



**County Government of Kwale & 2 others v Rahimkhan & 5 others (Civil Appeal 75 of 2020) [2023] KECA 308 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 308 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 75 OF 2020  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MARCH 17, 2023**

**BETWEEN**

**COUNTY GOVERNMENT OF KWALE ..... 1<sup>ST</sup> APPELLANT  
COUNTY EXECUTIVE COMMITTEE MEMBER, LANDS NATURAL  
RESOURCES AND URBAN PLANNING ..... 2<sup>ND</sup> APPELLANT  
COUNTY GOVERNMENT OF KWALE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ABDULKADIR AHMED RAHIMKHAN ..... 1<sup>ST</sup> RESPONDENT  
JABEEN MANAN ..... 2<sup>ND</sup> RESPONDENT  
LAND REGISTRAR, MOMBASA ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT  
DIRECTOR OF SURVEYS ..... 5<sup>TH</sup> RESPONDENT  
DIRECTOR OF PHYSICAL PLANNING ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of the Environment and Land Court at Mombasa dated 12th February 2020 by Justice Sila Munyao in ELC Civil Suit No 10 of 2008)*

**JUDGMENT**

1. The facts giving rise to the present appeal were that the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who were the plaintiffs in the original suit, held a lease over LR No 4659 (Original No 3855/19) (the suit land). That lease expired on January 1, 2013 but the was not renewed. As a result, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, sued the appellants together with the 3<sup>rd</sup> to 6<sup>th</sup> respondents, as defendants, seeking that they be compelled to



- renew the plaintiffs' lease over the suit land. They also sought an order compelling the said defendants to issue them with a certificate of title to the suit land.
2. In their defence and counterclaim, the appellants' case was that upon expiry of the lease, the interest in the suit property reverted to the County Government of Kwale to hold in trust for the residents of Kwale County. They therefore sought a declaration that the suit land reverted to the 1<sup>st</sup> appellant and also sought that they be granted vacant possession of the suit land.
  3. On April 9, 2019, when the matter was listed for hearing, the parties informed the court that they had agreed by consent to admit their documents as exhibits. The case for the plaintiffs then proceeded to conclusion before A Omollo, J after which the defence case was fixed for hearing on September 17, 2019. On September 17, 2019, the matter was placed before Munyao, J and the learned judge directed that the hearing proceeds. The defence case was heard to conclusion and at the close of the case, the learned judge directed that the parties to file their submissions. He also encouraged the parties to actively pursue negotiations with a view to arriving at an amicable settlement of the matter. The matter was then fixed for mention on November 26, 2019 for highlighting submissions if necessary.
  4. Nothing seemed to have happened on the said mention date but on January 21, 2020, the matter came up before Yano, J for an application dated January 21, 2020 seeking orders that the plaintiff's case be marked as withdrawn and that the costs of the application as well as those of the suit be borne by the defendants. The learned judge certified the said application urgent and directed that the same be served for inter partes hearing on February 12, 2020. The basis of the said application was that during the course of the proceedings, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who are the 3<sup>rd</sup> and 4<sup>th</sup> respondents in this appeal, renewed the lease and issued the title to the plaintiffs. Accordingly, the plaintiffs' suit had been overtaken by the events. That application was opposed by the 1<sup>st</sup> and 6<sup>th</sup> defendants, the appellants herein, who filed a replying affidavit sworn on February 5, 2020. The gravamen of their opposition was that the action of renewal of the lease offended the doctrine of lis pendens as it defeated the substratum of the suit and their counterclaim.
  5. After hearing the said application, the learned judge in his ruling delivered on February 12, 2020, while relying on order 25 rule 2 of the *Civil Procedure Rules*, found that there was nothing wrong with the plaintiffs withdrawing the suit after the matter was compromised. It was also his view that the renewal of the lease rendered the appellants' counterclaim superfluous. According to him, if the County Government of Kwale, the 1<sup>st</sup> appellant herein, was aggrieved by the renewal of the lease, its recourse was to file a new suit to challenge the title. In his view the counterclaim could not be sustained by an amendment. He therefore ordered that the plaintiffs' suit be discontinued and proceeded to strike out the counterclaim with each party bearing own costs.
  6. It is that decision that gave rise to this appeal in which the appellants are challenging the decision by the trial judge to strike out the counterclaim.
  7. When this appeal was called out for hearing on virtual platform on October 31, 2022, Mr Kariuki Henry held brief for Munyao for the 1<sup>st</sup> and 2<sup>nd</sup> appellants while Mr Mwandeje appeared for the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> and 4<sup>th</sup> respondents were not represented notwithstanding service upon them of the hearing notice. They also did not file their submissions. While Mr Kariuki relied on his written submissions Mr Mwandeje informed the court that he did not participate in the counterclaim and was not opposed to the appeal.
  8. We have considered the submissions filed on behalf of the appellants. The only issue for determination before us is whether it was proper, in the circumstance of the case, for the learned judge to have struck



out the appellants' counterclaim upon the discontinuation of the plaintiffs' suit. Order 25 rule 2(2) of the *Civil Procedure Rules* provides as follows:

"Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just."

9. However, order 7 rule 13 of the *Civil Procedure Rules* provides that:

"If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."

10. The rationale for this provision is that a counterclaim is separate claim and is only brought within the main claim for the purposes of convenience. A counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant hence a counterclaim is a suit distinct from the plaintiff's suit. See *Kenya Commercial Bank Limited v James Karanja* [1981] KLR 209 and *Kibona v Tanscan Timber Co Ltd* [1995-1998] 1 EA 121.

11. It is therefore clear that the discontinuation of the plaintiffs' suit did not necessarily mean that the appellant's counterclaim was thereby overtaken by events. While the plaintiff's suit may not be divisible from the counterclaim, unless it was shown that the discontinuation of the plaintiff's suit renders the counterclaim so hopeless that it can no longer be sustained, the order striking the counterclaim is uncalled for. In this case none of the parties applied for the striking out of the counterclaim and in their submissions the plaintiffs' counsel acknowledged that the appellants were at liberty to proceed with their counterclaim. The appellants' counsel, in his submissions informed the court that the appellants intended to proceed with their counterclaim and in so doing intimated that the appellants intended to amend their counterclaim.

12. In our view, in light of the appellants' submissions that they intended to apply for amendment of their counterclaim, even if the discontinuation of the plaintiffs' suit rendered the counterclaim, as it then stood, shaky, the trial judge ought to have considered whether the intended amendment could breathe life into the appellants' case before striking it out. That is a consideration that could only be made upon hearing the amendments that the appellants intended to introduce.

13. It is trite that a pleading will not be struck out unless it is worse than demurrable and the rule is only acted upon in plain and obvious cases. Therefore, and the jurisdiction should be exercised with extreme caution. Before exercising the jurisdiction to strike out a pleading, the court must see that the party whose pleading is sought to be struck out has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments. An action must not be dismissed merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved. If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a court of justice ought not act in darkness without the full facts before it. See *D T Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another* Civil Appeal No 37 of 1988 [1982] KLR 1.

14. In our view, in the circumstances of this case, it was not open to the learned trial judge to have taken up the issue of striking out the appellants' counterclaim suo moto when none of the parties addressed him on the same. By so doing the learned trial judge was in error and his decision occasioned a miscarriage of justice. It cannot stand.



15. In the premises, we allow the appellants' appeal, set aside the order striking out their counterclaim and substitute therefor an order reinstating the counterclaim to hearing.
16. As the decision to strike out the counterclaim was on the court's own motion, there will be no order as to the costs of this appeal.
17. Judgement accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**S. GATEMBU KAIRU (FCI Arb.)**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

