



**Njogu v Mbutura (Environment & Land Case E062 of 2021)  
[2023] KEMC 318 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEMC 318 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
ENVIRONMENT & LAND CASE E062 OF 2021  
PA NDEGE, SPM  
OCTOBER 3, 2023**

**BETWEEN**

**JOYCE WANGUI NJOGU ..... PLAINTIFF**

**AND**

**JACOB MBAABU MBUTURA ..... DEFENDANT**

**RULING**

1. The plaintiff herein, Joyce Wangui Njogu, filed the instant suit on 26.03.2021, vide a Plaint dated 23.03.2021, seeking ownership of land parcels Njoro/Ngata Block 8/211 (Karuiru) and Njoro/Ngata Block 8/222 (Karuiru). The Defendant herein, Jacob Mbaabu Mbutura, filed a Defense and Counterclaim dated 8/11/2021 and amended on 21/07/2022.
2. In an order dated 06/10/2022, this Honorable Court, then presided over by Hon. C. N. Ndegwa, Senior Principal Magistrate (SPM), issued status quo orders mainly restricting any adverse dealing respecting the subject land parcels pending the hearing and determination of this suit. Earlier on 01.09.2022, the plaintiff had filed a Notice of Withdrawal of the whole of her suit herein against the defendant with no order as to costs. The Defendant is however challenging the service of this notice on him.
3. In an application dated 21.02.2023, the Defendant herein filed a Notice of Motion application under sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 rule 1 of the Civil Procedure Rules and Sections 3, 4, 5, 28 and 30 of the *Contempt of Court Act* No. 46 of 2016. The application basically sought for the punishment of the Plaintiff for contempt of court for violating the status quo orders that are in existence herein. The same came up for inter partes hearing on 09/03/2023. Both parties were duly represented. Learned counsel for the plaintiff informed the court that they did not oppose the application. This court then looked at the application and found the facts disclosed therein to be uncontroverted and granted the orders sought therein as prayed. In short, the court found merit in the application.



4. The plaintiff then filed the instant application which is subject of this ruling. It is a Notice of Motion application dated 12/04/2023 for review of the orders that were issued on 09/03/2023. The application is based on the several grounds on the face of its and the Supporting Affidavit of Lawrence Ngugi Mwangi, the plaintiff's advocate. The main grounds are that there was late or insufficient service of the application, and that the application was not for hearing on that day.
5. The application was served on the defendant, who responded by way of Replying Affidavit sworn by himself at Nakuru on 11/05/2023. He opposed the application deposing that the plaintiff has arrogantly refused to obey and comply with the court orders dated 09/03/2023 and that she is therefore not entitled to any audience by this court and could not therefore be heard by this court until she obeys the orders of 09/03/2023 and purges her contempt.
6. Whereas this argument or deposition by the defendant might be sufficient to make me dismiss this application, given that any doubt as to whether the plaintiff is aware of the existence of the status quo orders herein are no longer in doubt, and that there is no demonstration from her that she has obeyed or purged the contempt, I do feel that there are some legal issues raised in the application and the written submissions filed herein that needs some clarifications from the court.
7. First is the issue of the withdrawal of the suit against the defendant by the plaintiff. As aforesaid, the withdrawal notice was filed before the status quo orders herein were issued. The defendant had however already filed his defense and a counterclaim.
8. As correctly submitted by the learned counsel for the defendant, the law grants parties the freedom to bring forth their cases and claims – the plaintiff can file their plaints, and the defendants can file their defense and counterclaims<sup>1</sup>. The defendant herein filed a counterclaim whose basis is to prevent multiplicity of suits as well as instances of sub judice.
9. The foundation of a counterclaim, as opposed to a set off, is the defense, and not the Plaintiff. It is trite that a counterclaim is a separate and distinct suit that can subsist even when the suit has been dismissed, withdrawn, abated or discontinued. Indeed, the provisions of Order 7 Rule 13 of the Civil Procedure Rules provides that the discontinuance of a suit still leaves alive and efficacious a counterclaim. A counterclaim therefore stands independent of the main suit that gave rise to it. It means that where the suit is either stayed or ceases to exist but there is reason to maintain the Counterclaim, the defendant is not barred from proceeding with the counterclaim.
10. The case of *Muna & 5 Others Vrs Boscardin & 5 Others* [2022] KEELC 3133(KLR) that was cited by the learned counsel for the defendant considered the effect that a withdrawal of a suit has on a counterclaim and stated: -

...Much has been said about the separateness of a counterclaim and I find as much in the instant suit. The totality of the above analysis is that the Plaintiff's argument on the limb that once the suit against the 2<sup>nd</sup> Defendant was withdrawn her Counterclaim automatically stood in the realm of non-existence fails.

<sup>1</sup> See Article 50(1) of *The Constitution* of Kenya, 2010



11. Counsel further referred the court to the provisions of section 35 of the *Limitation of Actions Act* which equally weighs in on the issue as follows:

For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

12. Further in *Beatrice Mumbi Wamahu Vrs Mobil Oil Kenya (2011) eKLR* it was held that: ‘...the withdrawal of the main suit did not affect the counter-claim. A counter claim is treated as a separate suit under Section 35 of the *Limitation of Actions Act* hence its survival cannot be pegged on the pendency of the primary suit’.
13. I do therefore find that despite the Plaintiff’s Notice of withdrawal of her suit against the defendant herein, the defendants counterclaim against her is still alive, subsisting, ought to proceed and is proceeding against her. The status quo orders herein were issued in the Defendant’s counterclaim against her. The court found that she had disobeyed the orders in an application by the defendant dated 21.02.2023, which was not opposed or challenged by her.
14. The plaintiff’s counsel sent out an advocate who acted for the plaintiff. He should therefore not be allowed to attack the court orders openly and transparently issued in open court in the presence of his representatives. This court has a role to dispense justice and its processes should not be taken for granted. I do therefore agree with the learned defense counsel’s arguments in submissions that the application herein is misleading and appears hellbent on maligning the processes of this court which both parties herein willingly participated in and submitted to. There was no need for a hearing given that the counsel for the plaintiff conceded to the application by not filing a response. The court just had to go through it to find out whether it was meritorious, which it did find in a ruling delivered on the same day.
15. I do therefore hereby find that the plaintiff was not discriminated against in any way as alleged. Let me remind her that a court order must be obeyed at all times in order to maintain the rule of law and good order. This means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors or those who concede to such contempt.
16. The court orders herein are therefore binding on the plaintiff herein, at least in her capacity as a defendant in the Counterclaim herein and her acts of failing to comply with the orders and instead attempt to drag compliance are not only meant to embarrass this court but also to make a joke of our judicial system. All then other legal issues in her application i.e. whether the declaration of the *Contempt of Court Act* as unconstitutional affects the contempt jurisdiction of this court etc., are legal rather than factual issues that may be basis of an appeal and not a review as sought for herein. The court of Appeal in *Pancras T. Swai Vrs Kenya Breweries Limited [2014] e KLR* held: -

...Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.

17. Furthermore, the decision of Justice Gikonyo in *Koilel & 2 Others Vrs Koilel & Another [2022] KEHC 10288 (KLR)* vindicates the legal process and the ruling on contempt sought to be impugned in the



application herein. I generally find the plaintiff herein not worth of any of the orders sought herein. Let her obey the court orders. The application dated 12/04/2023 is accordingly hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 03RD DATE OF OCTOBER, 2023**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

Plaintiff/ applicant's counsel: N/A

Defendant/ Respondent's counsel: Munye h/b Mwangi

Plaintiff: Absent

Defendant: Absent

