



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL CASE NO. 18 OF 2013

BREK SULUM HEMEDPLAINTIFF

VERSUS

CONSTITUENCY DEVELOPMENT FUND BOARD...1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY.....2ND DEFENDANT

ABDALLA A SAID JUMAAN & 17 ORS.....NECESSARY PARTIES

RULING NO. 2

The Preliminary Objection

[1] This is a ruling on a Preliminary Objection seeking the striking out of a Counter-claim filed herein by parties joined into the suit by order of the Court as necessary parties in the character of defendants. Upon joinder by the Court by Ruling of the Court herein delivered on 25th February 2014, the 18 Necessary Parties filed a Defence and Counter-Claim dated 12th March 2014 in which they named the Plaintiff together with three other persons as defendants to the Counter-claim.

[2] The Plaintiff gave Notice of a Preliminary Objection dated 24th March 2014 against the Necessary Parties' Counter-claim on the ground that the -

“The same is fatally and incurably defective for:

- 1. Joining stranger[s] to the suit without leave.*
- 2. Misjoining plaintiff as defendant with others in his own suit.”*

Submissions

[3] Counsel for the parties filed written submissions on the Preliminary Objection. For the plaintiff, it was contended that the three other person added as defendants in the counter-claim were not among the persons who sought leave and were allowed to join the suit by the Ruling of 25th February 2014, and that the plaintiff could never become **a defendant** in his own suit as he had been named together with three others in the Counter-claim by the necessary parties.

[4] The Necessary Parties simply relied on the provisions of Order 7 rule 8 of the Civil Procedure Rules,

2010 in response to the preliminary objection.

Determination

[5] Order 1 rule 10 (2) of the Civil Procedure Rules, 2010 recognises that persons who are necessary for the determination of the suit (necessary parties) may be joined as parties to the suit, as follows:

*“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, **and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**”*

[6] Of course, once joined they assume the character of plaintiff or defendant depending on their case. In the present case, having considered the application for joinder of the necessary parties herein in its Ruling of 25th February 2014, the Court ruled as follows:

“13. For the reasons set out above, and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants’ application for them to be joined in the suit, as necessary or interested parties. The applicants will, in accordance with Order 7 of the Civil Procedure Rules, file their defence, and counterclaim if any, within Fourteen (14) days from the date of this ruling, and the plaintiff may file a reply to the defence and counter-claim, if any, within fourteen days of service of the defence and counterclaim, after which the matter will proceed for pre-trial directions.”

[7] Upon joinder, the necessary parties became defendants to the plaintiff’s suit with all the rights of a defendant in a suit to file a defence, set-off and counterclaim as any other defendant to the suit. Such rights include the right to file a Defence and Counter-claim adding parties to the suit in the Counter-claim in terms of Order 7 rules 8 -12 of the Civil Procedure Rules, 2010 which provide as follows:

“[Order 7, rule 8.] Title of counterclaim.

8. 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.

[Order 7, rule 9.] Claim against person not party.

9. Where any such person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of summons.

[Order 7, rule 10.] Appearance by added parties.

10. Any person not already a party to the suit who is served with a defence and counterclaim as aforesaid must appear thereto as if he had been served with a summons to appear in the suit.

[Order 7, rule 11.] Reply to counterclaim.

11. Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon

him of the counterclaim and shall serve a copy thereof on all parties to the suit.

[Order 7, rule 12.] Exclusion of counterclaim.

12. Where a defendant sets up a counterclaim, if the plaintiff or any other person named in the manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just.”

[8] Clearly, and with much respect to Counsel for the Plaintiff, the above-cited rules of the Civil Procedure Rules, 2010 provide for joinder of other persons not hitherto parties to the suit, by way of a Counter-claim against the Plaintiff and such other persons, and for the addition, together with the title in the Defence, of a suitable “**further title similar to the title in a plaint, setting forth the names of all persons**” who are defendants to the Counter-claim. The preliminary objection as to the addition of other parties and naming the plaintiff, together with others, as a defendant in the Counter-claim therefore fails, and the same is rejected.

Orders

[9] Accordingly, for the reasons set out above, the Plaintiff’s Preliminary Objection herein is declined.

[10] Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED ON THE 30TH DAY MAY 2017.

E K OGOLA

JUDGE

Appearances:-

M/S Odongo B.O. & Co. advocates for the Plaintiff

Mr. Ngari, Litigation Counsel for the 2nd Defendant

M/S A. O. Hamza & Co. Advocates for the Necessary Parties/Defendants.