



**Tavares v Charo & 2 others (Environment & Land Case
19 of 2022) [2024] KEELC 4783 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 19 OF 2022
FM NJOROGE, J
JUNE 18, 2024**

BETWEEN

MARIEA ROZEND OLIVER TAVARES PLAINTIFF

AND

LAWRENCE SHUME CHARO 1ST DEFENDANT

REGISTRAR OF TITLES MOMBASA 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. By a notice of motion application dated 4th March 2024, the 1st defendant seeks the following orders: -
 - a. That the matter herein be dismissed with costs for being an abuse of the court process;
 - b. That the 1st defendant's counterclaim be listed for hearing;
 - c. That the plaintiff/respondent herein be condemned to pay the costs of this application.
2. The application, which was brought under Order 40 rule 3(1) & (3), of the *Civil Procedure Rules* Section 1A, 1B and 3A of the *Civil Procedure Act* is premised upon the grounds outlined on the face of the motion and supported by the affidavit sworn by the 1st defendant on 4/3/24.
3. According to the applicant, the grounds upon which the application has been brought are that the originating summons offends the doctrine of adverse possession, the plaintiff has admitted that he has been occupying the suit property with the permission of the true owner; that the plaintiff omitted to include the applicant; in another suit, CMCC Land Case 22 of 2020 whose judgment offends the provisions of the law; that a Senior Resident Magistrate has no jurisdiction to handle the matter in the lower court as it is beyond his jurisdiction, and that the Originating Summons (OS) offends the provisions of Order 37 of the *CPR* in that OS is supposed to be for summary orders only.



4. The plaintiff/respondent has filed very lengthy replying affidavit to the motion the gist of which is that the motion by the 1st defendant is a waste of the court's precious time as the matters that have been raised thereon could have been raised at the substantive hearing of the suit, that the plaintiff has been residing on the suit land and the 1st defendant only surfaced recently from nowhere to claim ownership, that the applicant is not the registered proprietor of the property such as to warrant fatality to the lower court claim for his non-inclusion therein; that the applicant's documents are fraudulent.
5. Having regard to the weight of the orders sought in the application at hand the brevity and generalization of statements in the supporting affidavit of the applicant is quite surprising. One would have expected more evidence of, say, the manner in which the decree in the lower court offends the provisions of the law as alleged, or why the non-inclusion of the applicant in the lower court suit which is a separate suit altogether should be fatal to the present suit. It would not matter is the same data is to be found elsewhere in the same file record containing the application. The reason for that holding is that an application to dismissal of a suit is a stand-alone proceeding.
6. It is also noteworthy that as the applicant seeks dismissal of the plaintiff's claim, he seeks that his counterclaim be set down for hearing after that event.
7. In contrast to the application and supporting affidavit, the overwhelming weight of the statements in the replying affidavit support the notion that a substantive hearing of the main suit on its merits is necessary.
8. This is a matter in which the plaintiff filed an originating summons on 21/7/2022 and the 1st defendant, in an irregular move, filed a "statement of defence and counterclaim" soon thereafter on 17/8/2022. Though directions can be issued by court to have a matter of this nature heard as if commenced by way of plaint, I do not find any directions which authorized the filing of a statement of defence and counterclaim in the matter by any of the defendants and that is why I find the said pleading filed by the 1st defendant to be irregular.
9. On 21/2/24, I issued orders to the effect that the applicant shall either file a more elaborate preliminary objection other than the one dated 9/2/2022 setting out the manner in which Order 37 Rule 8 of the CPR has been violated and how the judgment and decree mentioned in limb no 2 of the PO offends the provisions of the law, or file an application to agitate the matters set out in the PO dated 9/2/22 within 7 days of that order and serve all the other parties. In addition, the applicant was to substantiate the claim that there are pending investigations that would render any proceedings taken herein to be a waste of time if they were conducted and bring his findings to court. The court then stated that it was necessary to apply such caution and adjourn the matter, which had come up for hearing on that day, until such steps as ordered above had been undertaken by the 1st defendant.
10. Dismissal of a suit is not to be taken lightly. By it a party may be shut out of the corridors of justice even when they would otherwise have a good claim. Besides, courts of justice have been established for the exact purpose of examining a claimant's claim in detail and ruling on whether there is merit in the substantive claim rather than rule on technicalities. The *Constitution* of Kenya at Article 159(1) (d) discourages the use of technicalities to subvert substantive justice by any person. In *Kenya Bureau of Standards v Societe Generale De Surveillance SA* [2005] eKLR, by Nyamu J, quoting Megarry J in the case of *John v Rees* [1970] CH. 345:

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious, 'they say, 'why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who



take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”

11. In the present case, if there is a valid counterclaim as stated by the applicant, and the same has to be tried, it is clear that the same evidence that would have gone to support the OS is the same evidence that would be relied on to support the defence to the counterclaim. However, one should not without any proper direction of the court regularizing the said document, it lay their hopes firmly on that course of action.
12. The conclusion of this court is that the notice of preliminary objection dated 9/2/22 is hereby marked as spent by reason of the matters enumerated therein having been dealt with in the notice of motion dated 4th March 2024. Also, the 1st respondent’s Notice of Motion application dated 4th March 2024 falls far short of providing any evidence upon which the suit may be dismissed, and I hereby dismiss the same with costs to the plaintiff only.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF JUNE, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

