



Aziz (Suing in Her Capacity as the Administratrix of the Estate of Mohamed Bashir Meraj Din Ahmed Bux) v Muteru & 8 others (Environment & Land Case 275 of 2016) [2024] KEELC 6108 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 275 OF 2016
NA MATHEKA, J
SEPTEMBER 26, 2024**

BETWEEN

SAMEER AZIZ (SUING IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF MOHAMED BASHIR MERAJ DIN AHMED BUX) PLAINTIFF

AND

**DOUGLAS MWANGI MUTERU 1ST DEFENDANT
SAMUEL WACHIRA 2ND DEFENDANT
WESTMALL SUPERMARKETS LIMITED 3RD DEFENDANT
THE CHIEF LAND REGISTRAR 4TH DEFENDANT
THE ATTORNEY GENERAL 5TH DEFENDANT
ANGELO MORRIS OWINO 6TH DEFENDANT
THE NATIONAL LAND COMMISSION 7TH DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 8TH DEFENDANT
MOHAMED BASHIR MEJA DIN MOHAMED 9TH DEFENDANT**

RULING

1. The 3rd defendant has approached the court vide a notice of motion application dated 27th June 2024 under section 1A, 1B, 3A and 63 of the *Civil Procedure Act* Cap 21, Order 51 rule 5 of the Civil Procedure Rules, Order 5 Rule 1, 5,7, and 8, Order 11 Rule 4 (d) of the Civil Procedure Rules, 2010, Article 159 (2) (d) and Article 50 for *the Constitution* of Kenya seeking the following orders:

a. Spent.



- b. That the plaintiff's Reply to the 3rd Defendant's Amended Defence and Defence to Counterclaim dated 12th February 2024, filed in court on 12th February 2024 and served on 3rd defendant on 12th February 2024 at 1829hrs be struck out of the court's record.
 - c. That leave be and is hereby granted to the Applicant/3rd Defendant to file its reply to Defence to Counterclaim and out of time and within seven (7) days upon striking out of the Reply to the 3rd Defendant's Amended Defence and Defence to Counterclaim dated 12th February 2024.
 - d. That the Plaintiff extract the summons for 2nd defendant and be served in accordance with Order 5 of the Civil Procedure Rules.
 - e. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
 - f. That parties be at liberty to apply for any other order or direction to enable cause of justice.
 - g. That costs of this application be provided for.
2. The 3rd defendant claims that it had served the Plaintiff with its Defence and Counterclaim dated 15th May 2023 which was followed by the Plaintiff's Reply to Defence and Defence to Counterclaim dated 19th May 2023. Sometime later, the court was moved and opened pleadings where the plaintiff amended its plaint for the fifth time for purposes of separating the 1st and 2nd defendants who had been previously joined as one defendant. The said Further Further Re-Amended Plaint dated 2nd November 2023 was filed and served upon the 3rd defendant who equally filed and served its Amended Defence and Counterclaim dated 6th December 2023 to reflect the separation of the 1st and 2nd defendant who had previously been joined as one. The plaintiff once again filed a Reply to the Defence and Defence to counterclaim dated 12th February 2024 and it is this pleading that the 3rd defendant wants struck out for reason that it clashes with the previous Reply to Defence and Defence to Counterclaim dated 19th May 2023 in terms of 'context' and 'philosophy'. The 3rd defendant claims that it wishes to reply to the above pleading but it is unable to make an informed choice on which pleading it would reply to.
 3. Furthermore, the 3rd defendant is adamant that there would be a failure of the cause of justice if the suit proceeds without the participation of the 2nd defendant. He claimed that there are no summons to enter appearance extracted against the 2nd defendant and that its advocates have tried to engage the plaintiff's advocates on the same but it bore no fruits.
 4. The Plaintiff through a replying affidavit sworn on 22nd July 2024 by Counsel Michael Odhiambo Oloo claimed that the application is intended to delay the expeditious and final disposal of the suit and that the 3rd defendant is not interested in going for the main hearing. He stated that the latest Reply to Defence and Defence to Counterclaim dated 12th February 2024 was in response to the latest Amended Defence and Counterclaim by the 3rd defendant dated 6th December 2023 and consequently that there is no confusion as to which pleading to act on. He also responded to the concerns that the 2nd defendant had not been served with summons and averred that the court has severally made orders that the unrepresented parties be served by substituted service which the plaintiff has adhered to by advertising severally in the Daily newspaper and attached newspaper adverts citing substituted service dated 6th February 2024 and 26th April 2024.



5. The court has considered the application and the submissions filed therein. The issue for consideration is whether the application has merit or not? The rule relied on by the 3rd defendant is Order 7 rule 17 states as follows:

- “(1) A plaintiff shall be entitled to file a reply within fourteen days after the defence or the last of the defences has been served on to him, unless the time is extended.
- (2) No pleading subsequent to the reply shall be pleaded without leave of the court, and then shall be pleaded only upon such terms as the court thinks fit.
- (3) Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defence.”

6. The court is of the opinion that there is no confusion as to which Defence to Counterclaim by the plaintiff it can reply to as the obvious answer would be the latest Defence to Counterclaim dated 12th February 2024. This is supported by the plaintiff's advocates letter dated 25th June 2024 where the same position could be inferred. The court took it upon itself to further scrutinize the contentious pleadings to wit the Reply to Defence and Defence to counterclaim dated 19th May 2023 and the latest one dated 12th February 2024. The difference is that the plaintiff did not amend her Defence to the counterclaim dated 19th May 2023 but filed a more detailed Defence. The court has also observed that the 3rd defendant's Amended Defence and Counterclaim dated 6th December 2023 was only to the effect of the changing from its position as the 2nd defendant to the 3rd defendant as they currently are. I find that the 3rd defendant ought to respond to the latest defence to counterclaim. Furthermore, striking out of pleadings has been rendered as a draconian and drastic solution that ought to only be entertained in the hopeless cases which is not the case here. See Blue Shield Insurance Co. Ltd vs Joseph Mboya Ogotu (2009) eKLR.

7. The 3rd defendant ostensibly prays for the Reply to Defence and Defence to Counterclaim to be struck out but the 3rd defendant has only argued out a case for striking out of the defence to counterclaim and which matter was discussed in Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR). A defence has to raise triable issues which was discussed in Olympic Escort International Co. Ltd. & 2 Others –vs- Parminder Singh Sandhu & Another [2009] eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court stated as follows:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”

8. The court is convinced that the defence to the counterclaim dated 12th February 2024 raises triable issues which the 3rd defendant can reply to.

9. The other concern raised by the 3rd defendant that the 2nd defendant has not been served with summons. I have perused the court record and find that on 27th October 2010 the court allowed the plaintiff to serve by registered post and later on 24th June 2019 to serve by substituted service. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

