



**Edon Consultants International Limited v County Government of Migori
(Civil Case E1 of 2022) [2024] KEHC 17042 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CASE E1 OF 2022
RPV WENDOH, J
MAY 30, 2024**

BETWEEN

EDON CONSULTANTS INTERNATIONAL LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MIGORI RESPONDENT

RULING

1. Edon Consultants International Limited (the plaintiff) filed a suit by a plaint dated 23/5/2022. The subject matter of the suit, as can be gleaned from the pleadings is an alleged breach of contract dated 7/6/2019 by the County Government of Migori (the respondent). The plaintiff sought general damages for loss suffered, special damages of Kshs. 35,121,900/=, interest, costs of the suit and any other relief. The respondent entered appearance and filed a defence dated 12/8/2022.
2. Later, the respondent filed a notice of motion dated 19/9/2023 asking this court to grant it leave to amend its defence. On 27/9/2023 in the presence of Counsel for both parties, the application was withdrawn with no orders as to costs. A further order was made that the draft amended defence and counterclaim be filed and served within 7 days. The court directed that mention be on 26/10/2023 to confirm compliance. From the court record, it shows that the amended defence and counterclaim was filed on 12/10/2023 while the reply to the amended defence and counterclaim was filed on 11/10/2023.
3. Subsequently, the plaintiff filed a preliminary objection dated 9/10/2023 (objection) on the following grounds: -
 - a. The plaintiff shall raise a preliminary objection against the defendant's amended defence and counterclaim.
 - b. The plaintiff shall pray that the amended defence and counter claim be struck off with costs in favour of the plaintiff.



4. The objection was canvassed by way of written submissions. The plaintiff filed written submissions dated 21/12/2023. It was submitted that on 26/9/2023, the defendant withdrew his application dated 19/9/2023 by consent and therefore, by withdrawing the application, there was no defence on record; that the defendant was granted one week to file an amended defence or counterclaim but it did not file and serve the same within the stipulated time. The plaintiff urged this court to find that the defence is a mere denial, incompetent and an abuse of the court process intended to delay the process of the court.
5. The defendant filed its written submissions on 5/1/2024. It was submitted that the amended defence was filed before 18/12/2023; when the matter came up for mention that the plaintiff filed a reply to the amended defence and counterclaim on 11/10/2023. The defendant asked this court to invoke Article 159 and 50 of *the Constitution* and find that a party cannot be condemned because of a technicality or flaw in the pleadings or merely missing to file documents within the stipulated time. On that basis, the defendant asked that the preliminary objection be dismissed with costs and allow the suit to proceed for hearing.
6. I have considered the objection and the divergent positions taken by the parties in their respective submissions.
7. Although parties have not raised this issue, this court is inclined to address itself on what entails a notice of preliminary objection. The characteristic nature of a preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West end Distributors Ltd 1969 EA 696* where the principles were captured as follows: -

“ 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 the suit. Examples are an objection to 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...a preliminary objection is in the nature of what used to be a demurrer. 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 of what is sought is 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 issues. This improper practice must stop.”
8. Therefore, a preliminary objection raises pure points of law. A preliminary objection cannot be raised if facts have to be ascertained or what is being sought is an exercise of judicial discretion. Order 2 Rule 15 of the Civil Procedure Rules provides for striking out of pleadings. The mode in which the court is moved to strike out pleadings is through an application. In considering whether a defence should be struck out, the court exercises its discretionary power since striking out of pleadings.
9. The plea by the plaintiff to strike out the defendant’s amended defence and counterclaim, has been initiated through a preliminary objection. The issue of striking out pleadings is not a pure point of law. As it was held in the case of *Mukisa Biscuit (supra)* where the court is called upon to exercise its discretion, a preliminary objection cannot suffice. To this end, the preliminary objection is incompetent. It cannot stand.
10. Turning to the argument that since the application dated 19/9/2023 was withdrawn, there is no amended defence and counterclaim on record, the court proceedings do show that the parties agreed to allow the defendant’s application by consent on 27/9/2023. The defendant was directed to file and serve the amended statement of defence and counterclaim within 7 days. Therefore, the defendant was to comply on or before 4/10/2023.



11. The filed amended defence and counterclaim was filed on 12/10/2023 while the response to it by the plaintiff was filed on 11/10/2023. It is not practical to have a response to a pleading before the pleading itself is filed and served. It cannot be said that the amended defence and counterclaim has been properly filed. The defendant did not comply with filing the same within 7 days.
12. As I have held hereinabove, striking out of pleadings is a matter of discretion. Courts have been cautioned that the exercise being a drastic one, it should be exercised sparingly and in only the clearest of cases. The court is also called upon to consider if the defence raises a triable issue. This is not to mean that it must necessarily succeed but one which will not embarrass the trial process.
13. The Court of Appeal in *Coast Projects Ltd vs M. R. Shah Construction (K) Ltd* (2004) K.L.R 119 at page 122 stated in part as follows:-

“The Plaintiff is entitled to proceed with an application for striking out a defence with the consequential entry of judgement for liquidated claim in situations where the defence is frivolous and or vexatious. It is a procedure, which is intended to give a quick remedy to a party which is being denied its claim by what may be described as a sham defence. This is, however, a procedure which is to be resorted to in very clear and plain cases. A mere denial is not sufficient defence in most cases.”
14. I have perused the amended defence and counterclaim filed by the defendant although belatedly. I discern that the issues being raised in the defence and counterclaim is the proprietary of payment of services which have not been offered. The court is being called upon to interrogate the terms of the contract on payment of services. Whether it will succeed or not, that is a matter to be determined during the trial. In this instance, striking out the amended defence and counterclaim will not be in the best interest of justice.
15. Had the defendant adhered to the order of filing the amended defence and counterclaim, this suit would be proceeding for hearing in order to resolve the matters in controversy between the parties instead of dwelling on interlocutory applications. The plaintiff did well by himself by filing the response to the amended defence and counterclaim even before compliance by the defendant. The assumption is that he relied on the draft amended defence and counterclaim filed together with the defendant’s application.
16. In the best interest of justice, I will allow the amended defence and counterclaim filed in court on 12/10/2023 be deemed as duly filed. The defendant is liable to pay thrown away costs to the plaintiff. Likewise, the defendant’s response to the amended defence and counterclaim filed on 11/10/2023 is hereby deemed as duly filed.
17. The following orders do issue-
 1. The Preliminary Objection dated 9/10/2023 is not merited.**
 2. The Amended Defence and Counterclaim dated 29/9/2023 and filed on 12/10/2023 be and is hereby deemed as duly filed.
 3. The response to the amended defence and counterclaim dated 9/10/2023 and filed on 11/10/2023 be and is hereby deemed as duly filed.
 4. Parties to fix the suit for hearing.
 5. Each party to bear its own costs.



6. Mention on 23/7/2024.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MAY, 2024

R. WENDOH

JUDGE

