



**Samani v Maji Asili Limited & another (Commercial Case
E017 of 2024) [2024] KEHC 12624 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E017 OF 2024
JK NG'ARNG'AR, J
OCTOBER 22, 2024**

BETWEEN

EKBAL ALI SAMANI APPLICANT

AND

MAJI ASILI LIMITED 1ST RESPONDENT

MAURICE ODHIAMBO ACHOLA 2ND RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion application dated 14th June 2024 pursuant to Section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 7 Rule 3, Order 7 Rule 12, Order 51 Rule 1 and 3 of the Civil Procedure Rules, Section 6 (1) of the *Arbitration Act* and under the inherent power of the court, and all other enabling provisions of the law.
2. The Plaintiff/Applicant prayed for orders that the set-off and counterclaim in the Defendants/ Respondents' Statement of Defence, Set Off & Counterclaim dated 29th May 2024 be disallowed and pursued in an independent suit, that the counterclaim be excluded, and that in the alternative, the proceedings relating to the set off and counterclaim herein be stayed and the dispute referred to arbitration in accordance with Clause 27 of the Agreement for Sale of Shares, Assets, Goodwill and Trademark dated 1st September 2021, and that costs of this application be borne by the Defendants/ Respondents.
3. The application is premised on grounds on its face and the Supporting Affidavit of the Plaintiff/ Applicant sworn on 14th June 2024 that the Plaintiff instituted the present suit following the breach by the Defendants of the Agreement for Sale of Plant, Machinery & Equipment dated 24th February 2022 as varied by a Deed of Variation dated 16th December 2022. That prior to the subject agreement, the Plaintiff/Applicant together with other vendors and the Defendants/Respondents herein had entered into an Agreement for Sale of Shares, Assets, Goodwill and Trademark dated 1st September 2021. That



the Defendants/Respondents alleged that a tax liability had arisen from the first agreement. That the Defendants/Respondents claim set-off in the counterclaim the alleged tax liability that had arisen from the first agreement in response to the Plaintiff/Applicant's plaint. That the tax liability alleged is subject to appeal at the Tax Appeals Tribunal in TATC/E639/2024 and that the liability as claimed is a cogent liability which has not crystallized for the Defendants/Respondents to claim.

4. The Plaintiff/Applicant further stated that the tax liability emanating from the first agreement that is subject of appeal therefore cannot be conveniently disposed of in the pending suit. That the Defendant/Respondents have without regard to Clause 27 of the first Agreement claim set-off and has set up by way of counterclaim the alleged tax liability emanating from the first agreement with a view of circumventing the mandatory provision of the arbitration clause. That the set-off and counterclaim by the Defendants/Respondents amounts to an abuse of the court. That this court lacks jurisdiction to entertain the suit on merit, that the tax liability should be referred to arbitration, that the counterclaim raised violates provisions of Order 7 Rule 8 of the Civil Procedure Rules, and it is fair and in the interest of justice that the orders sought in the application are granted.
5. The Defendants/Respondents in their Replying Affidavit sworn on 12th July 2024 averred that the issue of contention is that the agreement has a clause which provides for arbitration between the parties should a dispute arise. The Defendants/Respondents stated that the prior agreement was fulfilled in full and the dispute that has now arisen though emanating from the agreement cannot be classified as a dispute over the terms of the said agreement that were to be referred to arbitration. That the issue of tax liability that has subsequently arisen was not foreseen by the parties and is a completely new cause of action that can be relied upon as a defence or counterclaim. That if the present suit proceeds without the set off and counterclaim, the Respondents will have pending claims against the Applicant.
6. The Defendants/Respondents stated that the court is required to dispense substantive justice and resolve disputes efficiently between the parties pursuant to Sections 1A and 1B of the *Civil Procedure Act* as well as Article 159 of *the Constitution*. However, litigation in piecemeal as suggested will result in injustice. That the fact that tax liability is subject to the Tax Tribunal for determining the actual amounts due and outstanding is more reason as to why the same ought to be heard in conjunction with this suit. That the setoff and counterclaim are properly before the court and that it is in the interest of justice that they are heard on merit and a determination thereon made. The Defendants/Respondents therefore prayed that the application be dismissed with costs.
7. The application was canvassed by way of written submissions. The Plaintiff/Applicant in their submission dated 22nd July 2024 contended that Order 7 Rule 3 of the Civil Procedure Rules provides that where a counterclaim cannot be conveniently disposed of in the pending suit, it ought not be allowed and the Defendants/Respondents should be refused permission to avail themselves thereof. The Plaintiff/Applicant relied on the holding in *County Government of Kilifi v Mombasa Cement Limited (2017) eKLR*. That the set off and counterclaim which is based on the alleged tax liability from the first agreement ought not be allowed for reasons that the tax appeal on the entire tax assessment could make the set off and counterclaim an academic exercise, that the tax liability is a contingent liability, that there will be challenges in allocation of and precise assessment of tax liability, that there will be challenges in allocation of tax liability among the vendors of the first agreement, and that there is a mandatory arbitration clause in the first agreement. That pursuant to Order 7 Rule 12 of the Civil Procedure Rules, the claim raised in the counterclaim ought not be disposed of by way of counterclaim as the issues should be resolved in a separate lawsuit rather than as part of the counterclaim.
8. The Plaintiff/Applicant submitted that the counterclaim was raised prematurely without exhausting the available mechanisms for dispute resolution as was held in the case of *James & Catherine Holdings Ltd v Thika Greens Ltd & Another (Environment & Land Case E003 of 2024) (2024) KEELC*



1690 (KLR) (20 March 2024) (Ruling). That pursuant to Section 6 (1) of the [Arbitration Act](#), the proceedings which are subject to arbitration should be stayed and referred to arbitration. The Plaintiff/Applicant relied on the holding in *Eunice Soko Mlagui v Suresh Parmar & 4 Others* (2017) eKLR, *County Government of Kirinyaga v African Banking Corporation Ltd* (2020) eKLR, *Blue Limited v Jaribu Credit Traders Limited Nairobi (Milimani)* HCCS No. 157 of 2008 cited with approval in the case of *Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti* (2020) eKLR.

9. On whether the counterclaim is properly drafted in accordance with Order 7 Rule 8 of the Civil Procedure Rules, the Respondent submitted that the rule uses the word 'shall' which is a mandatory term requiring the Defendants/Respondents to add to the title of their defence a further title similar to the title in the plaint setting forth the names of all persons who, if such counterclaim were to be enforced by cross action, would be defendants to such action, which has not been done by the Defendants/Respondents. That the counterclaim is therefore not properly drafted, invalid in law and should be disallowed.
10. The Defendants/Respondents in their submissions dated 12th September 2024 argued that the Agreement for Sale of Shares, Assets, Goodwill and Trademark dated 1st September 2021 was between the Respondents and the Applicant herein along with Javaid Samani and Shamim Samani and therefore the tax liability ought to be apportioned between them if any is found to be due and owing. That the present application is brought to preempt the said joinder of parties who are indeed necessary parties to these proceedings as even though the agreement which is the basis of the present suit was signed by the Applicant, it was at the behest and concurrence of the other outgoing directors who were the owners of the company and assets associated with it. The Defendants/Respondent relied on Order 1 Rule 6 and Rule 10 (2) of the Civil Procedure Rules to support joinder of parties to proceedings. That the application is therefore premature as it seeks to obstruct the dispensation of justice to all parties by limiting the scope of defences available to the Defendants.
11. The Defendants/Respondents submitted that Order 7 Rule 3 of the Civil Procedure Rules allows a defendant by way of defence set off and/or counterclaim. That the Court of Appeal in the case of *Twiga Chemical Industries Limited v Rotam Agrochemical Co. Ltd* (2019) eKLR where they cited with approval *Kenya Oil Company Ltd v Kenya Ports Authority* (2009) eKLR disagreed with the Applicant's train of thought that the tax liability has not crystalized and therefore should not be allowed to stand.
12. On whether the arbitration clause in the first agreement should stay in the counterclaim herein, the Defendants/Respondents argued that the issue before court is whether or not the tax liability that has now arisen should be referred to arbitration as sought by the Plaintiff/Applicant herein under Section 6 of the [Arbitration Act](#) and the counterclaim stayed and determined at such arbitration. That the Agreement for Sale of Shares, Assets, Goodwill and Trade Mark dated 1st September 2021 was indeed concluded successfully as payment was made as scheduled and the transfer of shares effected at the Company Registry. That however, something unforeseen (Tax Liability) that has since been raised by the Kenya Revenue Authority was not known by the parties at the time of entering into the agreement. That once a determination is made and the tax liability apportioned between the parties, it will then be clear who owes who what and the party so deemed liable to settle the same. The Defendants/Respondents cited the cases of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* (2001) eKLR and *Rene Industries Limited v County Government of Kituyi* (2019) eKLR. The Defendants/Respondents therefore urged the court to dismiss the application with costs.
13. I have considered the Notice of Motion application dated 14th June 2024, the Replying Affidavit sworn on 12th July 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.



14. It is not in dispute that there was an agreement for Sale of Plant, Machinery & Equipment dated 24th February 2022 that was later varied by a Deed of Variation dated 16th December 2022. It is also not in dispute that there was an earlier Agreement for Sale of Shares, Assets, Goodwill and Trademark dated 1st September 2021. That Kenya Revenue Authority conducted an audit and established tax liabilities for 3 years that the Plaintiff/Applicant was running the company and 1 year when the Defendants/ Respondents took over. That the said issue is before the Tax Appeals Tribunal No. TATC/E639/2024 pending hearing and determination. It is on this basis that the Defendants/Respondents in their Statement of Defence dated 29th May 2024 that they have raised both setoff and counterclaim for any sums that may be found to be owed to the taxman after taking into account any sums that may be owed to the Plaintiff/Applicant.
15. Set off and counterclaim were observed by the court in *Panalpina Airflo B.V v PJ Dave Flora Limited* (2021) eKLR as follows: -
46. It is a settled principle in law that the right of set off arises where the plaintiff's claim is for a liquidated sum and the defendant has counterclaimed for a debt which if established, will extinguish or reduce the plaintiff's liquidated claim. In *Union of India v Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others* [(2004) 3 SCC 504] the Supreme Court of India discussed the concept of set off as follows:
- “Set –off” is defined in *Black’s Law Dictionary* (7th Edition, 1999) inter alia as a debtor’s right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from ‘*A Treatise on the Law of Set –Off, Recoup-ment, and Counter Claim*’ as stating, “Set-off signifies the subtraction or taking away of the demand from another opposite or cross demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to distinguish both. It was also formerly, sometimes called stoppage, because the amount to be set-off was stopped or reduced from the cross-demand.”
16. Further to the above, Order 7 Rule 3 of the Civil Procedure Rules provides: -
- A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.
17. Set off and counterclaim are permitted by the court to avoid multiplicity of claims and proceedings based on the same or different cause of action between the parties to enable the court make a final judgment on the original claim and counterclaim. The court however has wide discretionary powers in disallowing the counterclaim upon application by the Plaintiff.
18. The Respondent submitted that the agreement dated 1st September 2021 was between the Respondents and the Applicants together with Javaid Samani and Shamim Samani and that tax liability ought to be apportioned between them if any is found due and owing. That the application preempts joinder of parties who are necessary to these proceedings pursuant to Order 1 Rule 6. The court in



Kabuito Contractors Ltd v David Mereka t/a Mereka & Company Advocates [2004] eKLR held as follows: -

“The plain interpretation of these rules is that they clearly recognise that a defendant by his counterclaim may join to the counterclaim parties other than the plaintiff. The parties so joined, if they are not already parties to the suit with the plaintiff, must then be brought into the suit by serving them with the defence and counterclaim and allowing them time to appear and defend, if they are inclined to do so. But either the plaintiff or any of the parties so joined by the defendant in the counterclaim may be of the view that the claim raised by the counterclaim ought not to be disposed of by way of counterclaim, but in an independent suit, then in such a case, the plaintiff or any of the parties joined in the counterclaim, may apply to the court, at any time before filing a reply to the counterclaim, for an order that such counterclaim be excluded, and the court may, on the hearing of the application, make such order as it deems just.”

19. The Plaintiff/Applicant is however of the opinion that the Defendants/Respondents in their Statement of Defence, Set Off & Counterclaim dated 29th May 2024 have failed to add a further title and to set forth the names of all persons who would be Defendants to the cross action in accordance with Order 7 Rule 8 of the Civil Procedure Rules. This court finds that the issue herein does not go to the substance of the case and may be cured by Article 159 (2) (d) of *the Constitution*.
20. According to the Plaintiff/Applicant, the appeal at the Tax Appeal Tribunal could make the set off and counterclaim an academic exercise and that the liability claimed is cogent and has not crystalized for the Defendants/Respondents to claim. That additionally, according to Clause 27 of the first agreement, this court lacks jurisdiction to entertain the suit on merit as the tax liability should be referred to arbitration.
21. However, the Defendants/Respondents argue that the issue of tax liability that has subsequently been raised by the Kenya Revenue Authority was not foreseen by the parties at the time of entering into the agreement and is a completely new cause of action that can be relied upon as a defence or counterclaim. That once a determination is made and tax liability apportioned between parties, it will then be clear who owes who what and the party so deemed liable to settle the same.
22. In deed the issue of tax liability is pending before the tribunal in Tax Appeals Tribunal No. TATC/E639/2024 for hearing and determination, and in conformity with Clause 27 of the first agreement. This court finds that it is upon determination of the matter before the tribunal that the Defendants/Respondents can specifically claim the amount in the Statement of Defence, Set Off & Counterclaim dated 29th May 2024 for the interest of justice.
23. In conclusion, the Notice of Motion application dated 14th June 2024 has no merit and is dismissed. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF OCTOBER, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Timamy for Applicant (Waithera)

Odundo for Defendant/Respondent

Court Assistant – Mr. Samuel Shitemi

