



**Mumbo (Being the representative of Jamhuri Jua Kali Investment Group)
v Khakame; Registrar (Interested Party) (Environment & Land Case
E007 of 2023) [2024] KEELC 4568 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E007 OF 2023**

**JA MOGENI, J
JUNE 10, 2024**

BETWEEN

**ELLY ODHIAMBO MUMBO (BEING THE REPRESENTATIVE OF JAMHURI
JUA KALI INVESTMENT GROUP) PLAINTIFF**

AND

CAROLINE KHAKAME DEFENDANT

AND

CHIEF LAND REGISTRAR INTERESTED PARTY

RULING

1. This Ruling is in respect of two Applications. The Plaintiff filed a Notice of Motion Application dated 15/02/2024 brought under the provisions of Order 51 Rule 1 and 11 of the [Civil Procedure Rules](#) and the inherent Jurisdiction of the Court. The Plaintiff is seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the judgment date on the Counter-claim against the Plaintiff herein set on 14/03/2024 be set aside and the Plaintiff's case be fixed for hearing in merit.
 4. That the costs of this application be provided for.
2. The Intended 2nd Defendant's filed an Application dated 27/02/2024 brought pursuant to the provisions of Order 1 Rule 10 (2) of the [Civil Procedure Rules](#), Section 1A, 1B and 3A of the [Civil](#)



Procedure Act, Article 50 of the Constitution of Kenya and all enabling provisions of law. The Intended 2nd Defendant seeks the following orders: -

1. Spent.
 2. That this Honourable Court be pleased to grant leave to Franklin Kamathi to be enjoined in the instant suit as a the 2nd Defendant.
 3. Spent.
 4. That this Honourable Court be pleased to order that the file in this matter ELC Case No. E007 OF 2023 be placed before the Presiding Judge of the Environment and Land Court for purposes of giving directions on the hearing and determination of this suit and a related suit namely ELC Case No. E044 OF 2022 Caroline Khakame v Franklin Kamathi.
 5. That in the alternative, this Honourable Court be pleased to reopen this suit and grant leave to the Applicant/Intended 2nd Defendant to submit Pleadings, Written Responses, Affidavits, Applications and submissions to the pleadings filed in the instant suit.
 6. The Honourable Court be pleased to grant any further orders as may be just in the circumstances.
 7. That costs for the instant Application be in the cause.
3. The Application dated 15/02/2024 is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Kevin Seda, the Plaintiff herein, sworn on 21/09/2023.
 4. The Application dated 27/02/2024 is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Franklin Kamathi, the intended 2nd Defendant herein, sworn on 21/09/2023.
 5. Both Applications are opposed. The Defendant filed two Replying Affidavits sworn by Caroline Khakame, the Defendant herein, on 2/05/2024 and 1/05/2024 respectively in response to both Applications.
 6. The Court gave directions that both Applications be canvassed by way of written submissions. By the time of writing this Ruling, it is only the Plaintiff who had duly submitted. The Plaintiff's submissions are dated April 2024 and filed on 25/04/2024.

Issues For Determination

7. Having considered both Applications, the rival affidavits together with the Plaintiff's submissions and the authorities cited to me, the following arise as the issues for determination before this court.
 - a. Whether the Application dated 15/02/2024 is merited.
 - b. Whether the Application dated 27/02/2024 is merited.



Analysis And Determination

Whether the Application dated 15/02/2024 is merited

8. It is the Plaintiff's case that the judgment date has been set before the Plaintiff being heard and the judgment might enter on the Defendant's counterclaim due to no mistake or negligence on the part of the Plaintiff. The Plaintiff's counsel contended that when the matter came up for hearing, he kept waiting to be let in until about 13hrs. That it is only upon checking the portal that he realized that the case was set for judgment on 14/03/2024 without giving the Plaintiff a chance to be heard and that judgment might be entered in default of defence to counterclaim. He moved immediately to prepare this application to prepare this application to have the judgment date set aside.
9. He contended that the judgment herein should not be allowed to stand as the subject matter of the counterclaim is indivisible from that of the Plaintiff. The amount for which judgment that might be entered on the counterclaim is quite substantial and the Plaintiff has a strong defence against the Counterclaim which raises triable issues and should therefore be allowed to defend the said counterclaim. The failure to attend court was not due to any intention or negligence on their part but was purely and wholly inadvertent.
10. On the other hand, the Defendant argued that the present application is filed in bad faith, full of half-truths, malicious and only intended to waste the courts previous time and delay the court from delivering its appropriate judgment. They agree that the Plaintiff fixed the matter for hearing n 13/02/2024 *ex parte*. In spite of them fixing the hearing date *ex parte*, the Plaintiff never bothered to serve a hearing notice to the other parties who were not present in court. That it is the Defendant's advocates on record who served a hearing notice upon all the parties in spite of not being in court and having knowledge of the hearing date. It was clear from the days' causelist and it is the norm of the Court that all hearings are conducted in open court from 10 am and not online. The defendant wonders why counsel was waiting online until 13hrs without taking any action not even calling the other parties whose contacts appear on the pleadings to confirm the position if at all he was online and was never admitted as alleged.
11. Counsel for the Defendant argued that the Court called out the matter more than twice and it is on the Plaintiff's absence that the Court dismissed the suit and proceeded with the counterclaim in the presence of the defendant and the Interested Party's representative. The court should not entertain litigants who are indolent, negligent and not keen on pursuing their matters thus wasting the court's time. Further, the reply to defence and defence to counterclaim and set off does not raise any triable issues and does not even give an iota denoting the Plaintiff has ever owned the property. That since there is no suit in which this application is made and there is no application for reinstatement of the suit or the setting aside of the sad orders then there will be no plaint on which the plaintiff's application is hinged.
12. To begin with, the Court has noted that the Plaintiff's counsel contended that the judgment herein should not be allowed to stand as the subject matter of the counterclaim is indivisible from that of the Plaintiff.
13. Order 7 Rule 13 of the [Civil Procedure Rules](#). It provides as follows:

“Discontinuance, stay or dismissal of suit. 13. 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.”



14. The import of the provision is that as much as a defendant can and is permitted to bring a counterclaim in a suit, the latter, basically independent of the matter that gave rise to it, being filed by him to seek to resolve all matter in one judgment. It means that where the suit is either stayed or ceases to exist but there is reason to maintain the Counterclaim, the defendant is not barred from proceeding with the counterclaim.
15. Additionally, when the provision is looked at from the prism of the *Limitation of Actions Act*, it becomes clear that a counter-claim is separate or independent of the suit but once tried together, it gives rise to one judgment. This is because the law acts in synchrony. In a functioning legal system which esteems the rule of law, laws ought to be unitary in terms of purpose for the well-functioning of society. The law cannot and should never provide for one issue in two different ways. That would be a recipe for chaos: it would be a precursor for disobedience of the law. See the case of *Beatrice Mumbi Wamabiu v Mobil Oil Kenya Ltd* [2011] eKLR.
16. Thus, if the law treats a suit and counterclaim as separate for purposes of delineating the genesis of a cause of action, so it should for purposes of continuance and determination of that those causes of action. It goes without saying then that a counterclaim is a separate entity from a suit. It resides in independence but when tried together fate calls on them to merge as one judgment. Section 35 of the *Limitation of Actions Act* provides:

“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”
17. In this matter, the Plaintiff’s suit was dismissed for want of prosecution therefore the Court proceeded with the counterclaim as is it independent of the Plaintiff’s suit. A counterclaim is treated as a separate suit under Section 35 of the *Limitation of Actions Act* hence its survival cannot be pegged on the pendency of the primary suit.
18. That being said, the main issue for determination in this instant application is whether the Plaintiff has met the grounds to warrant an order setting aside the order for dismissal of the Plaintiff’s suit for want of prosecution.
19. Order 45 Rule 1 of the Civil Procedure Rules as well as Section 80 of the *Civil Procedure Act* give this Court unfettered discretion to allow a review on any sufficient reason which reason may relate to not only the law, but also to facts as they may emerge from adducing evidence. See the case of *Shanzu Investments Ltd v Commissioner for Lands* Civil Appeal No. 100 of 1993.
20. The substantive law regarding reviewing a judgment or order of the court is found in Section 80 of the *Civil Procedure Act* and the procedural law is Order 45 of the *Civil Procedure Rules* which stipulate as stated above. That the jurisdiction of the Court under the Order 45 of the *Civil Procedure Rules* is restricted to the grounds set out in the said order which are well outlined in Rule 1 as follows: -

“Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



21. The Applicant therefore should satisfy any of the three grounds of (a) Discovery of new and important matter or evidence (b) some mistake or error apparent on the face of the record (c) other sufficient reason.
22. The issue of inordinate delay was discussed in the case of *Mwangi S Kimenyi v Attorney General & Another* [2014] eKLR where it was held that there was no precise measure of what amounted to inordinate delay save that it would differ from case to case. In the instant application, the impugned order dismissing the Plaintiff's suit was delivered on 13/02/2024 and the instant Application was brought on 20/02/2024. That is a period of about four (4) working days. The same in my view was filed without inordinate delay.
23. On account of some mistake or error apparent on the face of the record, it was submitted that in *Mumby's Food Products Limited & 2 Others v. Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002, the Court held that:

“a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.”
24. The instant application is based on the affidavit of Kevin Seda, the Plaintiff's advocate on grounds that the judgment date has been set before the Plaintiff being heard and the judgment might enter on the Defendant's counterclaim due to no mistake or negligence on the part of the Plaintiff. That when the matter came up for hearing, he kept waiting to be let in until about 13hrs. That it is only upon checking the portal that he realized that the case was set for judgment on 14/03/2024 without giving the Plaintiff a chance to be heard.
25. The provisions of Order 45 Rule 1 of the Civil Procedure Rules were restated by the Court of Appeal in *Benjob Amalgamated Limited and another v Kenya Commercial Bank Limited* [2014] eKLR as follows:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.
26. The court in the case of *Muyodi – v - Industrial & Commercial Development Corporation & Ano.* (2006) IEA 243 stated as follows: -

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.
27. The Plaintiff's counsel contended that when the matter came up for hearing, he kept waiting to be let in until about 13hrs. The Plaintiff's counsel has argued that his failure to attend court on 13/02/2024



was not due to any intention or negligence on their part but was purely and wholly inadvertent. I do not agree with the Plaintiff's counsel narrative. This Court always makes an announcement in virtual court that all matters listed for hearing will proceed in open court at 10.30am. I have perused the Court record and I note that the Plaintiff indeed took the hearing date of 13/02/2024 ex parte when he appeared before this court on 29/01/2024.

28. From the proceedings of 13/02/2024, it was only counsels for the Defendant and Interested Party who were in Court. Mr. Andati moved the Court to dismiss the Plaintiff's suit for want of prosecution and applied to proceed with the counterclaim. The Court delivered a Ruling wherein it was noted that this file was first called out at 10.05am, the Plaintiff and his counsel were not in Court. The file was placed aside until 11.05am. At 11.05am, the Plaintiff and his counsel were not in court. The Defendant having confirmed that he served the Plaintiff vide an affidavit of service dated 30/01/2024 and also noting that the Plaintiff was the one who took that day's date, the Court proceeded to dismiss the Plaintiff's suit for want of prosecution.
29. The Court agrees with the Defendant's counsel statement that it is normally clear on the causelist and it is the norm of the Court that all hearings are conducted in open court from 10 am and not online. Hybrid or virtual hearings are normally requested beforehand. The Plaintiff did not request for a virtual hearing when he appeared before me on 29/01/2024.
30. In my view, I find that there definitely has not been any discovery of any new matter or evidence that was not available at the time the order was issued. There is no error apparent on the face of the record or sufficient reason advanced either. The Plaintiff only succeeded in bringing the application without delay. This is not enough.
31. The upshot of the foregoing is that I find the application by the Plaintiff dated 15/02/2024 to be devoid of any merit and I accordingly order the same dismissed with costs to the Defendant.

Whether the Application dated 27/02/2024 is merited

32. There is also an application dated 28/02/2024 before me by an Intended 2nd Defendant seeking to be joined to the suit. The intended 2nd Defendant also seeks to have the file placed before the Presiding Judge of the Environment and Land Court for purposes of giving directions on the hearing and determination of this suit and a related suit namely ELC Case No. 044 of 2022 Caroline Khakame v Franklin Kamathi. That in the alternative, this Court be pleased to reopen this suit and grant leave to the Applicant/Intended 2nd Defendant to submit pleadings, written responses, affidavits, applications and submissions to the pleadings filed in the instant suit.
33. The Court found that the Plaintiff's suit was dismissed for want of prosecution on 13/02/2024 and the Court proceeded with the counterclaim as is it independent of the Plaintiff's suit and its survival cannot be pegged on the pendency of the primary suit.
34. There is no application for reinstatement of the Plaintiff's suit. The Plaintiff only filed an Application dated 15/02/2024 wherein his counsel sought for the order given on 13/02/2024 dismissing the Plaintiff's suit for want of prosecution to be set aside. The Court found that there definitely has not been any discovery of any new matter or evidence that was not available at the time the order was issued. There is no error apparent on the face of the record or sufficient reason advanced either. The Plaintiff only succeeded in bringing the application without delay and this was not enough not enough to warrant an order setting aside the dismissal of the Plaintiff's suit. As it stands, the Plaintiff's suit is still dismissed for want of prosecution. There is no suit for which the intended 2nd Defendant can be joined as a 2nd Defendant. The suit has not been re-opened.



35. It is my understanding that the intended 2nd Defendant was applying to be enjoined in the Plaintiff's suit and not in the counterclaim. I note that the Defendant and the intended 2nd Defendant already have an ongoing suit in ELC Case No. E044 OF 2022 Caroline Khakame v Franklin Kamathi. This means that the intended 2nd Defendant's application is spent.
36. In light of the foregoing, it is my finding that the Application dated 28/02/2024 is devoid of merit. The same is dismissed with costs.

Disposal Orders

37. To this end, I order as follows:
- a. The Plaintiff's Application dated 15/02/2024 is devoid of any merit and is accordingly dismissed with costs to the Defendant.
 - b. The intended 2nd Defendant's Application dated 28/02/2024 is devoid of merit and is hereby dismissed with costs.
38. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JUNE, 2024.

MOGENI J

JUDGE

In the Virtual presence of: -

Mr. Oyugi holding brief for Mr. Andati for Defendant

Mr. Kamau for Applicant/2nd Defendant

No appearance for Interested Party

C. Sagina - Court Assistant

MOGENI J

JUDGE

