REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 17 OF 2020 (OS)

MARSH VIEW LIMITED………………………………………………PLAINTIFF

=VERSUS=

BENVAR ESTATES LIMITED……………………………………DEFENDANT

RULING

1. What is before me for determination is the Plaintiff's Notice of Motion dated 28th October 2024 seeking he following orders:

   a) *The Defendant's Statement of Defence and Counterclaim dated 13th March 2020 and filed on 13th July be struck out.*

   b) *The costs of and occasioned by this application be borne and paid by the Defendant.*

2. The application is premised on the grounds set out on the face of the Notice of Motion which are amplified in the supporting affidavit of Jahangir Tejani, a director of the Plaintiff Company sworn on 28th October 2024.

3. In the said affidavit, Mr. Tejani avers that the Plaintiff filed suit by way of Originating Summons dated 26th February 2020 under the provisions of Section 38 (3) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya in accordance with Order 37 of the Civil

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Procedure Rules. Thereafter the Originating Summons was served upon the Defendant on 28th February 2020.

4. The Plaintiff's avers that upon service, the Defendant filed a Memorandum of Appearance dated 6th March 2020 and instead of filing a Replying Affidavit, filed a Defence and Counterclaim dated 13th March 2020 but filed on 13th July 2020. The same was served upon the Plaintiff on 4 years later on 12th September 2024.

5. It is the Plaintiff's contention that the Defendant's Defence and Counterclaim dated 6th March 2020 is incompetent and an abuse of the court process for the following reasons: Firstly, it has it has been filed in response to the Originating Summons under inapplicable provisions. Secondly, the Counterclaim as pleaded is in respect of a claim of trespass which cannot be brought in proceedings under the strict provisions of Order 38(3) of the Limitation of Actions Act. Thirdly, the Counterclaim ought to be brought by way of a separate suit instead of a counterclaim in proceedings commenced by way of Origination Summons. Fourthly and lastly, the said Defence and Counterclaim was filed and served out of time.

6. The application was resisted by the Defendant through the Replying Affidavit of Kennedy Thairu, a director of Benver Limited sworn on 7th February 2025. He deposes that simultaneously with the Originating Summons, the Plaintiff filed a Notice of Motion under Certificate of Urgency dated 26th February 2020.

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7. That upon service of the Originating Summons and Notice of Motion, the Defendant filed a Memorandum of Appearance and Replying Affidavit sworn by Mr Thairu on 6th March 2020 and another one by Robert Muchoki sworn on even date.

8. He adds that in his affidavit, he stated that the prayers sought in the application were similar to those sought in the O.S and it is therefore misleading to say that he did not file a response to the O.S. He maintains that since the prayers sought in the O.S and Notice of Motion were similar, there was no need to file two similar Replying Affidavits covering the both applications.

9. It is his position that since the court dismissed the application dated 26th February 2020, it can be interpreted that similar orders ought to be made in the main suit and therefor there is no suit capable of being heard.

10. With regard to the Defence and Counterclaim, he claims that the Plaintiff's advocates were served on time but they failed to acknowledge the same. He explains that the Defence and Counterclaim were filed during the Covid pandemic when there was a complete shutdown and the same is therefore properly on record.

11. In response to the Replying Affidavit, the Plaintiff filed a Further Affidavit sworn by Mr. Tejani in which he explained that the prayer for injunction in the application sought an order of temporary

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injunction whereas the O.S sought an order of permanent injunction and therefore the prayers were not the same. He reiterated that they were served with the Defence and Counterclaim 4 years after it was filed.

12. The application was canvassed by way of written submissions and both parties complied by filing their submissions which I have

ANALYSIS AND DETERMINATION

13. The singular for determination is whether the Defence and Counterclaim ought to be struck out for being incompetent and an abuse of the court process.

14. Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules of the Civil Procedure Rules 2010 provides as follows:

> *"15 (1) At any stage of the proceedings, the court may order to be struck out or amended any proceedings on the grounds that:*
>
> *a) It discloses no reasonable cause of action*
>
> *b) It is scandalous frivolous and vexatious*
>
> *c) It may prejudice, embarrass or delay the fair trial of this case*
>
> *d) It is otherwise an abuse of the process of the court*
>
> *And may order that the suit be stayed or dismissed or judgment be entered accordingly as the case may be."*

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15. The power to strike out pleadings is discretionary and it must be exercised cautiously having regard to all the circumstances of the case. The principles for striking out pleadings were laid down in the case of **D. T Dobie & Company (Kenya Ltd Vs Muchina 1982 KLR 1 in which Madan J** (as he then was stated as follows:

> *"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way," Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.*
>
> *If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.*
>
> *No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a*

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mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it."

16. In the case of **Meya Agri Traders Ltd v Elgon House (2010) Ltd Civil Appeal No. 15 of 2020 (2023) KECA 574 (KLR)** the court held as follows:

    "where a pleading is if no substance or ground, mere denial, fanciful and/or is of some ulterior motive, the court should not shy away from invoking its powers to strike out such suit. Invoking the power to strike pleadings must be in adherence to the well laid down principles requiring that it be exercised sparingly an in clear and obvious cases. A pleading may only be struck if the elements contained in order 2 Rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules are met."

17. In the instant case, the Applicant seeks to strike out the Defence on the grounds that the Defendant filed a Defence and Counterclaim instead of a Replying affidavit. Secondly, although the Defence and Counterclaim was filed on 13th July 2020, the same was only served upon the Plaintiff on 12th September 2024.

18. Although Order 37 of the Civil Procedure Rules does not specifically prescribe how one ought to respond to Originating Summons after entering appearance, it has been observed that the procedure of Originating Summons is not suitable for resolving complex and contentious questions of fact and law. See the case of **Kuria Kiarie & 2 Others v Sammy Magera (2018) KECA 467 (KLR).** The most

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suitable mode of responding to Originating Summons is therefore by way of a Replying Affidavit rather a Defence and Counterclaim as the latter introduces a new suit which would more conveniently be filed as a separate suit.

19. I am constrained to agree with the Applicant that the counterclaim has introduced a claim of trespass which cannot be accommodated in proceedings filed under the strict provisions of section 38(3) of the Limitation of Actions Act. The Defence and Counterclaim is likely to convolute the issues and delay the fair trial of the case.

20. With regard to filing and service of the Defence and Counterclaim, Order 7 Rule 1 of the Civil procedure provides as follows:

> "Rule 7 (1) *Where a Defendant has been served with Summons to enter appearance, he shall, unless some other of further order be made by the court file his Defence within 14 days after he has entered appearance in the suit and serve it upon the plaintiff within 14 days from the date of filing the Defence and file an affidavit of service."*

21. It is not in dispute that the Defence and Counterclaim was filed out of time without leave of the court and further that it was served upon the plaintiff 4 years later. The Defendant has attributed these lapses to the Covid 19 pandemic. Although the court takes judicial notice that the Covid 19 pandemic affected court operations in 2020 and the early part of 2021, the Respondent cannot use it as an excuse for long period of delay in serving the Plaintiff.

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22. In the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others (2013) eKLR,** the Court of Appeal referred to the case of **Ayub Murumba Kakai v The Town Clerk of Webuye Coounty Council, Civil Appeal No. 107 of 2009** in which it was held that:

> *"It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike, are enjoined to abide strictly by the rules. Parties ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules".*

23. Additionally, in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others (2014) eKLR,** the Supreme Court opined that:

> *"an act done beyond the set time and without leave of the court is a nullity. Further, where time has lapsed, a party has to first seek extension of time and only after such extension has been granted, that which ought to have been done within the lapsed time frame can now be done."*

The above authority is binding on this court.

24. The Defendant herein filed his Defence and Counterclaim a whole 4 years after filing them in flagrant breach of Order 7 Rule 1 which requires that a Defence be filed within 14 days after entering appearance and that the Defence be served within 14 days. The

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explanation given by the Defendant for this extremely inordinate delay is lame and inexcusable and Article 159 (2) (d) of the Constitution of Kenya 2010 cannot come its aid.

25. Having held that the Defendant's Counterclaim is incongruent with the Originating Summons and that the same was filed and served out of time without any reasonable explanation, I am persuaded that that the application is merited. I therefore strike out the Defence and Counterclaim with costs to the Plaintiff.

Dated, signed and delivered this 7th day of October 2025

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J. M ONYANGO

JUDGE

In the presence of:

1. Miss Zaynab for Mr Xavier for the Plaintiff/Applicant
2. No appearance for the Defendant/Respondent

   Court Assistant: Hinga.

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