



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.174 OF 2013

PETRO OIL KENYA LTD.....PLAINTIFF

VERSUS

GLADYS NDIRA KIRAITHE..... DEFENDANT

RULING

1. **Gladys Ndira Kirathe**, the defendant filed the notice of motion dated 1st December 2015 against **Petro Oil Kenya Ltd**, the Plaintiff, seeking to have the orders of 29th January 2015 in favour of the Plaintiff vacated, the plaint dated 26th June 2013 be struck out and judgment be entered in favour of the Defendant in terms of her counter claim dated 19th November 2015 and filed on 23rd November 2015. The application is based on the eight grounds on the notice of motion and supported by the affidavit sworn by **Gladys Ndira Karaithe** on 1st December 2015.

2. The Plaintiff then filed the notice of motion dated 19th January 2016 seeking for stay of the proceedings, setting aside the orders of 2nd November 2015 and directions on the hearing of the application. The application is based on eight grounds on the notice of motion and supported by the affidavit sworn by **Gordon Ogado**, an advocate on 19th January 2016.

3. The Plaintiff opposed the Defendant's notice of motion dated 1st December 2015 through the grounds of opposition dated 9th January 2016.

4. The application dated 1st December 2015 came up for hearing on the 20th January 2016 when counsel for the Plaintiff requested for time to file a replying affidavit and also notified the court that they had filed their application dated 19th January 2016. The court granted an adjournment to allow service of the application dated 19th January 2016 on the Defendant, and for the Plaintiff to file and serve their reply to the application dated 1st December 2015. The application dated 1st December 2015 was rescheduled to 10th February 2016. Later the same day the Plaintiff's application dated 19th January 2016 was certified urgent and placed for hearing also on 10th February 2016.

5. The two applications came up for hearing on 10th February 2016 when counsel entered a consent that Defendant do file and serve, in the cause of the day, their replying papers to the notice of motion dated 19th January 2016. The counsel further agreed that each file and serve submissions in respect to their application in seven days and, corresponding period for the other party after service. The court placed the matter for mention on 8th March 2016. On that date the Defendant's counsel indicated that they had filed two sets of written submissions in respect of the two applications. The counsel for the Plaintiff indicated that they had filed their submissions on 29th February 2016 but had retained them as the court file was not available. The court placed the matter for mention on 13th April 2016 to enable counsel for the Plaintiff place the written submissions on the court record and serve the Defendant's counsel.

6. The matter was mentioned on 13th April 2016 and counsel for the Plaintiff was absent. The counsel for the Defendant informed the court that the Plaintiff has not filed or served any submissions and requested for a ruling date for the two applications. The court fixed the ruling for 25th May 2016.

7. The Defendant filed written submissions dated 16th February 2016 in support of their application dated 1st December 2015, and another dated 29th February 2016 in opposition to the Plaintiff's application dated 19th January 2016.

8. The issues for determination are as follows:-

- a) Whether the Defendant's notice of motion dated 14th August 2015 was opposed.
- b) Whether the orders of 2nd November 2015 were procedurally obtained and if so whether reasonable grounds have been established for their setting aside.
- c) Whether the plaint discloses reasonable cause of action, and if not, whether it should be struck out.
- d) Whether judgment should be entered in terms of the counter claim filed by the Defendant.
- e) Who pays the costs of the two applications.

9. The court has carefully considered the grounds on the two notices of motion, the grounds of opposition to the application dated 1st December 2015, the affidavit evidence by both parties and written submissions by the Defendant in respect of both applications and come to the following conclusions:

(a) That the Defendant applied for leave to amend their statement of defence in the manner shown in the annexed draft of amended defence and counterclaim vide their notice of motion dated 14th August 2015. The application was served on the Plaintiff and affidavit of service, sworn on 6th October 20th by **Michael Peter Otieno Okelloh**, filed. When the application came up for hearing on 8th October 2015, the Plaintiff's counsel applied for 14 days to file and serve their, replying affidavit. The court directed that the matter be mentioned before the Deputy Registrar on the 2nd November 2015. On that day the Plaintiff and their counsel were absent and had not filed any documents in opposition to the notice of motion dated 14th August 2015 as required under **Order 51 Rule 14 of Civil Procedure Rules** which states:

" 14 (1) Any Respondent who wishes to oppose any application may file any one of or a combination of the following documents:

- (a) a notice of preliminary objection ; and/or,**
- (b) replying affidavit; and/or**
- (c) statement of grounds of opposition;**

(2) the said document in subrule (1) and a list of authorities, if any, shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3)

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard exparte.

(5)"

In view of the foregoing provision, the court finds that, as the notice of motion dated 14th August 2015

was not opposed, then it was proper for the Defendant's counsel to move the Deputy Registrar, as he did on the 2nd November 2015, to hear the same *ex parte*.

b) That the notice of motion dated 14th August 2015 was brought under **Order 8 of the court Procedure Rules** which deals with amendments. The Deputy Registrar has the jurisdiction to entertain applications for amendments as provided for under **Order 49 Rule 7 (1) (b) (vi) of the Civil Procedure Rules**. The *ex parte* orders of 2nd November 2015 were therefore procedurally obtained and the court concurs with the Defendant's counsel submissions that the Plaintiff's counsel alleged sickness does not suffice to have the orders set aside {see **Republic -V- Anita- Contempit Agency & 2 Others Ex Parte Surgippharm Limited** [2014] eKLR.

(c) That though the facts in the supporting affidavit of **Gladys Ndira Kiraithe** in support of the notice of motion dated 1st December remains largely uncontested, as the Plaintiff filed only grounds of opposition, the court is of the view that the plaint discloses triable issues contrary to the submissions by the Defendant's counsel. That though no defence to the counterclaim has been filed by the Plaintiff, the court will take it that they were waiting for the notice of motion dated 1st December 2015 to be decided. The Plaintiff should however file their defence to the counterclaim, if any, without any further delay.

10. That in view of the conclusions above the court orders as follows:

(a) That the notices of motion dated 1st December 2015 and 19th January 2016 are without merit and are both dismissed with each party bearing their own costs.

b) That so as not to delay this matter any longer, the Plaintiff is granted leave to file and serve a reply and defence to the amended statement of defence and counterclaim dated 19th November 2015 within the next 15 days.

c) That both parties do comply with **Order 11 of the Civil Procedure Rules** within the next 30 days.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/5/2016

DATED AND DELIVERED THIS 25TH DAY OF MAY 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Okello for the Defendant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/5/2016

25/5/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mr Okello for the Defendant

Court: Ruling delivered in open court in presence of Mr Okello for the Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/5/2016