



**Mbae (Suing as the legal representative of the Estate of Silas Judah Mbae - Deceased) & another v Mwamba & 5 others; M'Arimi & another (Interested Parties) (Environment & Land Case 42 of 2018) [2023] KEELC 15721 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15721 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE 42 OF 2018**  
**CK NZILI, J**  
**FEBRUARY 22, 2023**

**BETWEEN**

**KENNON MWITI MBAE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILAS JUDAH MBAE - DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**KENYA FINANCE BANK LIMITED (IL) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZAVERIO KIAMBI MWAMBA ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR IMENTI NORTH DISTRICT ..... 2<sup>ND</sup> DEFENDANT**

**LAND SURVEYOR IMENT NORTH DISTRICT ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**CONSOLATA KANUNGO MWAMBA ..... 5<sup>TH</sup> DEFENDANT**

**GREGORY KIMANTHI MWAMBA ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**Z. NYAMBU M'ARIMI ..... INTERESTED PARTY**

**FESTUS RIUNGU RIMBERE ..... INTERESTED PARTY**

**RULING**

1. The 2<sup>nd</sup> plaintiff who is also the 2<sup>nd</sup> defendant in the counterclaim has raised a preliminary objection dated 12.1.2023 seeking to have the 5<sup>th</sup> & 6<sup>th</sup> defendants' defense and counterclaim dated 2.11.2022 and the amended counterclaim dated 14.11.2022 struck out on the basis that it joined a wrong party and was also filed without leave.



2. The preliminary objection is supported by the case of *Katbiaka v Muraguri* Civil Appeal 7 “B” of 2019 [2022] KEHC 506 (KLR) (12 May 2022) Ruling. The 1<sup>st</sup> plaintiff filed written submissions dated 23.1.2022 in support of the preliminary objection stating that the said defence and counterclaim offends the procedure and the law namely Section 56 of the *Kenya Deposits Insurance Act* by suing the 2<sup>nd</sup> plaintiff in the counterclaim, filing an amended defence without the leave of court since the initial leave to file documents expired.
3. In opposing the preliminary objection, the 5<sup>th</sup> & 6<sup>th</sup> defendants by written submissions dated 24.1.2023 admitted that the original defence and counterclaim was filed on 2.11.2022 and the amendment was effected within 12 days of the filing. Relying on Order 7 Rule 17 (3), Order 8 Rule 1 (4) and Order 2 Rule 13 of the *Civil Procedure Rules*, the 5<sup>th</sup> & 6<sup>th</sup> defendants submitted that pleadings in a suit close 14 days after service of the reply or defence to the counterclaim or if neither was served, 14 days after service.
4. Therefore, it was submitted by the 5<sup>th</sup> & 6<sup>th</sup> defendants that 14 days were open to any fresh defence to the counterclaim to file their defence and a further open 14 days to the defendant/plaintiff in the counterclaim to file a reply as per Order 7 Rule 17 (1) of the *Civil Procedure Rules*.
5. The 5<sup>th</sup> and 6<sup>th</sup> defendants submitted that the filing of a counterclaim re-opens pleadings and takes the same sequence as that of a plaint hence they had up to 30.1.2023 to file a reply to the defense to the counterclaim which was filed on 2.11.2022, with leave of court and therefore the earliest pleadings would have closed was on 30.1.2023.
6. It was submitted that under Order 8 Rule (14) of the *Civil Procedure Rules* a party could without leave of court amend any of its pleadings before pleadings closed, so they did not require any leave to amend the defence and counterclaim and that even if they had no leave, they were in order since pleadings had not closed by then.
7. Similarly relying on Order 1 Rule 9 of the *Civil Procedure Rules* the 5<sup>th</sup> & 6<sup>th</sup> defendants urged the court to find that no suit could be defeated because of misjoinder or non-joinder of parties hence the preliminary objection was based on no particular provisions of the law.
8. Further, the 5<sup>th</sup> & 6<sup>th</sup> defendants urged the court to find that the mover of the preliminary objection should have filed a notice of motion under Order 8 Rule 2 (1) of the *Civil Procedure Rules* to disallow the amendment within 14 days after the amendment hence the preliminary objection was time-barred and lacking merits since the error has since been corrected.
9. In a ruling dated 19.10.2022, the 5<sup>th</sup> & 6<sup>th</sup> defendants sought a review of orders made on 3.2.2022 and leave to file a defence and a counterclaim out of time. The court directed that the defence and a counterclaim be filed within 14 days in compliance with Order 7 of the *Civil Procedure Rules*. The fourteen days were expiring on 3.11.2022. The 5<sup>th</sup> & 6<sup>th</sup> defendants filed the same on 2.11.2022.
10. The court on 14.11.2022 allowed the parties to respond to the same and comply with Order 11 of the *Civil Procedure Rules*. The 5<sup>th</sup> & 6<sup>th</sup> defendants however filed an amended defense and counterclaim on 14.11.2022 the subject matter of the preliminary objection.
11. The gist of the preliminary objection is that Kenya Finance Bank Limited (in liquidation), cannot be joined without leave of court in line with Section 56 of the *Kenya Deposit Insurance Act* (KDIA).
12. In the case of *Charity Wangui Ngumo v Chase Bank Ltd (in receivership) & Antique Actions Agencies* [2018] eKLR, the court cited with approval *Andrew Gikuni Muchai v Chase Bank Ltd & another* [2019] eKLR, *George Mureithi & others v Kentitio Taxis (under receivership)* [2016] eKLR on a



- preliminary objection under Sections 43 and 56 of the KDIA 2012 and said that the essence of seeking leave to commence a suit was to verify that the applicant had a valid claim which they needed to pursue against the institution and by extension, the corporation for purposes of creating orderliness, decency and to avoid a flood gate of actions.
13. Further, the court held that leave was a mandatory requirement without which a suit filed therein would be incompetent ab initio.
  14. In the case of Rashik Kumar Punja Shah & another vs Chase Bank Ltd (in liquidation) & another (2021) eKLR the court held that Section 56 (1) & (3) of the Kenya Deposit Insurance Act left no doubt that in peremptory terms prohibits against or the filing of civil proceedings without the sanction of the court. The court cited with approval Kwanza Estates v Dubai Bank of Kenya Ltd & another [2016] eKLR.
  15. In this matter, the 5<sup>th</sup> & 6<sup>th</sup> defendants were granted leave to file a defence and counterclaim. There was no application for leave to join or add new parties to the suit. More importantly, there was no specific formal or informal leave sought to sue the 2<sup>nd</sup> defendant in the counterclaim dated 14.11.2022.
  16. In the body of the counterclaim, the 5<sup>th</sup> & 6<sup>th</sup> defendants have not stated if they sought or obtained leave to commence the counterclaim which is a separate suit in law as against the 2<sup>nd</sup> defendant to the counterclaim under Order 7 Rules 3, 8 & 12 of the Civil Procedure Rules.
  17. Even though Order 7 Rule 8 of the Civil Procedure Rules provides that a defendant can bring on board a new party through a counter claim, in this instance, the party joined could only have been joined with leave of court under Section 56 of the Kenya Deposit Insurance Act. To my mind Section 56 of KDIA is Superior to Order 7 Rule 8 of the Civil Procedure Rules. See Kenyariri and Associates Advocates v Salama Beach Hotel Ltd & 4 others. This was the position taken in Bisai & another v Kenya Commercial Bank Ltd & others [2002] 2 E.A 346. The application dated 10.6.2022 did not seek such leave. Consequently, my finding is that the defence and counterclaim dated 14.11.2022 is bad in law to the extent that it has been brought against the 2<sup>nd</sup> defendant. The same is struck out with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2023**

In presence of:

C/A: Kananu

Mwarania for 5<sup>th</sup> & 6<sup>th</sup> defendants

Mwenda for Kieti for 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants

Cheptumo for 2<sup>nd</sup> plaintiff

Thangicia for 1<sup>st</sup> plaintiff

**HON. C.K. NZILI**

**ELC JUDGE**

