



Africa Kivulini Management Limited v Mugambi & 5 others (Environment & Land Case 20 of 2020) [2024] KEELC 314 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 20 OF 2020
FM NJOROGE, J
JANUARY 30, 2024**

BETWEEN

AFRICA KIVULINI MANAGEMENT LIMITED PLAINTIFF

AND

DAVID PIUS MUGAMBI 1ST DEFENDANT

SUNPALM LIMITED 2ND DEFENDANT

MOHAMED SHAIBU SHOSI 3RD DEFENDANT

SAID SEIF SIAKA 4TH DEFENDANT

SOUD SEIF SIAKA 5TH DEFENDANT

ALI SEIF 6TH DEFENDANT

RULING

1. By an amended notice of motion application dated 29th November 2023, the 1st Defendant sought orders that: -
 1. That this honourable court be pleased to set aside the proceedings of and Orders made on 7th February 2023.
 2. That the honourable court do arrest the judgment and any further hearing of this matter until this application is heard and determined.
 3. That the honourable court do issue any other orders it deems fit for ends of justice to be met.
 4. That costs be provided for.
2. The basis of the application is the grounds on the face of it and those in the supporting affidavit sworn by David Gikunda Miriti, counsel for the 1st Defendant, on 13th November 2023. Mr. Miriti narrated



that on 7th February 2023 when this matter was mentioned on the online court platform, he addressed the court together with counsel for the Plaintiff and the court directed that the matter is mentioned again on 27th March 2023. At that point, they logged out. Later in the course of the same day, counsel for the 4th, 5th and 6th Defendants, without notice moved the court by way of formal proof. The court directed counsel present to file submissions in preparation for judgment.

Counsel deposed that there has been improper change of advocates for the 4th, 5th and 6th Defendants and improper joinder of the said parties as defendants. He added that he was also not served with notice of withdrawal of suit by the Plaintiff.

3. Counsel averred that unless the proceedings on formal proof are set aside, the 1st Defendant will be condemned unheard and be prejudiced since he is in possession of the suit property known as KILIFI/JIMBA/699.

The 4th, 5th and 6th Defendants opposed the application. They filed a preliminary objection dated 6th December 2023, grounds of opposition evenly dated and a Replying Affidavit sworn by the 4th Defendant also of even date. The preliminary objection was based on the ground that the application as filed failed to adhere to Order 2 rule 16 of the *Civil Procedure Rules*. In his replying affidavit, the 4th Defendant deposed that following an application for joinder dated 18th February 2022, the 4th, 5th and 6th Defendants were properly joined to the present proceedings. They subsequently filed and served a defence and counter-claim on 31st March 2022.

4. Thereafter, the Plaintiff withdrew his claim against all the defendants on 3rd October 2022. On 23rd January 2023 when the matter was mentioned in court, his advocate sought the court's direction as to how to proceed with their counter-claim which was still pending and unchallenged. The court issued directions that the counter-claim do proceed on 7th February 2023 by way of formal proof. The 4th Defendant averred that the 1st Defendant was then served with the requisite notice. On the material date, so the 4th Defendant alleged, the Plaintiff and 1st Defendant herein misled the court as to the position of the matter. To the 4th Defendant, the Plaintiff and 1st Defendant had no business attending court on 7th February 2023, since they had not filed any defence to the pending counter-claim. He added that in the absence of any defence to their counter-claim, the 1st Defendant's rights and stake in the subject property and suit respectively cannot be ascertained.

The court directed that the application be canvassed by way of written submissions.

1st Defendant's/Applicant's Submissions**

5. Counsel for the 1st Defendant filed submissions on 21st December 2023. He relied on section 3A, 63 e, and 95 of the *Civil Procedure Act* and Order 12 rule 7 of the *Civil Procedure Rules*. He contested that the preliminary objection is unmerited since the application in the court records is duly signed. He added that as at 7th February 2023, the Plaintiff was yet to formerly withdraw its case and that any conclusive hearing of the matter was pre-mature.

4th, 5th And 6th Defendant's Submissions

6. In relation to the preliminary objection, counsel submitted that Order 2 rule 16 is framed in a mandatory nature that pleadings must be signed. Counsel argued that the present application was not signed hence a nullity and must be struck out. Counsel relied on the cases of *Regina Kavenya Mutuku & Others v United Insurance Co. Limited* Nbi Milimani HCCC No. 1994 of 2000 [2002] KLR 250, *Vipin Madanlal Shah v Investment & Mortgage Bank Limited & 2 others* Civil Appeal No. 19 of 2001 EA 274 and *John Onger Mariaria & 2 others v Paul Matundura* Civil Application No. 301 of 2003.



Counsel added that the 1st Defendant has not filed any response to their counter-claim therefore and in the absence of such, the court is unable to establish whether he has any claim over the suit property. He argued that since the 4th, 5th, and 6th Defendant's counter-claim is not challenged by the 1st Defendant, the latter will have no other business in this suit once their application is determined. In the ultimate, counsel urged the court to dismiss the application.

Analysis And Determination

The following issues arise for determination: -

- i. Whether the preliminary objection as raised is merited?
 - ii. Whether the proceedings of 7th February 2023 ought to be set aside.
7. Regarding issue no (i), the law of preliminary objections is now settled; that they consist of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. (See *Mukhisa Biscuit Manufacturers Ltd. -v- West End Distributors Ltd.* [1969] E.A). Similarly, in the case of *Oraro -v- Mbaja* (2005) eKLR, the Court held that: -

As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

8. The objection raised is grounded on Order 2 rule 16 of the *Civil Procedure Rules* which provides that every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.” The 4th, 5th and 6th Defendants' contention was that the present application was not signed by the advocate hence the same must be nullified. It is true, the application first filed was not signed, however I note that the same was amended on 29th November 2023. The amended application is duly signed. For this reason, I find no merit in the objection.

On issue no (ii), I have carefully considered the application and the response. A perusal of the court proceedings reveals that the 4th, 5th and 6th Defendants filed their statement of defence and counterclaim following leave to join the suit as defendants on 24th March 2022. The suit was subsequently slated for mention on 23rd January 2023. On that particular date, Mr. Michira counsel for the 4th, 5th and 6th Defendants informed the court that the Plaintiff had withdrawn its case against the Defendants and prayed for a hearing date of their counterclaim which was then slated for hearing on 7th February 2023.

9. On 7th February 2023, Ms. Mulwa for the Plaintiff informed the court that the plaintiff's case had been withdrawn, and in response, Mr. Gikunda, counsel for the 1st Defendant, requested for a statement from the 3rd Defendant and an adjournment which were granted. The matter was adjourned, to be mentioned on 27th March 2023. Later that same day (7/2/23) at 9.35 am, the file was recalled when Mr. Michira informed the court that the matter was coming up for formal proof. The court directed that the matter be heard at 11.30 am. Notably, it is clear from the proceedings that Mr. Gikunda was not present at both times when Mr. Michira appeared. There is no evidence that Mr. Gikunda was informed of the time indication given for the hearing of the counterclaim. As it would follow, Mr. Michira presented 4 witnesses at the hearing and was ultimately directed to file written submissions. Having also gone through the pleadings before me, I do not see any document/s filed by the 1st Defendant in response to the counter-claim. However, as I already stated in my previous ruling dated 6th November 2023, it matters not that no defence was ever filed by the 1st Defendant, for a party who has filed appearance in a matter is entitled to be present to cross-examine witnesses even where he had



filed no defence. In such circumstances, I am inclined to allow the setting aside of the proceedings of 7th February 2023.

10. The upshot of the foregoing is that the amended notice of motion application dated 29th November 2023 succeeds and it is therefore allowed as prayed in prayers nos 1 and 2 thereof. The costs of the application shall be in the cause. This matter shall be mentioned on 21/2/2024 for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

