



**Janian Enterprises Limited v Kiragu (Environment & Land Case  
7 of 2023) [2024] KEELC 1074 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1074 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 7 OF 2023  
JO OLOLA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JANIAN ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**PATRICK KANYORA KIRAGU ..... DEFENDANT**

**RULING**

1. By the Notice of Motion dated 23<sup>rd</sup> March 2023, Janian Enterprises Limited (the Plaintiffs) prays for orders that:
  1. This Court be pleased to strike out the Defendant’s Defence and Counterclaim;
  2. The suit filed by the Plaintiff do proceed by way of formal proof;
  3. The Plaintiff’s Defence to the Counterclaim be stayed pending the determination of this application; and
  4. The costs of this application be paid by the Defendant.
2. The application is supported by an Affidavit sworn by the Plaintiff’s Advocate on record Mwangi Kariuki and is based on the grounds that:
  - (i) The Defendant’s Defence is defective being unprocedural as the Defendant has not entered appearance or at any rate has not served any Memorandum of Appearance upon the Plaintiff;
  - (ii) Interlocutory Judgment had already been entered against the Defendant and/or the suit has been set down for hearing on application of the Plaintiff in default of appearance by the Defendant;



- (iii) The Defendant's Counterclaim is res judicata the claim in issue having been made against the Plaintiff in Nyeri High Court Civil Case No. 2 of 2019 and was adjudicated in finality on 5<sup>th</sup> October 2021; and
- (iv) The Defendant's Defence and Counterclaim are an abuse of the process of the Court and vexatious respectively.
3. Patrick Kanyora Kiragu (the Defendant) is opposed to the application. In his Replying Affidavit sworn on 18<sup>th</sup> May, 2023 and filed herein on 22<sup>nd</sup> May 2023, the Defendant avers that a memorandum of appearance seeks to identify the person coming on record which is also done in the Defence and hence the omission of filing the same is not fatal and is curable.
4. The Defendant further avers that the delay in filing his Defence was occasioned by his lack of funds due to a recent illness and he was therefore unable to instruct Counsel to come on record. The Defendant asserts that no interlocutory Judgment has been entered against him and that in any event entry of interlocutory Judgments do not apply in land matters.
5. The Defendant further denies that his claim is res judicata. It is his case that his suit in the High Court was dismissed for want of prosecution and that the same was never heard on merit. On the other hand, the Defendants asserts that it is the Plaintiffs' claim which is res judicata as the same was heard on merit in the said Nyeri HCCC No. 2 of 2019 and was dismissed.
6. I have carefully perused and considered the application by the Plaintiff as well as the response thereto by the Defendant. I have similarly perused and considered the written submissions as placed before me by the Learned Advocates representing the Parties herein.
7. By the application before the Court, the Plaintiff invites the Court to strike out the Defendant's Defence and Counterclaim and to have its case proceed by way of formal proof. It is the Plaintiff's case that the said Defence is defective and unprocedural as the Defendant has not entered appearance and/or served the Plaintiff with a Memorandum of Appearance.
8. The Plaintiff asserts that as at the time the Defence and Counterclaim were filed, an interlocutory Judgment had already been entered against the Defendant and the suit had been set down for formal proof. The Plaintiff further avers that the Defendant's Counterclaim is res judicata as the Defendant had raised the matters in issue therein against the Plaintiff in Nyeri HCCC No. 2 of 2019 which suit was adjudicated in finality.
9. As to the entry of appearance in any suit, Order 6 Rule 1 of the [Civil Procedure Rules](#) provides as follows:
- “ 1. Where a defendant has been served with summons to appear, he shall unless some order be made by the Court, file his appearance within the time prescribed in the summons.”
10. The consequence of non-appearance is provided at Order 10 Rule 9 of the said [Rules](#) which provides thus:
- “ 9. Subject to Rule 4, in all suits not otherwise specifically provided for by this order, where any party served does not appear, the Plaintiff may set the suit down for hearing.”



11. In the matter herein, the Defendant concedes that even though it did file a Statement of Defence and Counterclaim, they omitted to file a Memorandum of Appearance as required by the Rules. It is the Plaintiff's case that such an omission is fatal to the Defendant's case and the resulting Defence and Counterclaim is defective and unprocedural and hence the prayer that it be struck out.

12. The Motion before the Court is expressed to be brought under Order 2 Rule 15 of the [Civil Procedure Rules](#) which deals with striking out of pleadings and provides as follows:

“ 15 (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that –

- (a) It discloses no reasonable cause of action or defence in law: or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action;
- (d) It is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

13. Striking out pleadings as it were is a drastic remedy that should only be resorted to where the pleading is a complete sham. As the Court of Appeal asserted in [Blue Shield Company Limited v Joseph Mboya Oguttu](#) (2009) eKLR:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A (as he then was) in his Judgment in the case of *D.T. Dobie & Company (Kenya) Limited v Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case *inter alia* as follows:

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge.

On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

...

The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

14. Applying my mind to the circumstances herein, I was not persuaded that the omission to file the Memorandum of Appearance by the Defendant before he filed his Statement of Defence should lead to such a drastic remedy as to have his pleadings struck out. While it is true it is through the entry of appearance that a Party submits himself to the jurisdiction of the Court and identifies himself for the purpose of the claim, I was not persuaded that where one omits to file the same and proceeds to file a Defence, the same cannot be remedied by the Court through some extension of time to file the same as sought by the Defendant.



15. As has been stated in many judicial pronouncements, the power to strike out a pleading which ends in driving a Party from the Judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.
16. While it is indeed true that on the same 17<sup>th</sup> March, 2023, when the Defendant lodged his Defence and Counterclaim the Plaintiff did also request for interlocutory Judgment against the Defendant under Order 10 Rule 4 of the *Civil Procedure Rules*, there was no evidence that any interlocutory Judgment had been endorsed or entered in favour of the Plaintiff. Even where there was any such endorsement, the same would be irregular and of no consequence.
17. As was stated in *Solomon Mwobobia Nkuraaru v Jacob Mwiti* (2015) eKLR:
- The subject matter of the suit herein being land, the question which arises is whether given the fact that that the Plaintiff's claim is not a liquidated one, the entry of interlocutory Judgment in favour of the Plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory Judgment could only be entered in respect of the liquidated claim only."
18. On the other hand, the Plaintiff contended that the Defendant's Counterclaim was res judicata as it was based on the same cause of action as the Defendant's Nyeri HCCC No. 2 of 2019 which suit was dismissed. It was the Plaintiff's case that the Defendant himself had admitted that his counterclaim is res judicata by revealing in his Replying Affidavit that he has sought the reinstatement of the dismissed suit.
19. The doctrine of res judicata is provided for under Section 7 of the *Civil Procedure Act*, Cap. 21, as follows:
- "No Court shall try any suit or issue 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 the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."
20. As was stated in *Bernard Mugo Ndegwa v James Nderitu Githee & 2 Others* (2010) eKLR, for one to prove res judicata, he must establish that:
- (a) The matter in issue is identical in both suits;
  - (b) That the parties in the suit are substantially the same;
  - (c) There is a concurrence of the jurisdiction of the Court;
  - (d) That the subject matter is the same; and
  - (e) There is a final determination as far as the previous decision is concerned."
21. From a perusal of the material placed before me, it was apparent that the subject matter of the Counterclaim herein was the same one as those raised by the Defendant in the said Nyeri HCCC No. 2 of 2019. As against the Plaintiff herein, who was the 2<sup>nd</sup> Defendant in that suit, the Defendant herein had contested the transfer of L.R No. Thegenge/Karia/3391 to the Plaintiff herein who was sued together with I&M Bank Limited (as the 1<sup>st</sup> Defendant), one Janet Nyokabi Muthoni (as the 3<sup>rd</sup>



- Defendant) and Alice Muthoni Muiruri as the 4<sup>th</sup> Defendant. The Defendant herein further sought an order directing the Chief Land Registrar to cancel the transfer executed in favour of the Plaintiff herein.
22. It was also apparent from the Judgment delivered on 24<sup>th</sup> March, 2022 in the said Nyeri HCCC No. 2 of 2019 that the Plaintiff herein and his other Defendants had lodged a Counterclaim to the effect that the Defendant was a trespasser on the said parcel of land and had sought his eviction therefrom.
23. At Paragraph 2 of the Judgment, Lady Justice Florence Muchemi who heard the matter at the High Court observed as follows:
- “ 2. The Plaintiff’s application dated 2<sup>nd</sup> September, 2019 seeking to strike out the defence and enter Judgment in his favour against the Defendant was dismissed by Matheka J. on 13<sup>th</sup> February, 2020. The matter came up for hearing inter-parties on 5<sup>th</sup> October 2021 whereby the Plaintiff and his Counsel were absent. Counsel for the 1<sup>st</sup> Defendant made an application for dismissal of the Plaintiff’s claim for non-attendance on the ground that the date was taken by consent of the Parties. The Court dismissed the Plaintiff’s claim for non-attendance and proceeded to hear the Counterclaims of the 1<sup>st</sup> to 4<sup>th</sup> Defendants. The Plaintiff’s claim having been dismissed, the Defendant proceeded to adduce evidence on their Counterclaims.”
24. A further perusal of the Judgment (Paragraphs 26 to 34) reveals that the Learned Judge went ahead after dismissing the 1<sup>st</sup> Defendant’s Counterclaim to consider whether the High Court had jurisdiction to entertain the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ Counterclaim. At Paragraph 34 and 35 thereof, the Learned Judge concluded as follows:
- “ 34. From the foregoing, it is evident that the issues raised by the Defendants in their Counterclaim on ownership and occupation of land, vacant possession and payment of mesne profits which are all within the purview of the Environment and Land Court. As such this Court is not equipped with the jurisdiction to entertain the issues raised in the Counterclaim. Therefore, I hold the opinion that the Defendants’ Counterclaim cannot stand because this Court lacks the jurisdiction.
35. Similarly, the Counterclaim of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is hereby struck out.”
25. Arising from the circumstances, it was clear to me that contrary to the Plaintiff’s assertions herein, the Defendant’s suit in Nyeri HCCC No. 2 of 2019 had not been heard and decided on merit but was dismissed for non-attendance. It was also clear from the conclusion of the Learned Judge that the Court found it was not competent to try the matters raised by the Plaintiff herein against the Defendant and proceeded to strike out their Counterclaim.
26. That being the case, the matter did not pass the test of jurisdiction and final determination as required for establishment of a matter to be *res judicata*. That must be the reason that after his Counterclaim was struck out on 24<sup>th</sup> March, 2022 as aforesaid, the Plaintiff proceeded to lodge the same claim against the Defendant by the Plaintiff filed herein dated 6<sup>th</sup> February, 2013.
27. It follows that I did not find merit in the Motion dated 23<sup>rd</sup> March, 2023. The same is hereby dismissed.
28. Each Party shall bear their own costs.



29. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

In the presence of:

Mr. Mwangi Kariuki for the Plaintiff/Applicant

Mrs. Machira for the Defendant /Respondent

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

