



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL NO. 11 OF 2018

PRESKILA ATIENO MAJIWA.....APPELLANT

VERSUS

ERIC GEORGE HALWENGE.....1ST RESPONDENT

CAROLINE ATIENO OWICH.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon. J.P Nandi SRM in Oyugis

Senior Principal Magistrates Court E.L.C No. 43 of 2018

delivered on 22nd October 2018)

JUDGMENT

A INTRODUCTION

1. The instant appeal originates from the ruling of the trial court (J. Nandi,SRM) in Oyugis Senior Principal Magistrate’s Court rendered on 22nd October 2018, inter alia;-

“The court ordered that the plaintiff could file another suit subject to the law on limitation of actions. The counterclaim does not disclose when the cause of action arose. The 1st defendant in her counter claim cleverly kept the same unknown to the court to evade the issue of time limitation as pointed out by the court. Thus I find that the counterclaim does not disclose when the cause of action arose and I hereby strike it out with costs to the plaintiffs”

B. THE GIST OF THE RESPONDENTS’ CLAIM BEFORE THE TRIAL COURT

2. Briefly, the history of the circumstances leading to the dispute before this court is that by a plaint dated 17th June 2016 lodged at Kisii Environment and Land Court on 11th July, 2018 subsequently, transferred to this court and then transferred to Oyugis SPM’s Court on 7th May 2018 for hearing and determination, the respondents through George Wambura Advocates, claim that they were the registered proprietors of **Land Title No. Central Kasipul/Kamuma/2906** (hereinafter referred to as “**The Suit Land**”). That the Appellant had trespassed upon the suit land and exercised owner’s rights thereon. Thus, they sought an eviction, permanent injunction, mesne profits and costs of the suit against the appellant.

C. THE GIST OF THE APPELLANT’S RESPONSE BEFORE THE TRIAL COURT

3. On 16th April, 2018, the appellant through Achillah T.O. and Company Advocates, responded by filing an amended statement of defence and a Counterclaim. She denied the claim *in toto* and put the Respondents to strict proof thereof. It was her claim that she has never parted possession with the suit land.

4. In her counterclaim, the appellant stated that a person by the name **Jashon Albert Menya**, who she introduced as the **2nd Defendant**, fraudulently sold the suit land to the Respondents. It was further her case that **Mary Atieno Menya**, who she named as the **3rd Defendant**, approached her with an offer to purchase the suit land on the agreement that she will repay certain loan arrears she had fallen into with

Barclays Bank. The Appellant lamented that after various negotiations, the suit land got registered in the 2nd Defendant's name. That the 3rd Defendant did not repay her loan arrears as had been agreed.

5. On the foregone turn of events, the appellant prayed that the transfer of the suit land be declared fraudulent. That the title issued to the Respondents be cancelled and that she be registered as the proprietor of the suit land.

D. THE PRELIMINARY OBJECTION (P.O) BEFORE THE TRIAL COURT

6. Before the suit could be set down for hearing, the 2nd and 3rd Defendants raised preliminary objection dated 7th August 2018 claiming that the heading of the title to the counter claim was not properly set out as per the requirement under **Order 7 Rule 8 of the Civil Procedure Rules, 2010**. That as such, the same ought to be struck out. They further claimed that the suit against them was caught up by the principle of *resjudicata* and that it was time barred.

7. In response to the Preliminary Objection, the Appellant herein, asserted that she was a stranger to the Respondents' claim since she was being sued by the Respondents for a land they bought from 2nd and 3rd Defendants. She urged the trial Court to dismiss the Preliminary Objection in view of **Article 159 of the Constitution of Kenya, 2010** to the effect that the court should not pay undue attention to procedural technicalities. That it should instead dispense substantial justice by allowing the suit and the counterclaim to proceed to hearing on merits.

E. THE GIST OF THE TRIAL COURT'S FINDINGS ON THE PRELIMINARY OBJECTION

8. From the foregone arguments and counter-arguments, the learned Trial Magistrate in the impugned Ruling held that according to **Order 7 Rule 8 (Supra)**, it is mandatory to indicate a party whom a counter-claim is made against. He observed that the Appellant's Counter-claim did not have a title setting out the parties in the counterclaim contrary to Order 7 Rule 8 (supra). He found the error to be fatally defective. That was the basis upon which the court struck out the counter-claim. On the issues of res-judicata and statutory limitation, the learned Magistrate did not find merit as the same lacked necessary evidence produced in court.

F. THE INSTANT APPEAL

9. The foregone Ruling precipitated this appeal mounted by way of Memorandum of Appeal dated 25th November 2019 and filed on 26th November 2019. The grounds of the appeal are as set out hereunder;

“1. That the learned magistrate in his ruling failed to consider the special circumstance of the case that favoured an order for amendment and not striking out.

2. That the learned Magistrate misdirected himself in law in suggesting that the counter-claim ought to have disclosed when the cause of action arose.

3. That the learned magistrate failed to analyze and/or evaluate the facts, evidence and submissions by the Defendant on record thereby arriving at a conclusion that was contrary to the law.

4. That the learned magistrate erred in law by making a decision that is contrary to provisions of Article 159 of the Constitution, section 1 A & B of the Civil Procedure Act and Order 2 Rule 14 of the Civil Procedure Rules.”

10. Thus, the appellant sought orders that:-

i. The ruling be set aside and replaced with an order for amendment of the hearing of counter claim.

ii. The Appeal be allowed costs.

11. Directions were taken on 30/01/202 and parties agreed to argue the appeal by way of written submissions.

G. THE APPELLANT'S SUBMISSIONS

12. The Appellant's submissions are dated 20/02/2020 and filed in court on 28/02/2020. Her Counsel, Mr. Achillah, submitted that the proceedings of the case before the trial court without the participation of the 2nd and the 3rd Defendants will be highly prejudicial to her. That her Counterclaim raised fundamental questions. He submitted that the preliminary objection raised was only on the form of the pleadings as opposed to the substance.

13. Counsel cited **Order 1 Rule 10(2) and Order 2 Rule 14 Civil Procedure Rules, (supra), section 1A, 1B 3A of the Civil Procedure Act (Cap 21 Laws of Kenya)** and **Article 159(2)(d)** (supra) on the overriding objective in dispute resolution. That there is need not to pay undue attention to technicalities of procedure.

14. Counsel relied on the decision in **Mavuno Industries Limited & 2 Others -vs- Keroche Industries Limited (2012) eKLR, Saleso Maribu -vs- Meru County Council, Civil Appeal No. 183 of 2002, DT Dobie & Company Kenya Limited -vs- Joseph Mbaria Muchina & Another (1980) eKLR** on the need for courts to breath life into pleadings instead of striking them out.

15. As regards the provisions of Order 7 Rule 8 (**supra**), Counsel relied on the decision in **Civil Suit No 453 of 2012 Daniel Lemomo**

Matunge -vs- Joseph C Supeyo Tumpes where the learned judge ordered an amendment of the counter-claim. Counsel further submitted that the upholding of the Preliminary Objection on the basis that the counter claim did not disclose when the cause of action arose, was erroneous. He submitted that it remained a matter of evidence that could not be decided on a preliminary basis.

16. In the end, counsel submitted that there is a cause of action in the counterclaim and that by the Trial Court striking out the same, the 2nd and 3rd Respondents Preliminary Objection did not align with the requirement brought about by the case in **Mukisa Biscuit Manya Co. Ltd -vs- West End Distributors Ltd**. He urged the Court to allow the appeal and make an order for the amendment of the counter-claim.

H. THE RESPONDENTS' SUBMISSIONS

17. Mr. Bosire Gichana learned counsel for the 1st and 2nd Respondents urged the appeal through his submissions dated 11/06/20 and filed on 12/06/2020. He was emphatic that the provisions of Order 7 Rule 8 (supra) were flouted thus, resulting in defective pleadings. He stated that procedures are the handmaid of justice. He relied on the Supreme Court of Kenya decision in the Matter of National Gender and Equality Commission (2014) eKLR where it was held;

“it is our position that parties should not endeavour, in the pursuit of creativity to introduce new pleadings unknown to the law. The rules of procedure are a handmaid to the course of justice and should be followed with fidelity.

18. Regarding non-disclosure of the time when the cause of action arose, counsel argued that it was necessary for the Appellant to mention in the Counterclaim when the cause of action arose. He stated that the trial magistrate was right in not dealing with the issue on the basis that it did not have information on when the cause of action arose. Counsel further submitted that the Trial Court was right in its ruling on the Preliminary Objection since the issue revolved around compliance with Order 7 Rule 8 (supra). That it is a pure matter of law.

19. On the principle of *Res-Judicata*, counsel submitted that entertaining the appellant's Counterclaim will be a an affront to the rules of justice since the Appellant's dispute against the 2nd and 3rd Respondent had been conclusively determined in High Court Civil Case No. 333 of 1998, Preskilla Atieno majiwa -vs- Barclays bank of Kenya Ltd & 3 Others, whereby Justice Okongo in his ruling dated 28/06/2013, dismissed the Appellant's suit in its entirety.

20. In conclusion, Mr. Bosire stated that the Appellant can neither find refuge in Article 159 of the Constitution nor Sections 1A, 1B 3A of the Civil Procedure Act. He submitted that the Appellant cherry picked the said provisions by omitting the need that rules are made to facilitate the expeditious resolution of disputes. He cited Civil Appeal No. 29 of 2015, Njie Ngai -vs- Ephantus Njiru Ngai & Another (2016) eKLR and prayed that the appeal be dismissed with costs.

I. THE ISSUES FOR DETERMINATION

21. I have thoroughly considered the background of the matter, the appeal in it's entirety and the rival submissions. The only issue that arises for determination relates to the trial court's power in striking out the Counter claim. In doing so, this court will consider whether;

- i. The trial court was right in its interpretation of Order 7 Rule 8 of the Civil Procedure Rules,2010**
- ii. The Appellant's suit against 2nd and 3rd Defendants is Re-Judicata and;**
- iii. The claim of failing to disclose the time of cause of action in the counterclaim is merited**

J. ANALYSIS AND DETERMINATION

22. Since this is a first appeal, this court is reminded that its duty is to analyse and re-assess the Preliminary Objection before the Trial Court and reach its own conclusions. This was the position in **Selle and another -vs- Associated Motor Boat Company and others (1968) EA 123, Nkube -vs- Nyamiro (1983) KLR 403** and other long line authorities of the Court of Appeal to which I do subscribe.

23. **Order 7, Rule 8** of the **Civil Procedure Rules** (supra) provides as follows;

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.” (Emphasis added)

24. Quite clearly, the terms in the said section are couched in mandatory terms. The reasons for doing so is to be found in the principle of Natural Justice. The doctrine *audi alteram partem* requires a person to receive fair opportunity to respond to any case made against him. Apparently, the progression of the case before the trial court as was in the counterclaim, was going to involve the 2nd and 3rd Defendants in their absence.

25. The Court of appeal in **Pashito Holdings & another -v- Ndungu & 2 others KLR (E&L) 1 295** held that

“the rule of audi alteram partem is a rule of natural justice and an indispensable requirement of justice that the party who made the

decision shall hear both sides, giving each an opportunity of hearing what is urged against him”

26. In the light of the provisions of **Order 7 Rule 8** (supra) and the principle of espoused above, it is clear that parties named in the Counterclaim were going to be directly affected by the outcome of the case without being afforded the opportunity to participate therein; see **Re Hebtullah Properties Ltd (1976-80) 1 KLR 1195 at 1209**.

27. There exists a distinguishing feature in this appeal as compared to the one in **High Court Civil Suit 453 of 2012, Daniel Lemomo Matunge -vs- Joseph C. Supeto Tumpes (2014) eKLR**, relied upon by the Appellant. In sum, they are distinguishable as also noted in **Re Hebtullah case (Ibid)**.

28. If the contested counterclaim was made against the Plaintiff only, without reference to the 2nd and 3rd Defendants, the defect would have been of form which would have been easily cured by an order of amendment thereof as envisaged under **Article 159 (supra)**. However, that is not the case herein The Counterclaim names completely new persons and makes serious allegations against them that necessitates a response from them as observed by the Court of Appeal in **Ogada-v- Mollin (2009) KLR 620**.

29. Notably, the foregone are matters of substance and the court has to balance the interest of both parties as held by the Court of Appeal in the case of **Reliance Bank –vs- Norlake Investments Ltd (2002) 1 EA 227**. To that extent, I find and hold that the striking out of the Counter-claim was sound in law.

30. Another important role of **Order 7 Rule 8 (Supra)** was brought out aptly in **Bilha Njeri Kabiru & another –vs- Onesmus Karina & 3 others[2017] eKLR**. where the court observed as follows;

“18. The rationale of Order 7 rule 8 in my considered view is to avoid multiplicity of proceedings and claims based on the same or different causes of action between the parties to the suit. The 2nd Defendants claims in the counterclaim against the 1st Defendant and the Plaintiff stem from the same cause of action and therefore it is a claim that can be canvassed in one suit to avoid multiplicity of proceedings and suits. I see no difficulty in trying the counterclaim together with the Plaintiffs’ claims.”

31. From the facts presented, it appears that the Appellant has a case against the 2nd and 3rd Defendants which strictly speaking depends on the outcome of the suit in the trial court. In the event she loses the case, she can pursue the 2nd and 3rd Defendants for purposes of getting compensation for the land she allegedly sold to them.

32. The finding in **Bilha Njeri Kabiru (supra)** brings the second issue whether the appellant’s case as raised in the counter claim against the 2nd and 3rd Respondents is caught up by the doctrine of *res-judicata*. Indeed, the essential elements of res judicata are stipulated in the **Black’s Law Dictionary 10th Edition at page 1504** and are noted accordingly.

33. **Section 7** of the **Civil Procedure Act** outlines the ingredients of res judicata. It provides;

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such court.

34. This court has studied the Ruling in **High Court Civil Case No. 333 of 1998, Preskilla Atieno majiwa -vs- Barclays bank of Kenya Ltd & 3 others** and has established that the dispute therein did not concern the Appellant’s case as against 2nd and 3rd Defendants in respect of the suit land. In that case, the appellant sought to reinstate her suit against the 2nd and 3rd Defendants and other parties. The Application was denied on the basis that it had taken the appellant inordinately long (8 years) to reinstate the suit.

35. Thus, it is a misdirection for the Respondent to claim that the suit was *res-judicata* on the simple reason that issues in the counterclaim are not substantially the same as the ones in **High Court Civil Case No. 333 of 1998, Preskilla Atieno majiwa -vs- Barclays bank of Kenya Ltd & 3 others**. To that extent, this court finds and holds that the learned Trial Magistrate did not misdirect himself in his finding.

36. A consideration of the issue that the counter-claim does not disclose when the Cause of action arose is now moot. Its determination is immaterial in view of the finding that the non-compliance with **Order 7 Rule 8 (supra)** made the Counterclaim fatally defective.

37. In the end, it is the finding of this court that the learned trial magistrate was faultless in allowing the Preliminary Objection dated 7th August 2018.

38. The upshot is that the instant Appeal fails in its entirety. The same is hereby dismissed.

39. Costs of the appeal shall be borne by the Appellant by dint of the proviso to section 27 (1) of the Civil Procedure Act, Chapter 21 Laws of Kenya and **Halsbury’s Laws of England 4th Edition Volume 10**.

40. It is so ordered.

Delivered, Signed and Dated at Migori in open court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the

Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 22nd day of JULY , 2020.

G. M.A. ONGONDO

JUDGE

In Presence of :-

Mr. Omonde Kisera holding brief for Tom Achillah learned counsel for the appellants

Court Assistant – Tom Maurice