



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC77 OF 2015

1. SANSONNE BANINI T/A THE MAJI BEACH BOUTIQUE HOTEL.....PLANTIIF

VERSUS

2. THE NATIONAL LAND COMMISSION.....1ST DEFENDANT

3. MINISTRY OF LANDS HOUSING AND URBAN DEVELOPMENT.....2ND DEFENDANT

4. THE DIRECTOR OF SURVEY, MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT.....3RD DEFENDANT

5. THE ATTORNEY GENERAL4TH DEFENDANT

6. COUNTY GOVERNMENT OF KWALE.....5TH DEFENDANT

AND

SPIRE PROPERTIES (KENYA) LTD T/A

DIANI REEF BEACH RESORTSPA.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 6th September 2016 made under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2)(d) of the Constitution of Kenya, the InterestedParty/Applicant seeks orders:

- 1) THAT leave be granted to the InterestedParty/Applicant to file its defence and counter claim.**
- 2) THAT the draft defence and counter claim annexed herewith be deemed as duly filed upon the orders sought being granted.**
- 3) THAT the costs of this Applicant be provided for.**

The application is supported by six grounds on the face of the motion, namely:

- 1. THAT this Honourable Court declined to extend time in order for the InterestedParty/Applicant to file their defence and counter-claim.**

2. **THAT failure of Counsel to file the defence and counter-claim in time was inadvertent.**
3. **THAT article 159 of the Constitution of Kenya provides that justice should be administered without undue regard to procedural technicalities.**
4. **THAT this application has been made without unreasonable delay.**
5. **THAT the orders sought herein will not prejudice the Respondents in anyway.**
6. **THAT this application ought to be granted in the interest of equity and justice.**

2. The application is also supported by the affidavit of Samuel Michael Onyango the Advocate then on record for the Applicant sworn on 6th September 2016 in which he deposes inter alia that he knew that the case was coming up for mention on 30th August 2016 to confirm if parties had complied and filed the requisite documents. He deposes that he knew of this on his own knowledge and belief that the Interested Party/Applicant's defence and counter-claim was ready but the Interested Party's witness one Titus Kangangi had not yet signed the witness statement and that he had instructed his Advocate to attend Court on their behalf and seek for more time to enable them find the said Titus Kangangi for him to sign the documents for filing. He further deposes that he knew that the said Advocate sought for an extra one week but the Honourable Court declined on the grounds that it had not been given any proper reason. Mr. Onyango further deposes that he knew of his own knowledge and belief that failure to file the Interested Party's defence and counter-claim in time was not intentional and that the defence and counter-claim raises issues which if substantively dealt with will go a long way in resolving the dispute at hand and that granting the prayers sought herein will not prejudice herein will not prejudice the Respondents in any way whatsoever.

3. The application is opposed by the Plaintiff who filed grounds of opposition dated 2nd February 2017 as well as the 1st, 2nd, 3rd and 5th Defendants who filed their grounds of opposition dated 23rd January 2017.

4. In her submissions, Miss Sadia, learned Counsel for the Interested Party relied on the said affidavit of Samuel Michael Onyango. She submitted that the draft defence and counter-claim raises triable issues and the subject matter being land which is an emotive issue, the Court should consider the application favourably. The learned Counsel submitted that the Court has the powers under article 159 (2)(d) of the constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 7 of the Civil Procedure Rules to allow the application. Equally, Counsel submitted that under Order 11 of the Civil Procedure Rules, the Court has the power to direct the parties to file their document and the Interested Party should not be shut out from filing its pleadings. Counsel further submitted that the delay in filing the defence and counter-claim was beyond the Interested Party's control as the Interested Party relied on the on then Advocate on record who negligently failed to file. The learned Counsel relied on the case of **JAMNA KAKAD –V- LUCAS OLUOCH MUMIA (2015)eKLR** in which an ex-parte judgment was set aside because the defence raised triable issues. Counsel also relied on the case of **ABDALLA ALI BAJABER – VS- MANGALE DZOMBO NGOKA & ANOTHER (2012)eKLR** and submitted that the mistake of Counsel should not be visited on a Party. Finally, the learned Counsel urged the Court to go by the finding in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT –VS- IEBC & OTHERS (2014)eKLR** which considered the principles to be observed in exercising the discretion to extend time.

5. On their part, the Plaintiffs learned Counsel Mr. Khagram submitted that the dispute between the Plaintiff and the Defendants is almost settled and the Interested Party has been murking the waters. The learned Counsel submitted that on 23rd June 2016, the Interested Party requested for and was granted time by the Court to file their pleadings and it was granted up to 29th June 2016 to do so. That on 29th July 2016, the Court again granted the parties including the Interested Party up to 30th August 2016 to file their documents. On 30th August 2016 the Court declined to extend time to file any documents and Counsel submitted that the matter is re judicata and that this cur tis not sitting on appeal against those orders. He submitted that the application is an abuse of the Court process. The learned Counsel also submitted that

under order 7 of the Civil Procedure Rules, the Interested Party, not being a defendant cannot purport to file a counter-claim. He further submitted that the Applicant has not come to Court with clean hands as the supporting affidavit states that the documents were not filed because they had not been signed while in her submissions, Counsel for the Interested Party states that the Advocate was negligent. Learned Counsel relied on the case **OF JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER –VS- INFRASTRUCTURE & 3 OTHER (2015) eKLR** and submitted that the application is res judicata, the same having been heard and determined by the Court and the Applicant did not file an appeal. He also relied on the case of **WAMUGU MAINA DAMAIYO –VS- GATEWAY INSURANCE COMPANY LTD (2013) eKLR** in which the Court of appeal considered the applicability of sections 3A of the Civil Procedure Act and the overriding principles where a Party is obliged to observe time frames provided in the Rules.

6. Mr. Makuto, learned Counsel for the Defendants submitted that the application is res judicata, a similar application having been allowed by the Court and no reason has been given why the same was not complied with, and no appeal or review on the same has been preferred. He submitted that the Court is being asked to sit on appeal, which is an abuse of the Court process. The learned Counsel observed that in their supporting affidavit, the deponent, Mr. Onyango depones that the Interested Party's witness statement had not been signed and pointed out that a defence need not have been signed by a witness. Mr. Makuto further submitted that the application is defective as the affidavit in support is sworn by an Advocate and there is no company resolution granting the Advocate the authority to swear and also that there is no authority by the company granting the Advocate now on record the authority to appear before Court and argue the application. He further submitted that there is no mistake of Counsel mentioned in the application. He pointed out that the case between the Plaintiff and defendant has been settled.

7. In reply, Miss Saidia, learned Counsel for the Applicant submitted that res judicata applies only when a case has been decided between the same parties and is over the same subject matter. She pointed out that the consent entered into between the Plaintiff and the Defendants to settle the matter did not touch on the Interested Party.

8. I have considered all the issues raised in the application and the rival submissions. In the application, the Interested Party/Applicant is seeking leave to file its defence and counter-claim. I have perused the Court record. By an application dated 19th June 2015, the Interested Party/Applicant applied for leave to be enjoined as an Interested Party in this suit. In its ruling delivered on 16th December 2015, the Court allowed the Interested Party's application to be enjoined in the suit. On 23rd June 2016, Mr. Onyango who was acting for the Interested Party sought leave to file the Interested Party's pleadings and the Court granted the request and ordered the Interested Party to file their pleadings within 60 days. The matter was then fixed for pre-trial on 29th July 2016. On 29th July 2016, the Plaintiff's Counsel informed the Court that the Plaintiff had complied with Order 11 of the Civil Procedure Rules. However, the defendant's Counsel sought for time to amend their defence which request was not objected to by the Plaintiff and the Interested Party, and by consent of the parties, the Court made an order on which it granted the 1st, 2nd, 3rd and the 5th Defendants 7 days to file their amended defence and the Plaintiff was at liberty to file an amended plaint if need be within 7 days of service. The Court further made an order that the Interested Party was at liberty to file any pleadings and lastly that parties to comply with Order 11 within 21 days of the filing of the amended defence. The matter was then fixed for mention on 30th August 2016 for further orders. By 30th August 2016, the Interested Party had not filed their documents and their request for more time was rejected by the Court which concluded that the Interested Party had not given any explanation why they had not filed their pleadings by then. The Court stated that in the absence of any explanation, it saw no reason to extend the time given to the Interested Party and consequently certified the matter as ready for hearing and ordered the parties to fix a hearing date for the suit at the registry. It was after the Court had declined to extend the time tithing which to files its pleadings that the Interested Party then filed the present application.

9. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of Civil Procedure Act which states:

“No Court shall try any suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between 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”.

It is now a settled principle of law that the principle applies to applications with the same force whether the application be final or interlocutory.

10. For me to determine if the current application is res judicata, the only two questions that I have to ask myself are; firstly, whether the issues which were before this Court previously are the same as those in the present application; secondly whether there is a final determination on those issues by the previous Court. There is no dispute that the parties are the same in all these proceedings.

11. I have already outlined the application made by the Counsel for the Interested Party on 23rd June, 2016, 29th July 2016 and 30th August 2016 and the orders made by the Court. On 3rd June 2016, the record indicates that Mr. Onyango, Counsel for the Interested Party stated:

“We seek leave to file our pleading as we have just been served. We require 2 months.”

In its order, the Court stated:

“The application dated 27th April 2016 is marked as settled. The Interested Party do file their pleadings within 60 days. The matter be fixed for pre-trial on 29th July 2016.”

Again, in its order made on 29th July 2016, the Court, inter alia, made an order that:

“The Interested Party be also at liberty to file any pleadings....mention on 30th August 2016 for further orders”

12. On 30th August 2016, the record indicates that Mr. Mwakireti who was holding brief for S. Onyango for the Interested Party stated:

“The Interested Party will file their documents in the cause (sic) of the week. They seek for 7 days. I am being shown defence & counter-claim which has been prepared and ready for filing”.

He later prays that they be given time, and the Court made the following order: ***“It is true the Interested Party applied and were joined in this suit on December 2015. On 29th July 2016, the Court ordered parties to comply with Order 11 within 21 days of that date. The Interested Party has not given any explanation why they have not filed any pleadings during the entire time or why the statement of their witness was not ready before today. In the absence of such explanations, I see no reason to extend time to them. Consequently this matter is certified ready for hearing. The parties to fix a hearing date from the registry.”***

13. In both the oral applications made in Court and the current applications, the Interested Party is seeking for leave to file its defence and counter-claim. These issues are similar in all forms and had been canvassed and determined. The statutory provision under section 7 of the Civil Procedure Act is clear and bars a Court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined after a hearing. In my view, the issue has already been determined. The Court having already adjudicated on the issue, the Applicant cannot now seek the same reliefs as those they sought in the previous applications yet the Court had adjudicated on those issues. If the Interested Party was dissatisfied, they ought to have preferred an appeal. Similarly, they are not applying for a review of the orders already given by the Court. By virtue of section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata. The Interested Party applied for

and was granted leave to file its pleadings. The application for extension of time was disallowed for good reason. Although the Applicant has come under sections 1A 1B and 3A of the Civil Procedure Act and Article 159 (2)(d) of the Constitution I am guided by the decision in the case **OF MRADURA SURESH KANTARI –VS- SURESH NANALAL KANTARI CIVIL APPEAL NO.277 OF 2015 (UNREPORTED)** in which the Court of appeal states as follows:

“The overriding principles will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”

14. By reason of the foregoing, I find that the Application lacks merit and the same is hereby dismissed with costs.

Dated and signed at Mombasa this 12th day of July, 2017.

C. YANO

JUDGE