



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO. 324 OF 2008

JULIUS MUSILI KYUNGA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

JOEL TITUS MUSYA

T/A MAKURI ENTERPRISES.....2ND DEFENDANT

AND

JAMES MURIUKI KARAYA.....INTERESTED PARTY

RULING

1. The application for determination is brought under Order 1 Rule 10 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya. The plaintiff/applicant's application is dated 4th November 2020 and seeks the following prayers:-

a. Spent

b. That fresh directions be given to enable Julius Musili Kyunga to file a defence to the counterclaim by the interested party and file witness statement, list of documents and list of witnesses.

c. That the cost of the application be provided for.

2. The suit herein was filed on 13th November 2008 by the plaintiff/applicant and on 16th January 2009, the court entered interlocutory judgement against the 1st and 2nd defendants. The interested party joined the suit vide an order of court on 1st April 2009 as an affected party. However the applicant pleaded that court did not give directions on which documents the parties would file or amend. The applicant pleaded that the interested party, after been enjoined and without leave of court filed a defence and counterclaim on 4th May 2009. The applicant further claimed that he has since withdrawn the suit herein, but added that while the suit was alive, he had no cause of action against the interested party.

3. The application is supported by the affidavit of Julius Musili Kyunga. He deponed that he was the plaintiff in the matter herein but has since withdrawn the suit. He also stated that he has never sued the interested party but he is aware that the interested party was enjoined into the suit as an affected party. He claimed that after the interested party had been joined as a party to a suit, the pleadings ought to have been amended and that the interested party should have waited for court's direction before filing his defence and counter claim. He further pleaded that the plaintiff has since withdrawn the suit and he lays no claim whatsoever from the interested party and believes that the interested party should frame his suit afresh and the applicant be allowed to file his defence. He pleaded with court to allow the application before the matter can be fixed for hearing.

4. The application is opposed by the interested party who filed a replying affidavit on 8th February 2021 sworn by James Muriuki Karaya. He deponed that prior to the plaintiff's filing the suit herein, he entered into a sale agreement with the 2nd defendant on 11th November 2008 for the sale of LR 2812/I/MN Shanzu through a public auction. That before the interested party could complete the sale, the plaintiff instituted this suit on 13th November 2008 seeking inter alia the nullification of the charge document dated 4th September 1997 in respect to LR 2812/1/MN against the defendant. That the interested party sought leave of court to be joined into the suit and on 30th March 2009, the court

allowed the interested party to join the suit, and he consequently filed a defence and counter claim on 4th May 2009.

5. The interested party pleaded to court that after a series of litigation at this court and the Court of Appeal, the suit herein was settled vide a consent entered into by the plaintiff and defendants on 12th July 2016. The consent was later set aside by court on 30th May 2019. However the suit between the plaintiff and defendant stood withdrawn.

6. He also claimed that the application was only meant to delay justice as the applicant was aware of the interested party's defence since 4th May 2009 when service was effected. Further that the applicant has not demonstrated to court the reason for the delay in bringing this application for leave to file defence to the counterclaim. He further stated that the plaintiff and defendants delayed prosecuting the suit in order to enjoy the subsisting injunction orders to the detriment of the interested party who has since lost rent and mesne profit.

7. The applicant on 23rd February 2021 filed a Notice of Preliminary Objection on the grounds that an interested party does not exist in a suit initiated by a plaintiff and that the pleadings by the interested party in the form of a statement of defence and counterclaim dated 4th May 2009 is a nullity ab initio and is for striking out with costs.

8. The plaintiff filed his submissions on 23rd February 2021 and stated that the concept of interested party is sui generis in public interest litigation and the purported defence and counter claim by the interested party herein is null and void and the applicant raises a preliminary objection to it. The plaintiff submitted that the defence and counter claim filed by the interested party on 4th May 2009 does not fit the description stated in the Civil Procedure Rules and therefore irregular and defective. The plaintiff pleaded that the interested party's counterclaim is based on the Memorandum of Sale dated 11th November 2008 which is a separate claim from the suit herein which was anchored on the charge between the plaintiff and 1st defendant. The plaintiff submitted through several authorities that an interested party cannot reframe issues placed before the court by primary litigants.

9. The interested party/respondent filed his submissions on 18th March 2021 and submitted inter alia that although the application prays for directions and based on Order 1 Rule 10 of the Civil Procedure Rules, the application is principally an application for leave of court to file defence and counterclaim out of time. The respondent submitted that having filed his defence and counterclaim on 4th May 2009, the applicant had 15 days to file and serve their defence and counterclaim. Yet again on 30th October 2015, the court also granted leave to parties including the applicant to amend their pleadings, but the applicant did not file any pleadings. The respondent submitted that the applicant has failed to set out the reasons for failing to file his defence to the counterclaim more than 10 years after being served with the respondent's defence and counterclaim, nor has he annexed a draft defence for court to consider if it raises triable issues.

10. On the issue of the respondent being an interested party, the respondent submitted that the court had not directed the notice of preliminary objection to be heard alongside this application and therefore the court should disregard the submissions. In addition, the respondent stated that he is no longer an interested party and that he has a suit as a plaintiff against the defendants, the applicant having withdrawn his suit vide a consent dated 11th July 2016. He concluded by stating at the Court of Appeal held in its judgement delivered on 12th February 2015 that the suit property had passed over to the respondent at the fall of the hammer and therefore the respondent was properly defending his interest.

11. I have considered the pleadings filed herein as well as the submissions.

12. The applicant herein seeks directions to enable him file a defence to the counterclaim filed on 4th May 2009 and relies on Order 1 Rule 10 of the Civil Procedure Rules. The applicant stated that the court did not give directions on how parties should proceed after allowing the interested party to be enjoined into the suit in 2009.

13. The respondent averred that he served the applicant with the defence and counterclaim on or about 4th May 2009 and when the applicant filed his amended plaint on 8th November 2015, the applicant did not address the issues that the respondent had stated in his counterclaim. He further averred that the applicant has, for the past decade been aware of the interested party's defence and counterclaim and has even litigated extensively on this matter to the extent of going to the Court of Appeal. That the applicant was using this application to delay justice and deny the respondent a chance to litigate the matter to finality.

14. While I do find that this application seeking directions, eleven (11) years after the interested party filed his defence and counterclaim has been brought after inordinate delay, I also do find that directions have never been given by the court on how the parties were to proceed after leave was granted to the respondent to be enjoined into the suit as an affected party. Accordingly, having considered the plaintiff's application, it is the view of this court that allowing the application permits the court to have the interested party's counterclaim decided on its merits. On the other hand, if the court were to disallow the application, it would be denying the plaintiff an opportunity to ventilate their case pertaining to the counterclaim. This court is not satisfied that the plaintiff's inaction over the years should result in shutting the doors of justice to the plaintiff to defend itself on the counterclaim. Indeed the interested party has since filing the counterclaim not taken any step on the same, until now when jolted by the current application and preliminary objection.

15. In addition, it is also the view of this court that upholding the preliminary objection raised by the plaintiff would deny the interested party an opportunity to ventilate his case, the court having previously allowed him to be enjoined into the suit, even though the plaintiff has since withdrawn his case against the defendants. Indeed, the question of whether the plaintiff has a defence on merit against the interested party's counterclaim and if he can sustain the same ought to be considered during the hearing of the counterclaim herein when this court will consider the proposed defence against the counterclaim. The issue cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of the counterclaim. The court having enjoined the interested party as an affected party to the suit has the mandate of ensuring that all matters in controversy between the parties should be completely and finally determined. This is to avoid instances where the parties file multiplicity of legal proceedings.

16. For the reasons foregoing, the plaintiff's Notice of Preliminary Objection dated 23rd February 2021, is not merited and the same is hereby

dismissed. However the Notice of Motion dated 4th November 2020 is allowed and the court makes the following directions:-

a) The plaintiff, Julius Musili Kyunga (and the defendants if they so wish) do file defence to the counterclaim by the interested party and to file witness statements, list of documents and list of witnesses within fourteen (14) days from the date hereof.

b) Costs of this application shall be in the cause.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF JUNE 2021.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE