



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 28 OF 2016**

**KEMUSALT PACKERS PRODUCTION LIMITED.....PLAINTIFF**

**VERSUS**

**DUBAI BANK KENYA LIMITED (In Liquidation).....1<sup>ST</sup> DEFENDANT**

**PETER KAHL.....2<sup>ND</sup> DEFENDANT**

**ANTHONY MUTHUSI.....3<sup>RD</sup> DEFENDANT**

**COUNTER-CLAIM**

**BETWEEN**

**DUBAI BANK KENYA LIMITED (In Liquidation).....PLAINTIFF**

**VERSUS**

**KEMUSALT PACKERS PRODUCTION LIMITED.....1<sup>ST</sup> DEFENDANT**

**HASSAN ZUBEIDI.....2<sup>ND</sup> DEFENDANT**

**Coram: Hon. Justice Reuben Nyakundi**

**Rachier and Amollo LLP Advocates for the Plaintiff**

**Oraro Advocates for the 1<sup>st</sup> Defendant**

**Wagara, Koyyoko Advocates for the 2<sup>nd</sup> Defendant in Counter Claim**

**RULING**

In the midst of finalizing case conference to have the claim between the plaintiffs and the defendants heard on the merits, the 2<sup>nd</sup> defendant moved this court by way of a notice of motion dated 28.10.2019 seeking the following orders:

***a. That the court be pleased to strike out the counter claim by the plaintiff against the 2<sup>nd</sup> defendant.***

***b. In the alternative the honourable court be pleased to exclude and sever the counter claim raised by the plaintiff against the 2<sup>nd</sup> defendant from this suit for hearing in a distinct independent suit.***

The application as pleaded is based on the key identifiable reasons on the part of the 2<sup>nd</sup> defendant being that:

***1. The counter claim as pleaded arises from the distinct and separate account of a company known as Kamp Engineering Limited.***

**2. The claim in the counter claim concerns a different customer and account number from the plaintiff and bears no nexus with the dispute between the 1<sup>st</sup> defendant concerning the accounts and securities of Kemu Salt Packers Productions Limited.**

**3. There is already a suit pending in Nairobi Commercial Courts being HCCC NO. 467 OF 2015 Kenya Deposit Insurance Corporation as liquidator of Dubai Bank Kenya Limited –vs- Hassan Ahmed Abdul Zubeidi & 5 Others in which the matters pleaded in the counter claim against the 2<sup>nd</sup> defendant are in issue.**

**4. The matters pleaded in the counter claim disclose a separate and distinct cause of action from the dispute between the plaintiff and 1<sup>st</sup> defendant in the counter claim.**

**5. The counter claim as filed in an abuse of the court process and the court should strike out the counter claim against the 2<sup>nd</sup> defendant.**

The applicant **Hassan Ahmed Zubeidi** in his affidavit has enumerated a number of grounds why he thinks this court should accede to the prayers in the notice of motion.

His main concern is clearly captured in paragraph of the affidavit which states that the claim and matters pleaded in the plaint in regard to the accounts of Kamp Engineering are similar and arise from the facts and circumstances which are already in issue in **Nairobi – Milimani Commercial and Admiralty Courts Civil Case No. 467 of 2015 between Kenya Deposit Insurance Corporation as liquidator of Dubai Bank Kenya Limited –vs- Hassan Ahmed Abdul Hafedi Zubeidi**. In support of the averment the applicant annexed copies of pleadings marked as HAZICII.

The **respondent – Dubai Bank** through **Adam Boru** did file a replying affidavit dated 19.11.2019 detailing various grounds objecting to the orders sought by the 2<sup>nd</sup> defendant. He asserted and argued that it's not possible to sever the counter claim or have it heard as a distinct suit from the one currently pending determination:

First, in his dispositions, on 14.8.2015 vide gazette number 5968 of 2015, the Central Bank of Kenya placed Dubai Bank Kenya Limited under statutory receivership. That the said receivership was to be undertaken by the Kenya Deposit Insurance Corporation in accordance with the provisions of Section 43 and 53 of the Kenya Deposit Insurance Act. That as a result of the Gazette notice, the Central Bank of Kenya appointed the Kenya Deposit Insurance Corporation as the liquidator of Dubai Bank Kenya Ltd vide Gazette Number 6227 of 2015. That Dubai Bank Kenya Limited was owned by one **Hassan Zubeidi** who also happens to be one of shareholders of the original plaintiff in this case **Kemu Salt Packers Ltd 'now under receivership'**

Second set of averment, the applicant **Mr. Hassan Zubeidi** occupied the position of *chairmanship* of **Dubai Bank Kenya Ltd which is alleged to have financed Kemu Salt Packers production and that one of the revisions of liquidity issues of Dubai Bank are associated with illegal and unjustified Credit facilities which went against the Central Bank of Kenya Prudential Bank guidelines**.

Further **Mr. Adam Boru** deponed and relied on various annexures with regard to overdraft facilities advanced to Kemu Salt Packers Ltd by Dubai Bank Kenya Limited under the leadership of **Mr. Hassan Zubeidi** as the chairman of the Bank. **Mr. Adam Boru** singled out annexure Exhibit AB5 on account opening by Kemu Salt with Dubai Bank, annexure Exhibit AB5 dated 21.6.2005.

On an overdraft of 10 Million with **Hassan Zubeidi**, covenanting to furnish a personal guarantee, Annexure AB5 dated 29.6.2005 **Mr. Hassan Zubeidi** and **Mr. Mohammed Sumeer** authorized a 25 Million credit facility to Kemu Salt Packers Ltd, annexure AB5 dated 23.8.2006. Dubai Bank enhanced an overdraft facility of Kshs.25 Million to 75 Million to **Kemu Salt Packers**.

Third, of separations, **Mr. Adam Boru** deposed that **Mr. Hassan Zubeidi** was the chairman of Dubai Bank Ltd and a signatory of Kemu Salt Packers Production Ltd as supported by annexure AB5 being a board resolution of 16.7.2007.

Fourth, that **Kemu Salt Packers Ltd** had sought and obtained letters of credit, overdraft facilities or loans from Dubai Bank of Kenya Ltd on terms which were reduced in writing and which appear in annexure AB5. Further, he deposed that in most of those facilities indicated as being held was the personal guarantee of **Mr. Hassan Zubeidi**.

Fifth, **Mr. Adam Boru** deposed and made reference to the ELC Judgment in **ELC NO. 172 OF 2014** which determined inter alia the ownership of property registered in the name of Suleiman Enterprises Ltd and **Kemu Salt Packers Ltd**, was duly charged to the financial institution to secure loans, credit and overdraft facilities.

Sixth, that as aforementioned a sum of Kshs.82,999,528 was misappropriated from the Bank on account of Kamp Engineering so as to purchase machinery for use by Kemu Salt Packers Ltd.

Seventh, that the suit being referred to as **HCCC NO. 467 OF 2015** currently pending determination is not a bar to the consideration raised by the bank against the 2<sup>nd</sup> defendant/applicant with that the respondent argued and urged this court to dismiss the application.

In ventilating the issues in support of the notice of motion, Learned Counsel **Mr. Koyyoko** for the applicant submitted that the counter claim as drafted and pleaded offends Section 6 of the Civil Procedure Act. According, to the Learned Counsel the pleading on the counter claim in the instant suit is similar if not identical with the one in HCCC NO. 467 OF 2015 domiciled at Nairobi Commercial Court.

That further, Kamp Engineering Ltd who are identified as beneficiaries of the monies advanced are not party to the claim filed by the plaintiff against the defendants. On the application to strike out the counter claim Learned counsel invited the court to apply the provisions

of Order 7 Rule 12 of the Civil Procedure Rules.

Equally, Learned counsel argued and submitted in the alternative this court should deem it fit to stay proceedings in **HCCC NO. 28 OF 2016** to give precedence to **HCCC NO. 467 OF 2015** which is likely to determine the counter claim in question. He placed reliance on the case of **Heritage Insurance Co. Ltd v Patrick Kasina Kisilu {2015} eKLR**.

**Mr. Muchiri** Learned counsel for Dubai Bank Ltd (now under receivership) submitted that the applicant's premise is facility, given the factual background of the matter. **Mr. Muchiri** further submitted that the inclusion of the counter claim against the applicant was informed from the perusal of loan facilities advanced to various legal persons and entities from Dubai Bank Kenya Ltd.

He argued that the case law on this matter has consistently demonstrated that one of the visible options is not to strike a claim may it be a plaint or defence for that matter. In focus Learned counsel cited the following authorities **R -vs- Registrar of Societies – Kenya & 2 Others Ex-parte Moses Kirima & 2 Others {2017} eKLR**, **Nyanza Garage vs Attorney General Kampala High Court Civil Suit No. 450 of 1993**, **Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 others {2012} Eklr**, **Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga {2013} eKLR**

In applying the principles elucidated in the above cases, **Mr. Muchiri** argued against the striking out of the counter claim when considered in totality of the dispute.

**Mr. Muchiri** further argued that the court ought to examine the abuse process of the court where the 1<sup>st</sup> defendant is bringing an action on behalf of Kamp Engineering Limited. Based on those arguments, **Mr. Muchiri** submitted that the counter claim should be retained as a distinct suit as pleaded.

### **Analysis and Determination**

The first point in this notice of motion is the power to strike pleadings, defence or plaint or counter claim pursuant to Order 2 Rule 15 of the Civil Procedure Rules.

In sum a pleading may be strike out if:

- (a) It discloses no reasonable cause of action or defence in law or*
- (b) It is scandalous, frivolous or vexatious.*
- (c) Or may prejudice or embarrass or delay the fair trial of the action.*
- (d) It is otherwise an abuse of the process of the court.*

The point has however been considered by a superior court in the matter of **Joseph Okumu Simiyu v Standard Chartered Bank** where **Hayanga J** as he then was stated that:

- “(i). A pleading is scandalous if, it states matters which are indecent or*
- (ii). Matters that are offensive or*
- (iii). Matters made for the mere purpose of abusing or prejudicing the opposite party.*
- (iv). Matters that are immaterial or unnecessary which contain imputation on opposite party (See **Chrislle v Chrislle {1973} LR & CL 499***
- (v). Matters that charge the opposite party with bad faith or misconduct against him or anyone else.*
- (vi). Matters that contain degrading charges.*
- (viii). Matters that are necessary but otherwise accompanied by unnecessary details (see **Black v Albion Life Assurance Society {1876} 5QB 663**)*

Secondly, in the case of **Chaffers v Golds Ltd {1894} 1 QBD** a pleading is frivolous if it is fanciful or where a party is trifling with the court. In addition, the case of **Ezekiel Kibe Ruto & Others {2013} eKLR Justice Munyao** stated as follows on the same subject matter thus:

*“A scandalous pleading in my view is a pleading that attempts to put the other party into bad light. It attempts to disparage the other party to the pleadings. Such pleadings border on defamation. However, such disparaging's words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course, the words cannot be scandalous. They must be disparaging pleadings which are completely irrelevant to the proceedings in issue. A frivolous pleading in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at*

*all. For example if a litigant founds his cause of a chain on a law that has been repeated that such pleading is obviously lacks legal foundation and can be said to be frivolous.”*

A vexatious pleading in my view

*“is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily a frivolous pleading or scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party. A pleading that is an abuse of the process of court, in my view encompasses scandalous, frivolous or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situation where a litigant is using the process of the court in the wrong way, not for purposes of agitating a right but for other extraneous reasons.”*

In this context, it is well to remember that the Court of Appeal in **D. T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Mucnina & Another CA NO 37 OF 1988 (1982) KLR**. The court dealing with the competent of the pleadings stated inter alia that the court has inherent jurisdiction to stay or to strike out pleadings which are vexatious or frivolous or in any way an abuse of the process of the court but such a jurisdiction should be exercised with extreme caution and only in clear cases where the plaintiff or defendant discloses no cause of action at all.

There is a further reason which even if a matter was to be stayed by reason of granting leave of the court for an amendment to salvage the cause of action, the court may however strike out pleadings which a party acted habitually and persistently in the conduct of a litigation.

In support of the course of action taken by the applicants counsel special reference is made to the persuasive decision in the case of **Attorney General v Banker 2000 1 FLR 759** where it was stated as follows on the meaning of the words habitually and persistent:

*“The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of pursuing claim after claim that the claimant relies essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who, if they were to be sued at all shall be joined in the same action.....”*

In this case, Kemu Salt Packers Production Limited sued Dubai Bank Ltd (in liquidation) as the 1<sup>st</sup> defendant and **Peter Kahi** and **Anthony Muthusi** being appointed receiver managers duly appointed by the ‘Bank’ to oversee the assets and liabilities of Kemu Salt Packers Production Limited.

The record further highlights that vide a court order dated 14.12.2017 summons were stated to be issued and served upon **Ahmed Abdullahi**, **Hassan Zubeidi** and **Ahmed Hassan** for purposes of mitigation and sentencing in terms of the Ruling delivered by **W. Korir J** on 28.9.2017.

On 12.4.2018, **Dubai Bank Kenya Ltd**, **Peter Kahi** and **Anthony Muthusi**, being appointed receiver managers filed joint statement of defence and it counter claim against Kemu Salt Packers Production Ltd and the 2<sup>nd</sup> defendant **Hassan Zubeidi** seeking an order for the sum of Kshs.82,999,528 claim with interest at commercial rates from December 2005.

After laying the background of the matter, the Learned Counsel **Mr. Koyyoko advocate**, that the counter claim as pleaded is not suitable at these proceedings in view of the fact that there is already a pending suit. He referred **HCCC NO. 467 OF 2015** in respect of all that remedy can be availed and orders passed against the 2<sup>nd</sup> defendant, **Mr. Hassan Zubeidi**. It is to be noted that **HCCC NO. 467 OF 2015** currently pending determination, the plaintiff Kenya Deposit Insurance Corporation (liquidator of Dubai Bank Kenya Ltd) moved the court against **Hassan Zubeidi, Africa Energy Ltd, Suleiman Enterprises Company, Kamp General Engineering Company, Kemu Salt Packers Production Company, Mastro Properties Company** for orders of injunction and declarations from interfering, seeking, alienating or whatsoever dealing in any way with Law parcels registered in the aforementioned defendants.

In this civil proceedings **HCCC NO. 467 OF 2015** the plaintiffs claim against the defendants’ properties is as a consequence of their default on mortgage payments pursuant to respective agreements. That the powers of sale and distress and of appointing a receiver and all ancillary powers conferred on the plaintiff under the provisions of Section 43 (1) of the Kenya Deposit Insurance Act 2012.

The instrument exercisable on recovery proceedings against Kamp General Engineering is to entitle the plaintiff to exercise the power of sale may or may not be completely divorced from the unauthorised, improper or irregular exercise of the 2<sup>nd</sup> defendant to have the monies advanced to Kamp General Engineering Company for the beneficial interest of Kemu Salt Packers Production Limited.

In my view, the issue to be determined at the end of the litigation in both **HCCC NO. 467 OF 2015** and the counter claim in **HCCC NO. 28 OF 2016** is whether it was open to the parties to modify the lending regulations in a manner which appears to have deprived the Bank of the sum total of Kshs.82,999,528.

In the counterclaim in support of this contention the 2<sup>nd</sup> defendant relied upon the series of transactions being referred to culminating into a covenant of Kamp Engineering advanced the loan/overdraft herein under calculated to purchase machinery for onward transmission to Kemu Salt Packers.

Whether the 2<sup>nd</sup> defendant has the authority to execute the scheme of transactions in which the monies left the bank for Kamp Engineering account in my view is a matter to be considered and addressed within the four corners of the loan instrument.

It is impossible to pretend that the counter claim can be litigated without being looked broadly as to whether there was collusion between the 2<sup>nd</sup> defendant and Kamp Engineering Co. Ltd the plaintiff in **HCCC NO. 467 OF 2015** is pursuing Kamp Engineering as a mortgagor who facilitated to pay the sums due and the mortgagee bank, now under liquidation requested payment of all the principal and interest due under the loan agreement.

In Article 50 the right to a fair trial is illustrated within the spectrum of civil proceedings one of the procedural aspect of the pleadings should be the principle of legal certainty which require a party to frame the issues in a precise and effective manner to enable the other party to answer for the tribunal or court to grant a judicial remedy to the dispute.

The ultimate issue is for a pleading not to place the defendant to a suit under circumstances that are likely to occasion prejudice or substantial disadvantage.

I am unable to agree with **Mr. Muchiri** that the counter claim as joined in **HCCC NO. 28 OF 2016** do proceed for hearing even without joinder of Kamp Engineering whereas in **HCCC NO. 467 OF 2015**. There is a nexus and similarity to the questions asked and to be answered by the defendants on loan facilities which remain unpaid.

The first flaw from the submissions and arguments in opposition to the application is its effect designed to circumvent the effect of Section 43 and 44 of the plaintiff in **HCCC NO. 467 OF 2015** to somehow review all the mortgage deeds entered into between Dubai Bank (under liquidation and the defendants). There are two key reasons why an adaptation of the Learned counsel ought to be rejected.

The first is the peculiarity of the claim at stake the scope of the claim in **HCCC NO. 28 OF 2016** revolves around Kemu Salt Packers Production Ltd instituting a suit against Dubai Bank which placed it under liquidation by appointing receiver managers ad infinitum.

The second, perhaps more competent is the supervisory jurisdiction of the Banks/Financial institutions by Central Bank through the Kenya Deposit Insurance Corporation.

According to the Regulatory Framework inevitably (KDIC), the plaintiff in **HCCC NO. 467 OF 2015** is seeking recovery of all debts owed to the bank from debtors, in this claim the defendants. The residual remedy in one way or another such assets in the hands or registered in the name of the defendants shall be disposed off to capitalize the Dubai Bank or for the interests of the depositors.

The claim in **HCCC NO. 467 OF 2015** and **HCCC NO. 28 OF 2016** at a deeper level is the duty owed by the Board of Directors to the Bank and obligations and performance of the mortgagors advanced credit/loan facility which remained unpaid subjecting it to financial "haemorrhage".

This clear manifestation require specific procedural directions made intended to administer justice within the tenets of Section 1A of the Civil Procedure Act. Whether there is between the plaintiff and the defendants a real issue which it is reasonable for Malindi High Court to try and determine, the answer is yes if the answer is yes, whether the defendants counter claim as introduced in the amendment has a real prospect of succeeding at the main trial which relates to Kamp Engineering debtor asset one under Section 43 of Kenya Deposit Insurance Act in HCCC 467 of 2015 at Miliman Commercial Court?

Though, I am yet to hear the full arguments of the claim in **HCCC NO. 28 OF 2016** in effect of **HCCC NO. 467 OF 2015** which was drawn to our attention by Learned counsel for the 2<sup>nd</sup> defendant before I handed down this ruling. It would in this context for good administration of justice to prorogue the jurisdiction of this court. This is to allow the earlier action filed in the court; with concurrent jurisdiction proceed to determine the cross-cutting issues that may arise between the 2<sup>nd</sup> defendant, Dubai Bank Kenya Ltd and Kamp Engineering as it relates with the counter claim in **HCCC NO. 28 OF 2016**.

The deposit of title deeds by Kamp Engineering Ltd by way of security which is being pursued in HCCC 467 of 2015 could be taken as creating an equitable mortgage, dependant on the actual contract between the parties.

Whether the 2<sup>nd</sup> defendant breached his fiduciary duty owed to Dubai Bank (under receivership) to execute the loan agreement in favour of Kamp engineering Ltd for the benefit of Kemu Salt Packers are matters can't escape the Milimani Court justifying an injunction and grant of power of sale to realize the security if the 2<sup>nd</sup> defendant was fully involved in the transactions in any way to defraud the Dubai Bank is a matter that may arise in order to establish the allegation made.

In the counterclaim by the defendant in HCCC 28 of 2016 there is no evidence at the moment to show that the claim in HCCC 467 OF 2015 in general terms would not raise the existence of such a duty to explain the nature, effect and security by Kamp Engineering. The basis of the counterclaim in HCCC 28 of 2016 at Malindi Court it emerges that for the defendant to succeed in an action against Hassan Zubedi, they have to show the capacity Kamp Engineering borrowed the money from Dubai bank. The defendant in the counterclaim has neither pleaded nor applied for joinder of Kamp Engineering Ltd.

I consider it therefore quite rational and in the interest of justice to suspend the counter claim to allow the court in **HCCC NO. 467 OF 2015** subject to the jurisdiction and powers within its reach to conclusively determine the claim. In the result I accept the applicant characterisation of the action lodged against the 2<sup>nd</sup> defendant. There is incompatibility to deal with HCCC 467 of 2015 and HCCC 28 of 2016 simultaneously without a likelihood of occasioning prejudice to the applicant by issuing conflicting judgements on the counterclaim.

Accordingly, the notice of motion dated 28<sup>th</sup> October, 2019 partially succeeds in terms of order No (2) with no orders as to costs. Each party be at liberty to apply.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2020.**

.....

**R NYAKUNDI**

**JUDGE**

**In the presence of: -**

Mr. Muchiri for the Plaintiff