



**Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others  
v Petro Oil Kenya Limited & 6 others (Environment & Land Case  
63 of 2020) [2024] KEELC 6209 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6209 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 63 OF 2020  
FM NJOROGE, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED TRUSTEES & 58  
OTHERS & 58 OTHERS ..... PLAINTIFF**

**AND**

**PETRO OIL KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
SAID ZEMBE BADI ..... 2<sup>ND</sup> DEFENDANT  
SALAT ABDULLAHI MOHAMED ..... 3<sup>RD</sup> DEFENDANT  
JAVICK & COMPANY ..... 4<sup>TH</sup> DEFENDANT  
THE LAND REGISTRAR KILIFI ..... 5<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT  
THE DIRECTOR OF SURVEYS ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. The dispute before me revolves around the costs of the withdrawn counterclaim. The genesis of this matter is that the Plaintiffs instituted this suit against the Defendants on 24/8/2020 seeking inter alia cancellation of some titles issued to 1<sup>st</sup> – 4<sup>th</sup> Defendants. In response, the 1<sup>st</sup> Defendant raised a preliminary objection dated 15/9/2020 seeking that the suit be struck out on the ground of res judicata. The 1<sup>st</sup> Defendant also filed a statement of defence and counterclaim dated 27/10/2020, which the Plaintiffs responded to on 8/3/2021 vide a reply to defence and defence to counterclaim of an even date. On 30/7/2021, the court upheld the preliminary objection. Resultantly, the Plaintiffs' suit was struck out with costs.



2. On 5/3/2024, upon Mr. Oluga's request, the counterclaim was withdrawn. The court did not however pronounce itself on whether or not the Plaintiffs would have costs but, when it noted that there was a tug of war regarding payment thereof, directed parties to agree on the same within 14 days thereon, failure to which they file written submissions regarding the same for its determination.

### **Plaintiffs' submissions**

3. Counsel for the Plaintiffs, Mr. Ondabu, submitted that for having engaged counsel to respond to the counterclaim, the Plaintiffs were entitled to costs of defending the same, appearing in court and preparing for hearing of the same. To counsel, costs must follow the event, and considering that the 1<sup>st</sup> Defendant was awarded costs of the Plaintiff, the Plaintiffs should in the circumstances be awarded costs of the counterclaim.
4. In support of his arguments, counsel relied on the cases of Orix Oil (Kenya) Limited v Paul Kabeu & 2 others [2014] eKLR; Chuka Civil Appeal No. 3 of 2020 Southern Sacco Limited v Vanancio Ntwiga; and Kabarnet HCCC No. 2 of 2017 formerly HCCC No. 14 of 2015 Samson K.A Tim v D.M Machoge.

### **1<sup>st</sup> Defendant's Submissions**

5. On his part, Mr. Oluga contested that the Plaintiffs are not entitled to costs for reasons that it was them that dragged the 1<sup>st</sup> Defendant to court; that the Plaintiffs' preliminary objection was raised rather late in the day and that the counterclaim had not been set down for hearing.

### **Analysis and Determination**

6. It is trite that a counterclaim is in all respects a separate suit filed against a plaintiff, or a plaintiff and other parties, by a defendant. Basically, a counterclaim contains assertions that a defendant could have made by commencing a lawsuit if the Plaintiff had not already begun his action. It is governed by the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiff's claim. Having stated as above, it is important I reproduce Section 27 of the [Civil Procedure Act](#) which provides: -

“ 27

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”



7. In Republic v Vs Ihururu Dairy Farmers Co-operative Society Ltd, Ex-Parte Rosemary Wairimu Munene, Judicial Review application [on no 6 of 2014](#) the court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

8. I also take the position that trouble taken in prosecuting or defending the suit or counterclaim in this case does not necessarily mean suffering or woes or distress. In my view, it refers to the various lawful and legitimate steps taken by the parties in the case in pursuit of a remedy. Such compensation by way of costs if awarded can not be said to be punitive.

9. In this case, the Plaintiffs evidently filed a response to the counterclaim and attended court on various occasions. The 1<sup>st</sup> defendant however argues that the plaintiffs are the ones who dragged the 1<sup>st</sup> defendant to court yet they knew that the issues in dispute in the suit had been determined in past cases and that it only raised the counterclaim as a shield to the plaintiff's suit which was unmerited, and I think that the 1<sup>st</sup> defendant has delivered itself well on that issue. Noting that the suit was struck out on the basis of the doctrine of res judicata. The court stated as follows while striking out the suit:

“I am in agreement with the submissions of the 1<sup>st</sup> defendant that the present suit is merely aimed at embarrassing and harassing the defendants. Having been adjudged in various instances since 1998 as the rightful proprietor of the suit land, the 2<sup>nd</sup> defendant had every right to dispose of portions of the suit land to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as there was nothing to prohibit such alienation.”

10. Though in ordinary circumstances the successful litigants must be compensated for whatever steps taken to defend a counterclaim regardless of it having been withdrawn, the observation of this court as set out in the passage above dissuades me from considering the defendants to the counterclaim as being entitled to costs.

11. In view of the foregoing, I order that the defendants in the counterclaim in this matter do not deserve any costs.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

