suit discloses no or no reasonable cause of action known in law.**

13. By a ruling dated and delivered on 22<sup>nd</sup> September, 2017, Omollo J. upon considering the said preliminary objection concluded and found that the same had merit and struck out the plaintiff's suit. There was a counterclaim by the Defendant filed on 2<sup>nd</sup> November 2016. Whereas it is the plaintiff's contention that when the preliminary objection was upheld on 22<sup>nd</sup> September, 2017, the counterclaim was also terminated, the Defendant thinks otherwise. It is that divergence of views that has now led to the invitation of the court to interpret the said ruling.

14. In the ruling delivered on 22<sup>nd</sup> September, 2017, the court upheld the Defendant's preliminary objection dated 23<sup>rd</sup> December 2015 and struck out the plaintiff's suit. In paragraph 9 of the said ruling the learned Judge stated as follows:

***"9. Since prayer (a) and (c) of the plaint fails for lack of a contract between the parties, prayers (b) & (d) which are consequential prayers would automatically fail. I am therefore satisfied that there is no reasonable cause of action to go by trial. I conclude by finding merit in the preliminary objection. The result of this is I hereby strike out the plaintiff's suit. Given the circumstances and nature of the claim and considering that the preliminary objection was raised before filing of the defence I order that each party to bear their respective costs of the suit." (Ephasis added).***

15. I have perused the court record and I find that the Defendant's preliminary objection that disposed of the suit is dated 23<sup>rd</sup> December, 2015 and filed in court on the same date. The amended statement of defence and counterclaim dated 31<sup>st</sup> October, 2016 was filed in court on 2<sup>nd</sup> November, 2016. In my considered view, since the preliminary objection was lodged earlier than the counterclaim, once the same was canvassed and a ruling issued thereof, there was no subtraction upon which a counterclaim could be anchored. A counterclaim is made by a Defendant to a Civil Proceeding against a plaintiff in response to allegation in a plaint and is typically filed as part of a defendant's answer to a plaint. My reading of paragraph 9 of Hon. Omollo J. ruling delivered on 22<sup>nd</sup> September 2017 is clear that in the learned Judge's mind, at the time of striking out the plaintiff's suit pursuant to the Defendant's preliminary objection, it was as though there was no amended defence and counterclaim that had been lodged. Indeed the learned Judge stated that "considering that the preliminary objection was raised **"before filing of the defence,** I order each party to bear their respective costs of the suit." What is not in dispute is that the preliminary objection was raised before the filing of the counterclaim. While I appreciate that by the time the ruling on the preliminary objection was being delivered there was an amended defence and counterclaim on record the learned Judge must have based her ruling on the pleadings that were on record as at the time the objection was raised.

As already stated, in the said ruling, the learned Judge clearly stated that the preliminary objection was raised "before filing of the defence." Ever since the court rendered its decision by the said ruling, none of the parties herein has applied for review of the said ruling.

Therefore, my interpretation of the ruling delivered on 22<sup>nd</sup> September, 2017 and specifically the conclusions made by the learned Judge in paragraph 9 of the said ruling, the total effect of the said ruling was to obliterate all the proceedings with each party ordered to bear their own costs thereof.

16. Having arrived at the above conclusion, it is my view that this court is now "functus officio", since a decision was rendered that in my view settled the entire suit. I do not think I should consider the other issues since the matter is now out of the hands of this court.

I am of the view that in the circumstances this court is not entitled to revisit the matter as doing so would be re-opening a suit that was concluded by the ruling delivered on 22<sup>nd</sup> September, 2017.

17. Accordingly, I find that the Notice of Motion dated 19<sup>th</sup> March, 2020 is in properly before this court and the same is hereby struck out. Each party to bear their own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF JUNE, 2021**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**C.K. YANO**

**JUDGE**