



**Sol Electronics Kenya & 2 others v Raikundalia & another (Civil Appeal  
384 of 2018) [2025] KECA 970 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 970 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 384 OF 2018  
MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA  
MAY 23, 2025**

**BETWEEN**

**SOL ELECTRONICS KENYA ..... 1<sup>ST</sup> APPELLANT**

**VINOD SATPUTE ..... 2<sup>ND</sup> APPELLANT**

**RAJESH RAMESH ..... 3<sup>RD</sup> APPELLANT**

**AND**

**NISHIT RAIKUNDALIA ..... 1<sup>ST</sup> RESPONDENT**

**SAWAN RAIKUNDALIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the High Court at  
Nairobi (L. Njuguna J.) dated 12th July 2018 in HCCC No. 94 of 2017)*

**JUDGMENT**

1. In the ruling dated 12<sup>th</sup> July 2018, the High Court, Civil Division in Nairobi (L. Njuguna J.) allowed the respondent's application dated 16<sup>th</sup> October 2017 seeking to strike out the 1<sup>st</sup> appellant's counterclaim dated 12<sup>th</sup> June 2017. The court struck out the counterclaim on the basis that while it had jurisdiction to determine it, it was a different cause of action to the main suit and should, for convenience, be tried separately.
2. The appellants were aggrieved by the ruling and filed the present appeal raising 8 grounds of appeal in the memorandum of appeal dated 17<sup>th</sup> October 2018. The appellants fault the trial court for: disregarding the mandatory provisions of Order 2 Rule 15(2) of the Civil Procedure Rules; failing to strike out the respondents' supporting affidavit; failing to hold that there is a nexus between the plaintiff and the counterclaim in that whereas the plaintiff is a defamation claim, the defence and counterclaim contain averments of the defence of justification and qualified privilege; misinterpreting Order 7 Rule 3 of the Civil Procedure Rules by striking out the counterclaim suo motu rather than refusing



permission to the defendant/1<sup>st</sup> appellant to avail himself of the counterclaim at trial; basing the court's decision on the wrong provision, namely Order 7 rule 3 instead of Order 7 rule 12 of the Civil Procedure Rules, thus disregarding the latter by striking out the counterclaim even though the application to strike out was brought after the respondents had filed a reply to defence.

3. They further fault the learned judge for failing to consider the overriding objectives of the *Civil Procedure Act* and for improperly exercising her discretion in striking out the counterclaim.
4. The background to the application is that the respondents had filed a suit by way of a plaint seeking general damages against the appellants for libel. In response, the 1<sup>st</sup> appellant filed an amended defence and counterclaim dated 17<sup>th</sup> June 2017 alleging, inter alia, breach of fiduciary duty on the part of the 1<sup>st</sup> respondent.
5. By an application dated 16<sup>th</sup> October 2017, the respondents asked the court to strike out the defence and counterclaim as it was based on a tortious claim and ought to have been filed in the Commercial Division of the High Court; and that it may prejudice, embarrass, or delay the fair trial of the action. The application was supported by an affidavit sworn by Nishit Raikundalla on 16<sup>th</sup> October 2017 in which he reiterated the grounds forming the basis of the application. He further averred that the counterclaim was scandalous, frivolous and vexatious as it raised no triable issues; and that there was no nexus between the cause of action in the plaint and in the counterclaim.
6. In response to the application, the appellants filed grounds of opposition dated 23<sup>rd</sup> January 2018, contending that the application violated the mandatory provision of Order 2 rule 15(2) of the Civil Procedure Rules; and that the High Court has original jurisdiction in civil, commercial and criminal matters. The 2<sup>nd</sup> appellant, Vinod Satpute, swore a replying affidavit dated 16<sup>th</sup> February 2018 in which he averred that sometime in 2015, when SOL Group of Companies was reconciling its accounts, the 3<sup>rd</sup> appellant, Rajesh Ramesh, sought clarification from the 1<sup>st</sup> respondent, Nishit Raikundalia, on some financial anomalies that appeared with regard to SOL Kenya, but that he received only unsatisfactory answers. He further averred that it was the breach of duty that gave rise to the appellants' cause of action and was part of their defence in the defamation claim. The appellants' averment, therefore, was that the causes of action were intertwined.
7. Upon considering the application and the responses thereto, the trial court found that the application to strike out was merited and, in the ruling the subject of this appeal, proceeded to issue the orders sought and struck out the 1<sup>st</sup> appellant's counterclaim, leading to this appeal.
8. At the hearing of the appeal, learned counsel, Mr. Shah, appeared for the appellant and highlighted the appellants' submissions dated 5<sup>th</sup> September 2023. In their submissions, the appellants argue, on the authority of *Phillys Nyokabi Kamau v Industrial & Commercial Development Corporation* [2017] eKLR, that this Court will interfere with the exercise of the trial court's discretion when the court misdirected itself and considered factors that it should not have.
9. Further, that as was held in *DT Dobie & Company {Kenya} Ltd -vs- Muchina* (1980) eKLR and *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR, striking out a suit should be used sparingly, with the greatest care being taken to ensure that a litigant is not driven away from the seat of justice.
10. The appellants submit that the trial court did not exercise its discretion properly as it considered irrelevant factors in striking out their counterclaim, and in failing to consider the prejudice that they would suffer; and that it disregarded the mandatory provisions of Order 2 rule 15 (2) of the Civil Procedure Rules in failing to strike out the affidavit in support of the respondents' application.



11. They submit that the respondents' application relied on Order 2 rule 15 of the Civil Procedure Rules; that they did not amend their application in any way, nor did they, in their submissions, limit themselves to Order 2 rule 15(a), (b) (c) and (d) of the Civil Procedure Rules. The appellants submit that since the respondents did not address themselves to the issue, the trial court decided the issue on their behalf, which was entirely improper. In support of this submission, the appellants rely on the case of Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another [2009] eKLR. It is their submission that the respondents' affidavit in support of the application should have been struck out.
12. The appellants further submit that the trial court erred in failing to find that the plaint and the counterclaim were interlinked. They submit that while the respondents claimed in their plaint that they were defamed by the statements made by the appellants, the words they claimed were defamatory relate to the business affairs of Sol Group, of which the appellants are a part. The 1<sup>st</sup> appellant had pleaded the defence of justification, fair comment and qualified privilege arising out of the relationship between the appellants and the respondents in the Sol Group; that due to concern about the running of the business, they had made several requests for documents relating to the business, but such requests had fallen on deaf ears. They were therefore concerned that the respondents were abusing their fiduciary positions, to the detriment of the appellants.
13. The appellants submitted that they had pleaded that due to the relationship between themselves and the respondents, there was a breach of fiduciary and statutory duty by the respondents, which warranted the statements they had made. They submit that the defence of justification, fair comment and qualified privilege will no doubt require evidence from the appellants, and that such evidence may be similar in respect to the breach of fiduciary duties by the respondents.
14. They submit that the court should have considered that if their counterclaim, even in an independent suit, would have succeeded, it would have had a bearing on their defence of justification, fair comment and qualified privilege, and the trial court was wrong in ignoring the pleadings and failing to see that there was a clear link between the two causes of action.
15. The appellants further submit that the trial court was wrong in misinterpreting Order 7 rule 3 of the Civil Procedure Rules. They contend that the respondents' application was brought under Order 2 rule 15 of the Civil Procedure Rules and not under Order 7 rule 3 seeking for the appellants to be denied permission to avail themselves of the counterclaim at the trial. They submit, on the authority of this Court's decision in County Government of Kilifi v Mombasa Cement Limited [2017] eKLR that the court erred in striking out their counterclaim as it could properly be tried with the respondents' suit against them. It is their submission that a defendant is permitted to raise a counterclaim against a plaintiff on any right he may have against the plaintiff, even where the subject matter or cause of action may be different from the original suit, in order to avoid a multiplicity of proceedings and claims based on the same or different cause of action.
16. The appellants further contend that the trial court failed to set out what would be inconvenient in having the suit and counterclaim heard together, apart from their being different causes of action. They contend that the parties were the same, the incidents appeared to be linked, the evidence would potentially be relevant in both matters, and the witnesses could invariably be the same. They submit therefore that the trial judge exercised her discretion improperly.
17. It is their case further that Order 7 rule 12 of the Civil Procedure Rules was inapplicable in the circumstances of this case. They argue that it applies only where a reply to the counterclaim has not been filed; that in this case, the 1<sup>st</sup> respondent had filed a defence to the counterclaim, but the court stated that no defence had been filed. They submit that the application before the court in this case



was not for exclusion of the counterclaim under Order 7 rule 12 of the Civil Procedure Rules but for striking out under Order 2 Rule 15 of the Civil Procedure Rules.

18. The appellants submit, finally, that the trial court ignored the overriding objectives of the *Civil Procedure Act*, which are to ensure that disputes are handled expeditiously, without technicalities, and effective use of judicial and administrative resources. Further, that by striking out the 1<sup>st</sup> appellant's counterclaim, the court effectively denied it a fair hearing, and the 1<sup>st</sup> appellant is effectively time-barred from pursuing an independent suit against the respondents.
19. In their submissions dated 1<sup>st</sup> October 2023, the respondents identified two issues for determination: whether the learned judge disregarded the mandatory provisions of Order 2 rule 15  
(2) of the Civil Procedure Rules, 2010 in allowing the respondents' application; and whether the learned judge failed to properly exercise her discretion in allowing the respondents' application.
20. They submit that their application before the trial court was filed pursuant to Order 2 rule 15 of the Civil Procedure Rules, and not specifically under Order 2 rule 15 (2) as alleged. They submit that the trial court did not err in finding that a supporting affidavit by the respondents to the application was necessary since no specific sub-rule of Order 2 rule 15 was quoted by the respondents.
21. They submit, further, that if the application was specifically brought under Order 2 rule 15 (1) (a) and Order 2 rule 15 (2), then the application ought not to have been supported by affidavit evidence; that the application was instead grounded on all the four grounds under Order 2 rule 15 (1), thus necessitating the application to be supported by an affidavit. The respondents rely for this submission on the case of *Taj Villas Management Limited v Taj Mall Limited* [2018] eKLR.
22. With respect to the second issue, whether the learned judge failed to properly exercise her discretion in allowing the respondents' application, the respondents submit that their suit before the trial court against the appellants is for defamation, while the 1<sup>st</sup> appellant's counterclaim against the 1<sup>st</sup> respondent is for breach of fiduciary and statutory duty.
23. They observe that the counterclaim is by the 1<sup>st</sup> appellant against the 1<sup>st</sup> respondent, in which the 1<sup>st</sup> respondent prays for orders for, among others, "production of all bank statements of accounts in the name of the 1<sup>st</sup> defendant from 2 May 2012 till judgment; production of books of accounts of the 1<sup>st</sup> defendant; taking of accounts for the years 2013, 2014, 2015 and 2016..."
24. The respondents submit that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not parties to the counterclaim, which is purely between the 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent, and the causes of action in the plaint and counterclaim are evidently different. Further, that the information and documents sought by the 1<sup>st</sup> appellant in its counterclaim can be obtained by way of discovery under section 22 of the *Civil Procedure Act* without the need to file a suit for their production. Further, that the said documents would have no bearing on the defamation suit at all, even if the counterclaim was to succeed, as the matter would have been determined and the orders would have been granted after the conclusion of the suit.
25. It is the respondents' submission that the 1<sup>st</sup> appellant prays for judgment compelling the 1<sup>st</sup> respondent to produce documents, but does not do so at an interlocutory stage to assist the court in determining the suit on its merits. They maintain that the prayers sought in the counterclaim by the 1<sup>st</sup> appellant have no nexus whatsoever with the claim for defamation and cannot be conveniently tried with the said suit.
26. The respondents submit further that Order 7 rule 5 (d) of the Civil Procedure Rules provides that copies of documents to be relied on must accompany a defence or a counterclaim; that the 1<sup>st</sup> appellant



not having filed any documents together with the counterclaim as required under the law, the trial court did not have the benefit of considering if the claims set forth in the counterclaim had any nexus with the claim for defamation so as to make a finding whether or not the main suit and the counterclaim could be conveniently tried together. They submit, therefore, that the trial court correctly found that the respondents' cause of action and that of the 1<sup>st</sup> appellant were different and could not be conveniently disposed of in the suit for defamation.

27. The respondents submit, finally, that Order 7 rule 3 of the Civil Procedure Rules gives the court discretion to reject a counterclaim where, in the court's opinion, it would not be convenient to try the main suit and the counterclaim together. They submit that an appellate court will not interfere with the exercise of discretion by the trial court unless in exercising that discretion, the trial court was clearly wrong, citing in support the case of *Mbogo v Shah* [1968) EA 93.
28. The respondents submit that the appellants have not demonstrated how the trial judge's decision was wrong or how she misdirected herself, or that she acted on matters which she ought not to have acted on or she failed to take into consideration matters which she ought to, and consequently arrived at a wrong decision in allowing the respondents' application. They urge the Court not to interfere with the exercise of discretion by the trial court, and to dismiss the appeal.
29. We have considered the record of appeal, the submissions of the parties, as well as the authorities that they rely on. In our view, two main issues arise for determination in this appeal: first, whether the trial court erred in failing to strike out the respondents' affidavit in support of their application to strike out the 1<sup>st</sup> appellant's counter-claim; and secondly, whether the trial court failed to exercise its discretion properly in striking out the 1<sup>st</sup> appellant's counter-claim in reliance on Order 3 rule 7 of the Civil Procedure Code.
30. With respect to the first issue, the appellants contend that the affidavit should have been struck out in light of the provisions of Order 2 rule 15 (a). We have considered the application dated 11th October 2017. At its head, the applicants, the respondents before us, indicate that their application is brought 'Under Order 51, Order 2 Rule 15 of the Civil Procedure Rules 2010 and Section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya'. Order 2 rule 15, titled 'Striking out pleadings', provides as follows:
  - (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; or
    - 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.
  - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made. (Emphasis added).



31. In its decision in *Taj Villas Management Limited v Taj Mall Limited* [2018] eKLR, this Court cited the case of *Mosi v. National Bank of Kenya Ltd* [2001] KLR and stated:

"Where a party opts to make an application for striking out a pleading solely under order 2 rule 15 (1)(a), order 2 rule 15(2) denies him the right to rely on any evidence. All that such a party is required to do is to state concisely the grounds on which the application is founded. Thus, for example, in *Mosi v. National Bank of Kenya* (supra), interpreting order VI rule 13 (I) (a) which is now order 2 rule 15 (1) (a), the court stated thus: "Order VI rule 13 specifies four distinct grounds on which an application to strike out a pleading may be grounded. These are that it discloses no reasonable cause of action or defence; that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court. If the application is made under the first ground, no evidence shall be admissible thereon but grounds on which it is made shall be stated concisely. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1). All that is required is that the grounds relied on be specified in the application and if they be other than the first one, then affidavit evidence is expected." (Emphasis added).

32. In the matter before us, we note that no particular ground in Order 2 rule 15 was specified, so that the conclusion to be drawn is that the application was brought under all the grounds in the said rule. That being the case, the trial court found, rightly so in our view, that since the application was brought under Order 2 rule 15 (1) and that no specific grounds were set out in the application, then affidavit evidence was necessary, and there was therefore no basis to strike out the affidavit filed in support of the application. We therefore resolve the first issue in favour of the respondents.

33. The second issue for determination is whether the trial court exercised its discretion properly in finding that the 1<sup>st</sup> appellant's counter-claim could not be properly and conveniently tried with the respondents' claim in defamation, and in striking it out. In making this finding, the trial court relied on Order 3 rule 7 of the Civil Procedure Code which provides that:

3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross- suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof. (Emphasis added).

34. Whether or not to strike out pleadings is within the discretion of the court. It is settled law that an appellate court will not interfere with the exercise of discretion except under fairly circumscribed circumstances. These circumstances were well articulated in the case of *Mbogo & Another vs Shah* (supra), and subsequently, in the words of Madan JA in *United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd* [1985] KLR 898 in which the learned judge stated:

"The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of



which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

35. While considering the exercise of such discretionary powers under Order 7 rule 3 in *County Government of Kilifi v Mombasa Cement Limited* (supra) this Court held as follows:

“However, Order 7 rule 3 of the Civil Procedure Rules gives courts a wide discretion such that, on the application of the plaintiff, the court may reject a counterclaim where it would not be convenient or where, in the opinion of the court, the counterclaim ought not to be allowed. No doubt, that is a wide discretion and the reasons as to why a court would disallow a counterclaim would be many and varied to be decided on a case-by-case basis. In the present appeal, in as far as the learned Judge declined to issue an injunction in respect of the adjacent suit land and further in disallowing the counterclaim filed by the appellant, the Judge was exercising discretion in both instances. Injunctions being equitable remedies are discretionary and in disallowing the counterclaim the Judge must have been exercising the discretion granted to court by order 7 rule 3 of the Civil Procedure Rules. It is trite law that such discretion must be exercised judicially and never capriciously or whimsically. The Court of Appeal's mandate when dealing with the exercise of such discretion was explained in the oft cited case of *Mbogo & Another v Shah* [1968] EA 93... in which it was held that a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

36. Turning to the case before us, we note that in reaching the conclusion that the 1st appellant's counterclaim could not be conveniently tried with the respondents' defamation claim, the court first addressed its mind to the caution that the power to strike out pleadings should be exercised sparingly and cautiously, as was held in the case of *DT Dobie & Company v. Muchina* [1982] KLR 1. It further observed that Order 7 rule 3 gives the court the discretion to decide whether a counter claim should be determined within the suit, or be tried as a separate suit. The court then considered the respondents' suit against the 1<sup>st</sup> appellant's counter-claim, and concluded as follows:

“The Plaintiffs' suit is based on defamatory emails from the defendants and they are seeking damages for: defamation. In the counterclaim, the Defendants seek orders for production of bank statements, books of accounts and general damages for breach of fiduciary duty, among other orders. It is clear that the causes of action are quite different. It is my finding that whether the Defendants defamed the Plaintiffs or not, that has no connection to their breach of fiduciary duty. The two are different causes of action and the counter-claim cannot be conveniently disposed of in the pending suit. It is the considered opinion of this court that the counterclaim would best be tried separately.”

37. Having considered the pleadings of the parties and the findings of the trial court as set out above, we find no reason to fault the exercise of discretion by the trial court. The respondents claim was a claim in defamation, directed at all the appellants. The 1st appellant then filed an amended defence and a counterclaim, directed solely at the 1st respondent, alleging breach of fiduciary and statutory duty, claiming damages for such breach, and praying for production of books of account and statements as one of the final orders in his counterclaim.



- 38. We have not found any nexus between the defamation claim against the appellants and the breach of fiduciary duty alleged by the 1<sup>st</sup> appellant against the 1<sup>st</sup> respondent. In our view, the trial court was correct in finding that these two claims could not be conveniently tried in the same suit, and that the 1<sup>st</sup> appellant ought to file a specific claim against the 1<sup>st</sup> respondent for the alleged breaches of fiduciary and statutory duty.
- 39. It is our finding, therefore, that the trial court correctly exercised its discretion, and there is no merit in the appeal before us. The appeal is therefore dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2025**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**. JUDGE OF APPEAL**

**MUMBI NGUGI**

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**.. JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

Deputy Registrar.

