Cytonn Investments Management PLC v Okoth t/a The Kenyan Wall Street Journal (Civil Suit E176 of 2020) [2023] KEHC 3186 (KLR) (Civ) (30 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E176 OF 2020

CW MEOLI, J

MARCH 30, 2023

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC ..... PLAINTIFF

AND

JACKSON OKOTH T/A THE KENYAN WALL STREET JOURNAL ..... DEFENDANT

RULING

1. The background to the Motion dated April 8, 2021 by Cytonn Investments Management PLC (hereafter the Plaintiff) is that the Plaintiff sued Jackson Okoth t/a The Kenyan Wall Street Journal (hereafter the Defendant) for defamation. The Defendant filed a statement of defence and counterclaim, the latter which was not accompanied by a verifying affidavit. By its motion, the Plaintiff has applied to have the defence struck out and judgment entered as prayed in the plaint. The motion is expressed to be brought under section 3A of the *Civil Procedure Act*, order 7 rule 5(a), and order 51 Rule 1 of the *Civil Procedure Rules*. The motion is premised on grounds on the face of the motion and as amplified in the supporting affidavit sworn by Faith N Claudi who describes herself as a Legal Officer at the Plaintiff Company, well versed with the pertinent facts and thus competent to depose thereto.

2. The affidavit is to the effect that the Defendant's statement of defence and counterclaim filed on February 28, 2022 was not accompanied by a verifying affidavit. That on account of the failure, the said defence statement and counterclaim ought to be struck out and judgment entered for the Plaintiff as prayed the in the plaint. On 5.07.2022 the Defendant filed a verifying affidavit.

3. The Defendant opposed the motion through grounds of opposition dated July 15, 2022. The grounds are to the effect that failure to file a verifying affidavit is curable by way of a basic step that shall not prejudice the Plaintiff; that the Defendant has a constitutional right to be heard that should not be taken away due to an inadvertent filing error; that the error can be cured through service of the verifying

affidavit filed by the Defendant on July 5, 2022; that the Defendant thus seeks leave for the stated affidavit to be deemed as duly filed; that the court ought to determine the Defendant's counterclaim on merit as opposed to prematurely striking it out; that the courts are mandated by article 159 (2)(d) of the *Constitution* to administer justice without undue regard to procedural technicalities; and that in the spirit of Article 159 courts ought to endeavor to sustain suits rather than striking them out on technicalities based on defects that are easily curable.

4. The motions were canvassed by way of written submissions. Counsel for the Plaintiff took offence with the Defendant's verifying affidavit filed without leave of the court and in total disregard of the instant motion. Counsel asserted that the Defendant should not be allowed to undermine the Plaintiff's motion in such manner and the offending verifying affidavit ought to be expunged from the record. Addressing the court on the merits of the motion, counsel cited order 4 rule 1(2) of the *Civil Procedure Rules* and the decisions in *Priska Onyango Ojwang' & another v Henry Ojwang' Nyabende* [2018] eKLR to argue that a counterclaim being separate and distinct suit and the Defendant was required to file a verifying affidavit concerning the averments therein. That order 7 rule 5(a) of the *Civil Procedure Rules* is couched in mandatory terms and failure to comply therewith renders the Defendant's counterclaim incompetent.

5. While calling to aid the decision in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR as cited in *Tana Teacher's Cooperative and Credit Society Limited v Andriano Muchiri* [2018] eKLR the plaintiff's counsel submitted that article 159 of the *Constitution* cannot cure the Defendant's failure because the requirement of a verifying affidavit is a fundamental matter of law that goes to the very root of the propriety of the Defendant's claim. In conclusion, the court was urged to find that the verifying affidavit filed by the Defendant is not properly on record and order the same ought to be expunged from the record.

6. Counsel for the Defendant on his part anchored his submissions on the provisions of article 50 & 159 of the *Constitution* and several authorities including, *Jefitha Muchai Mwa v Peter Wangio Thuku* [2015] eKLR, *Teclah Jepkiruiwilson*; *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* Nairobi (Milimani) HCCC No 810 of 2001 [2001] KLR 410 and *Sebei District Administration v Gasyail & others* [1968] EA 300. In asserting that, courts are bound to uphold the right to hearing and to administer justice without undue regard to procedural technicalities.

7. He stated that failure to file the verifying affidavit was an inadvertent error that can be easily remedied, and the said inadvertency does not prejudice the Plaintiff or go to the jurisdiction of the court. Counsel pointed out that striking out of the counterclaim would be a draconian measure. It was pointed out that the suit is yet to proceed for hearing. In support of the plea that the verifying affidavit be deemed as properly filed, counsel cited the overriding objective as captured in section 1A of the *Civil Procedure Act*. He urged the court to balance the prejudice to be suffered by each party and to to deem the affidavit as properly filed in the interest of justice.

8. The court has considered the material canvassed in respect of the motion. The key question falling for determination concerns the competence or otherwise of the Defendant's counter-claim for want of compliance with the requirement of order 7 rule 5(a) of the *Civil Procedure Rules*. The motion is anchored on the said Rule and section 3A of the *Civil Procedure Act*, the latter which reserves the inherent power of the court

> "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court".

9. The Court of Appeal in *Rose Njoki King'au & another v Shaba Trustees Limited & another* [2018] eKLR stated concerning the said power that:-

> " Also cited was section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
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> > "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a court implicitly without its being derived from the *Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."
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> The Supreme Court went further in Board of Governors, Moi High School Kabarak and another versus Malolm Bell [2013] eKLR, to add the following:-
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> > "Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

10. Order 7 Rule 5(a) of the *Civil Procedure Rules* provides that;-

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
>
> (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;"

11. The principles governing applications for striking out of pleadings were spelt out by Madan JA (as he then was) in *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[1980] eKLR. The court stated that:-

> " A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.
>
> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

12. These principles have held sway in subsequent years and have been applied consistently in Kenyan courts. In *Kivanga Estates v National Bank of Kenya Limited* [2017] eKLR , for instance, the Court of Appeal echoing the dicta in *DT Dobie* (*supra*) stated;-

> " It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and

an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious". (Emphasis added)

13. The requirements in Order 7 rule 5(a) (concerning counterclaims), and indeed the counterpart provisions of Order 4 Rule 1(2) of the *Civil Procedure Rules* (concerning plaints) may be couched in mandatory terms but the wording of Order 4 Rule 1 (6) of the *Civil Procedure Rules* regarding striking out of offending pleadings for non-compliance with the requirement is permissive. Under the latter Rule, striking out of pleadings for want of compliance is a matter of discretion. The Rule states;-

> "(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule".

14. The rationale and purpose behind the requirement that a plaint or counterclaim be accompanied by a verifying affidavit was spelt out by the Court of Appeal in *Josephat Kipchirchir Sigilai v Gotab Sanik Entrprises Ltd & 4 others* [2007] eKLR. The Court cited order VII rule 1(2) of the old procedure rules, now Order 4 Rule 1(2) of the *Civil Procedure Rules* before restating the dicta by, Ringera, J (as he then was) in *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* Milimani Commercial Courts (Nairobi) No 810 of 2001 where the learned Judge observed *inter alia* of sub-rule 1 (2) (of then order VII) :

> "The sub-rule requires that every averment in the plaint be verified. The meaning of the term "Verified" has been the source of debate. Ringera J, (as he then was) held in the case of Galeb Gulam & another v Cyrus Shakhalaga Kwah Jirongo NAI HCCC No 393 of 2003, that a veryifying affidavit should be confined to matters which the plaintiff can depose from his own knowledge to be correct. It must be clear from the affidavit itself that the plaintiff is deposing from his own knowledge or not at all".

15. The Court also considered the decision of Mohammed Ibrahim, J in *Harpreet Singh Lotay v Starlit Insurance Brokers Ltd;* Milimani Commercial Courts Civil Case No 1072 of 2000 who held the view that the word "verify" as used in Order VII rule 1 (2) meant confirm the correctness and that the purpose of a verifying affidavit was to prevent litigants from bringing frivolous or vexations suits when they do not believe in the truthfulness of their causes of action and were motivated by ulterior motives, for instance, speculation, intimidation, harassment, nuisance, annoyance or other such motive.

16. And the Court of Appeal concluded by stating: -

> "But why did the rules making authority consider an affidavit to be essential to accompany a plaint? An affidavit, as a general rule, is evidence. It would appear to us that the affidavit is intended to make the plaintiff own every averment in his plaint. It was intended to change the averments in the plaint from being mere averments or pleadings into evidence as is true in other modes of instituting suits and to pin down the plaintiff to them and thus make them part of evidence in support of his case; and possibly to limit room for maneuver.....

> In view of the foregoing, it would appear to us that the Rules Committee by promulgating O.VII rule 1 (2) of the Rules, intended that in all suits commenced in Kenya, a uniform approach should be adopted and like in England, from where we think the provision was borrowed, to prevent a plaintiff from evasive and obscure pleadings and to prevent a multiplicity of suits on the same cause of action".

17. Regarding the power of the court to strike out pleadings, the Court stated that it was discretionary given the language employed in then order VII Rule 1(3) which is equivalent to Order 4 Rule 1(6) of the current *Civil Procedure Rules.* The court further stating that: -

> " The sub-rule uses the phrase "the court may" implying that the court has to consider aspects for instance, firstly, the prejudice the failure to comply with sub-rule (2) will cause the defendant. Secondly, whether such prejudice may be appropriately compensated. Thirdly whether or not the plaintiff's case has some merit, in addition to the other grounds contained in order VI rule 13(1) of the Rules for striking out a pleading." (Emphasis added).

18. In an obvious attempt to deflect the instant motion and evidently conceding his earlier failure, the Defendant filed a verifying affidavit dated June 29, 2022 in respect of his counterclaim. He however eschewed deposing an affidavit in response to the instant motion to explain his failure to file the verifying affidavit contemporaneously with the counterclaim. That said, striking out of pleadings for want of compliance with rules of procedure is draconian and drastic. Such action ought to issue as an order of last resort, in view of the timeless injunction to accord every party the right to a fair hearing as guaranteed by the *Constitution*.

19. The Plaintiff, despite asserting the obvious impropriety of the counterclaim has not demonstrated what prejudice it has or would suffer on account of the Defendant's omission or that an award of costs would not suffice. Besides, the counterclaim by the Defendant has itself not been impeached, the only defect being the lack of an accompanying affidavit, which defect is easily curable.

20. Article 159 (2) (d) of the *Constitution* commands the courts to dispense substantive justice expeditiously and without undue regard for procedural technicalities. The Court of Appeal recently in *Pereira v Nation Media Group & 2 others* (Civil Appeal 122 of 2016) [2021] KECA 135 (KLR) had this to say;-

> " Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of Jaldesa Tuke Dabelo v IEBC & Another [2015] eKLR; Raila Odinga and 5 Others v IEBC & 3 Others [2013] eKLR; Lemanken Arata v Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015] eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2)(d) of the *Constitution* is not a panacea for all procedural ills."

21. Ringera J (as he then was) in *Microsoft Corporation* (*supra*), stated generally concerning the purpose of rules of procedure that;-

> " Rules of procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predicable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected."

22. In this case, the Defendant attempted to remedy his omission by filing a verifying affidavit, albeit late and without leave. All considered, the justice of the matter lies in deeming the said affidavit as duly filed while disallowing the motion dated April 8, 2021. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 30TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Ms. Asiyo for the Applicant

Ms.Gathoni for the Defendant

C/A: Carole