



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ocean Engineering Works Ltd & another v SBM Bank of Kenya Ltd (Civil Suit 112 of 2021) [2024] KEELC 4724 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4724 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 112 OF 2021
LL NAIKUNI, J
JUNE 5, 2024

BETWEEN

OCEAN ENGINEERING WORKS LTD 1ST PLAINTIFF

SHERAZ MOHAMED ADAM 2ND PLAINTIFF

AND

SBM BANK OF KENYA LTD DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Preliminary objection date 6th November, 2023 by the Plaintiffs in the main suit while the Defendants in the Counter Claim herein, Ocean Engineering Works Limited and Sheraz Mohamed Adam, as against SBM Bank of Kenya Limited, the Defendant in the main suit but the Plaintiff in the Counter Claim herein.
2. Upon service of the objection to the Plaintiff in the Counter Claim, it filed Submissions to counter the Notice of preliminary objection.

I. The Applicant's case

3. The Applicant filed 5 paragraphed objection based on the following grounds:-
 - a. That this Honourable Court is functus officio the matter herein having been withdrawn prior to filing and service of the counter claim.
 - b. That there is an error of the law that cannot be remedied by the orders of this Honourable Court issued on 12th October, 2023.



- c. That the Plaintiff in the Counter – Claim did not seek for leave to file the counter – claim and no leave was granted.
- d. That the counter – claim as filed is contrary to the agreement of the parties and the Plaintiff’s in the counter – claim statutory power to sale.
- e. That the Counter – claim is an abuse of the Court process and malicious.

III. Submissions

4. On 6th February, 2024 while all the parties were present in Court, they were directed to have the Notice of Preliminary objection dated 6th November, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 29th May, 2024 a ruling date was reserved on 5th June, 2024 by Court accordingly.

A. The Written Submissions by the Plaintiff in the main suit

5. The Plaintiff in the main suit but the Defendant in the Counter Claim through the Law firm of Messrs. Marende Necheza & Company Advocates filed its submissions dated 14th February, 2024. M/s. Kyalo Advocate submitted that the Plaintiff and the Defendant in the Counter - Claim filed a preliminary objection raising and grounds of objections as already set out above. The Learned Counsel submitted that it was the Plaintiff’s submission that simply put the Counter - Claim filed could not stand and had no basis the suit herein having been withdrawn prior. The basis of the suit was a dispute between the Plaintiff and the Defendant over a debt. The parties did engage in out of court negotiations and agreed that the security be disposed off and proceeded to utilized to offset the debt. The said agreement was actualized prompting the Plaintiff herein to file a notice of withdrawal dated 2nd August, 2023. The Counter - Claim on the other hand is dated 2nd October, 2023.

6. The Learned Counsel submitted that as at the time of filing the Counter - Claim there was no suit hence the same was defected and should be struck out with costs. Withdrawal of suit was a right given to a Plaintiff under Order 25 of the Civil Procedure Rules 2020.

7. The Learned Counsel relied on the case of “Priscilla Njue – Versus – Geovheem Middle East & Ano (2021) eKLR page 4”, thereof the court noted as follows:

“The Supreme Court in Nicholas Kiptoo Arap Korir Salal – Versus – IEBC and 7 Others that party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed a propriate.”

8. According to the Learned Counsel, it was therefore evident that the Plaintiff herein had already withdrawn the suit hence the Counter - Claim could not be heard since it was pegged on the defence to a suit that did not exist. This was more so since the withdrawal was before the matter was set down for hearing hence the Court could not in any way decline to withdrawal since no permission was needed at that point. This according to the Learned Counsel was stated in the case of:-“Atlah Baksh – Versus – Naimat Ali (20) at page 5” of the authority acted above.

9. The Learned Counsel concluded by submitting that the preliminary objection herein having raised a point of law the same had merit and the same should be allowed and the Counter - Claim be struck out with costs. This was also taking account that the Plaintiff in the Counter - Claim had already exercised



their statutory power of sale as per the law and thus not benefit twice at the detriment of the Plaintiff in the withdrawn suit.

B. The Written Submissions by the Defendant & the Plaintiff in the Counter - Claim

10. The Defendant in the main suit but the Plaintiff in the Counter - Claim through the Law firm of Messrs. Muthee & Partnership LLP filed its written submissions dated 20th March, 2024. Mr. Gathu Advocate submitted that what was before the Honourable Court was the Defendant's counterclaim dated 6th November, 2023. The Learned Counsel further went to state that during the proceedings of 6th February 2024, the Honourable Court directed the Defendants to file their Submissions and they were to respond to the same upon being served. That at the time of preparing and filing the instant Submissions, the Plaintiff is yet to be served with the Submissions in support of the Preliminary Objection.
11. On the brief background, the Learned Counsel submitted that the matter was commenced by way of a Plaint and a Notice of Motion filed under a Certificate of Urgency dated 16th June 2021. The matter was never fixed for hearing of the main suit as the Parties opted to engage in out of Court negotiations towards settlement of the admitted debt owing to the Bank (Plaintiff). However, upon the sale of the securities, the Plaintiff was not in a position to recover the outstanding amount. This predicament plus the fact that the Defendant had already defeated part of the Plaintiff's right to recovery by disposing off the floating charge which included its machinery without the Plaintiff's knowledge forced the Plaintiff to now defend the suit by filing a Statement of Defence and Counter - Claim.
12. Upon the Defendant learning of this position, they moved to withdraw the main suit by filing a Notice of Withdrawal dated 2nd August 2023 and which withdrawal of the main suit was upheld by the Honourable Court and the Counter - Claim fixed for hearing. The Defendant had partially complied by filing its Defence to the Counter - Claim but had also filed the instant Preliminary Objection challenging the Counterclaim on account of the suit having already been dismissed.
13. On the issues for determination, the Learned Counsel relied on the following:-
14. They further submitted that the prosecution of the Counterclaim was independent and a Plaintiff in the Counterclaim can still proceed with the Counterclaim even after the discontinuous of the main suit as provided for under Order 7 Rule 13 of the Civil Procedure Rules, 2010 which provides that:-

“If, in any case in which the Defendant sets up a Counter - Claim the suit of the Plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”
15. According to the Learned Counsel no position had been pleaded or substantiated by the Defendant to warrant the Court to depart from the provisions of Order 7 Rule 13 of the Civil Procedure Rules, 2010. The independent nature of the Counter - Claim extended to the fact that a Counter - Claim could even be filed after the dismissal of the main suit which position was held by the Court of Appeal in the case of “Kenya Commercial Bank Limited – Versus - James Karanja [1981] eKLR” where the Court stated that:-

“A counterclaim is a fresh suit, and the Defendant instituting it becomes Plaintiff for all intents and purposes. The Counter - Claim is combined in the plaintiff's proceedings for convenience, to enable the court to pronounce a final Judgment in one set of proceedings, both on the original and on the cross claim. It is a fresh suit, and not an attempt to revive the original matter which was dismissed by the court, as Mr. Salter would have us say.”



16. The Learned Counsel further submitted that the instant Preliminary objection ought to fail as it did not raise pure points of law as evidenced under Paragraphs 4 and 5 of the Preliminary Objection which point would require the Court to diverge into the issues agreed upon between the Parties before the Plaintiff could exercise the Statutory Power of Sale and whether the Counter - claim was actuated by any malice. The above set of facts were issues to be determined through a full hearing and not by way of a Preliminary Objection.
17. The Preliminary Objection further ought to fail as there were no provisions warranting leave to file a Counter - Claim as erroneously pleaded by the Defendant under Paragraph 3 of the Preliminary Objection.
18. The Learned Counsel argued that this being a Court of Law, it could not be moved to grant that which was not availed or was not in existence in any provisions of Law.
19. In conclusion, the Learned Counsel submitted that based on the aforesaid, they invited the Honourable to find that the Preliminary Objection dated 6th November 2023 lacked merit and the same ought to be dismissed with costs to the Plaintiff. The Plaintiff be allowed to recover the outstanding amounts as at 2nd October 2023 amounting to a sum of Kenya Shillings Four Twenty Two Million Five Fifty Fourty Eight Thousand Five Ninety Two Hundred (Kshs. 422,548,592.00/=) together with costs.

IV. Analysis & Determination.

20. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
21. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Preliminary Objection dated 6th November, 2023 by the Plaintiff/ Defendants in the Counter Claim meets the fundamental threshold of a Preliminary Objection?
 - b. Whether this Honourable Court can determine that:-
 - i. The Honourable Court is functus officio the matter herein having been withdrawn prior to filing and service of the counter claim.
 - ii. Whether there is an error of the law that cannot be remedied by the orders of this Honourable Court issued on 12th October, 2023.
 - iii. Whether the Plaintiff in the counter claim has sought for leave before filing the counter claim.
 - iv. Whether the counter claim is an abuse of court process and therefore malicious.
- c. Who will bear the Costs of Notice of Preliminary objection dated 6th November, 2023.

ISSUE No. a). Whether the Preliminary Objection dated 6th November, 2023 by the Plaintiff/ Defendants in the Counter Claim meets the fundamental threshold of a Preliminary Objection



22. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made graphically clear in the now famous case of:- “Mukisa Biscuits Manufacturing Co. Limited –Versus - West End Distributors Limited [1969] E.A. 696.” Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

23. The ingredients of preliminary objections are well settled and the court cannot reinvent the wheel. Preliminary Objection was described in the “Mukisa Biscuits Manufacturing Co. Ltd (Supra) to mean: -:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

24. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

25. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The issue here is whether this Court has become functus official upon the withdrawal of the main suit by the Plaintiff notwithstanding the existence of the filed Counter –



Claim by the Defendant herein. Therefore, I affirm that the filed Preliminary objection by the Plaintiff/ Defendant in counter claim herein is founded on all fours of an objection as stated hereof.

ISSUE No b). Whether this Honourable Court can determine that:- (i). The Honourable Court is functus officio the matter herein having been withdrawn prior to filing and service of the counter claim, (ii). Whether there is an error of the law that cannot be remedied by the orders of this Honourable Court issued on 12th October, 2023, (iii). Whether the Plaintiff in the counter claim has sought for leave before filing the counter claim and (iv). Whether the counter claim is an abuse of court process and therefore malicious.

26. On the issue of whether this Honourable Court can determine that:- (i). The Honourable Court is functus officio the matter herein having been withdrawn prior to filing and service of the counter claim, the Court will examine the doctrine by itself. The doctrine of ‘Functus Officio’ was stated by the Court of Appeal in the case of “Telcom Kenya Limited – Versus - John Ochanda [2014]eKLR” as follows:-

“Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-

The general rule that final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division.”

27. Similarly in “Raila Odinga – Versus - IEBC *§ 3 Others Petition No. 5 of 2013*” the Supreme Court of Kenya cited with approval the following passage from “The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law” by Daniel Malan Pretorius:-

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

28. In addition the Supreme court also referred to the case of “Jersey Evening Post Limited – Versus - A. Thani [2002]JLR 542” at pg. 550 where the Court stated:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.” [own emphasis]

29. The Plaintiff herein filed a notice of withdrawal dated 2nd August, 2023 which was not admitted by the court as per the proceedings dated 26th September, 2023, 28th September, 2023, 2nd October, 2023, 3rd October, 2023 and 11th October, 2023 where the Honourable Court expressly declined to adopt the Notice of Withdrawal dated 2nd August, 2023. It must be noted that if a notice of Withdrawal has not been admitted by the court, it typically means that the withdrawal of the case or objection is not yet recognized by the judicial system. The process of withdrawal would generally involve filing the notice



with the court and then it would be reviewed by a judge or registrar. If the court has not admitted the notice, the case may still be considered active and pending before the court.

30. According to the Defendant did not have an objection to the Notice of Withdrawal although the Plaintiff had not served them with the same and they were keen on pursuing their Counter Claim. Therefore to this point the Court is not functus officio.

31. On whether there is an error of the law that cannot be remedied by the orders of this Honourable Court issued on 12th October, 2023, before answering that question the Court shall examine whether the Plaintiff in the counter claim has sought for leave before filing the counter claim and whether the counter claim was an abuse of court process and therefore malicious. Order 7 rule 8 of the Civil Procedure Rules gives the Defendants permission to raise a counterclaim against the Plaintiff together with any other persons. Any other persons give the Defendant a leeway to bring a counterclaim even against a person not already a party to the suit. He too may file a counterclaim against a Co-Defendant in the same suit. The provision (Order 7 Rule 8) states as follows;

“Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence”.

32. The provision of Order 7 rule 3 of the Civil Procedure Rules, 2010 which is pertinent to the foregoing states as follows:-

“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 Counter - Claim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or Counter - Claim 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”.

33. In my considered view, the rationale of the provision of Order 7 Rule 8 of the Rules is to avoid multiplicity of proceedings and claims based on the same or different causes of action as between the parties to the suit. The section did not contemplate a defendant filing an independent suit to a claim based on the same cause of action but rather envisaged the Defendant to proceed by way of counterclaim. I am also of the considered view that, the circumstances leading to the cross-action by way of Counter-claim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. Separating the Counter-claim from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of the provision of Section 1A (1) of the Civil Procedure Act.

34. Similarly, the provision of Order 7 rule 3 of the Civil Procedure Rules, 2010 as insinuating that a Counter - Claim is to be treated as a cross suit with all the indicia of pleadings as a Plaint. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. Sir Dinshah Fordunji Mulaa (sic) (the proper



name is Dinshah Fardunji Mulla) in “The Code of Civil Procedure, 18th Edition, 2011” at page 1928 where he stated that “A Counterclaim has the effect of cross-suit but only one final judgment is to be pronounced in the suit on the original claim of the Plaintiff and the Counterclaim of the Defendant.” In other words, a defendant can claim any right by way of a counter-claim in the same suit as a suit and cross suit and have them disposed of in the same trial.

35. This Court is alive to the fact that under the Civil Procedure Rules, 2101 a Defendant typically does not need to seek leave of the court before filing a Counter - Claim. A Counter - Claim is considered a standalone suit against the Plaintiff and can be filed along with the Defendant’s defense to the original claim. The Civil Procedure (Amendment) Rules, 2020, introduced several changes to streamline the process, but they do not mention the requirement for leave of the court to file a Counter - Claim.
36. The Court of Appeal case of the “County Government of Kilifi – Versus - Mombasa Cement Limited [2017] eKLR”, the Court held that the provision of Order 7 Rule 3 of the Civil Procedure Rules, 2010 that allows a Defendant to file a Counter - Claim or set - off, is silent on the effect such a Counterclaim must be related to the original subject matter of the suit. Further, on the proposition that a Counter - Claim stands independent of a suit, the Court relies on the “Indian Supreme Court case of Sh. Jag Mohan Chawla & another – Versus - Dera Radha Swami Satsang & Ors”, the Court held that a counterclaim can be treated as a cross suit. If it is a cross suit, as long as it was instituted within time, its existence should not necessarily depend on that of the suit. It breathes its own life and can bring forth the life of a judgment or decision of a court independent of the suit. Thus, I find the case of:- “Beatrice Mumbi Wamahu – Versus - Mobil Oil Kenya Limited [2011] eKLR” to fully summarise and makes the final conclusion on this issue. It was held that:-

“.....the withdrawal of the main suit did not affect the Counter - Claim. A Counter - Claim 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.”

37. Much has been said about the separateness of a Counter - Claim and I find as much in the instant suit. As much as the Plaintiff’s notice of withdrawal dated 2nd August, 2023 was not admitted by the Court, the totality of the above analysis is that the Plaintiff’s argument on the limb that once the “suit against the Defendant was withdrawn, its counterclaim automatically stood in the realm of non – existence fails. This places the Court on the plane of deciding whether since the Counter - Claim filed on 2nd October, 2023 should continue to be in existence. Following the above analysis and finding that a Counterclaim may be treated as a claim independent of the suit in which it is filed, the provisions of Order 7 Rule 13 of the Civil Procedure Rules (which was reproduced above in paragraph 31) apply regarding the life of the Counterclaim. In summary it states that in case the suit of the Plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless proceed. From the provision above cited as compared with the facts of this case, this Court finds that the withdrawal of the suit would not have affect the life and existence of the Counterclaim.
38. Now going back to the question of whether there is an error of the law that cannot be remedied by the orders of this Honourable Court issued on 12th October, 2023. As far as I am concerned, there is no error in law as the Plaintiff’s suit and the Defendant’s counter claim are different suits in nature in the same claim. Therefore the orders granted on 12th October, 2023 were not in any way correcting any error of the law. For these reasons, I discern that that the preliminary objection is unmerited and hereby stands dismissed.

ISSUE No. c). Who will bear the Costs of Notice of Preliminary objection dated 6th November, 2023.



39. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
40. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion & Disposition

41. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Preliminary objection dated 6th November, 2023 be and is found to lack merit and is hereby dismissed in its entirety.
 - b. That all the parties herein be and are hereby granted 14 days leave to fully comply with the provision of Order 11 of the Civil Procedure Rules, 2010.
 - c. That for expediency sake this matter be fixed for hearing on 8th October, 2024. There be a mention on 23rd July, 2024 for purposes of conducting the Pre Trial Conference.
 - d. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF JUNE 2024.

.....

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Kyalo Advocate holding brief for Mr. Shimaka Advocate for the Plaintiff/ Applicant.
- c. Mr. Gathu Advocate for the Defendant/ Respondent.

