



REPUBLIC OF KENYA



**Peter O. Ngoge t/a O. P. Ngoge & Associates Advocates v Coffee Board of Kenya & 2 others  
(Civil Case 599 of 2010) [2023] KEHC 21458 (KLR) (Civ) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21458 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 599 OF 2010**

**AN ONGERI, J**

**AUGUST 15, 2023**

**BETWEEN**

**PETER O. NGOGE T/A O. P. NGOGE & ASSOCIATES  
ADVOCATES ..... PLAINTIFF**

**AND**

**COFFEE BOARD OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**CRYSTAL VALUERS LTD ..... 2<sup>ND</sup> DEFENDANT**

**RACHIER & AMOLLO ADVOCATES ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 31/8/2021 brought under sections 3, 3A, 1A and 1B of the [Civil Procedure Act](#), Order 1 Rules 1 and 2, Order 2 Rules 11 and 15 (b) (c) and (d) and Order 3 Rule 2 of the [Civil Procedure Rules](#) and Articles 25, 27 and 50 of the [Constitution of Kenya 2020](#) )
2. The plaintiff/applicant is seeking the following orders;
  - i. That the defendants statement of defence and counterclaim herein be struck out and/or dismissed with costs.
  - ii. That further or in the alternative, judgment be entered against the defendants herein as sought by the plaintiff in the amended plaint.
  - iii. That upon granting prayer 2 above, the plaintiffs suit be listed for formal proof hearing for the purposes of assessing and ascertaining general damages payable to the plaintiff herein against the defendants.



- iv. That the costs of this application be borne by the defendants/respondents herein.
3. The application is brought under the following grounds;
    - i. That the defendants have deliberately refused and/or failed to traverse the plaintiffs amended plaint on record despite having been given leave to do so by the Hon. Lady Justice Githua on the October 1, 2020.
    - ii. That by deliberately refusing to transverse or oppose the plaintiffs amended plaint on record herein, the defendants herein are deemed to have admitted everything which the plaintiff has pleaded in the amended plaint and therefore judgment ought to be entered against the defendants in line with Order 1 Rules 1 and 2 of the Civil Procedure Rules on the basis of the said admissions.
    - iii. That alternatively, the plaintiff urges the honourable court to observe keenly that the defendants have also deliberately refused to comply with Order 3 Rule 2 of the Civil Procedure Rules and thereby denying the plaintiff to be accorded fair hearing or fair trial in this matter contrary to Articles 25,27, 48 and 50 of the Constitution apart from delaying the speedy conclusion of this suit.
  4. The application is supported by the affidavit of the plaintiff/ applicant dated August 31, 2021 which reiterates of the grounds stated above.
  5. The respondents filed grounds of opposition dated February 15, 2023 opposing the application.
  6. The parties filed written submissions which I have duly considered. The plaintiff/applicant submitted that the 3rd defendant herein has never defended the plaintiff/applicant's amended suit despite the order given by Hon Lady Justice Githua on October 1, 2020.
  7. Further, that the 1st and 3rd defendants have never deemed it necessary to amend their purported statement of defence and counterclaim on record despite leave being granted to them by the hon Lady Justice Githua on October 1, 2020.
  8. In the premises, the plaintiff/appellant contends that by deliberately refusing to file a reply to the plaintiff/applicant's amended plaint, the 1st, 2nd and 3rd defendants are deemed to have admitted the amended pleadings and judgement should be entered against the defendant under order 3 Rule 2 of the Civil Procedure Rules.
  9. The Plaintiff/Applicant also submitted that in the alternative, the plaintiff/applicant contends that by deliberately refusing to comply with the mandatory provisions of order 3 Rule 2 of the Civil Procedure Rules, the defendants are deliberately obstructing the course of justice by denying the plaintiff/applicant herein the right to be accorded a fair hearing and the right to be treated as equal before the court in contravention of Articles 10, 25, 27, 48 and 50 of the Constitution of Kenya, besides curtailing the fair and speedy determination of his suit, by refusing to fully disclose their case to the detriment of the plaintiff/defendant.
  10. The Respondents submitted that the plaintiff/applicant instituted this suit vide plaint dated December 2010 together with an application seeking interim orders.
  11. That the defendants filed a replying affidavit sworn on January 11, 2011 and a statement of defence and counterclaim dated January 31, 2011.
  12. That on 31/11/2017 before Justice Mbogholi, the plaintiff/applicant requested for a formal proof on the basis that the defendants had filed a defence.



13. During the formal proof on May 12, 2018, the defendants requested for time to file a preliminary objection and an application dated May 2, 2018 filed on May 8, 2018.
14. The court delivered its ruling on October 1, 2020 and the interlocutory judgement was set aside on the grounds that there was a valid defence and counterclaim on record.
15. The defendants/respondents also submitted that the application dated August 31, 2021 is Res Judicata as it raises issues already dealt with in the application dated July 16, 2018 which resulted in the ruling delivered on October 1, 2020.
16. The issues for determination in this ruling are as follows;
  - (a) Whether the Application dated August 31, 2021 is *res judicata*.
  - (b) Whether interlocutory judgment should be entered in favor of the plaintiff and the suit be listed for formal proof.
17. I have perused the ruling delivered on October 1, 2020 and I find that the interlocutory judgement was set aside on the grounds that there was a valid defence and counterclaim on record.
18. On the issue as to whether the Application dated August 31, 2021 is Res Judicata, I find that answer is in the affirmative since the issues raised in the said Application were raised in the Application dated July 16, 2018 and the ruling was delivered on the October 1, 2020.
19. The plaintiff submitted that the defendants have deliberately refused and/or failed to traverse the plaintiffs amended plaint on record despite having been given leave to do so by the Hon. Lady Justice Githua on the 1st October 2020.
20. Further, the plaintiff said that by deliberately refusing to transverse or oppose the plaintiffs amended plaint on record herein, the defendants herein are deemed to have admitted everything which the plaintiff has pleaded in the amended plaint and therefore judgment ought to be entered against the defendants in line with Order 1 Rules 1 and 2 of the Civil Procedure Rules on the basis of the said admissions.
21. The Defendants on their part submitted that they have a valid defence and counterclaim on record and further that they do not wish to file any amended defence.
22. I find that there is no basis to direct the defendants to file an amended defence since it is up to them buttress their suit the best way they know how.
23. The court already made a finding that there was a defence on record it is up to the defendants to decide whether it is necessary to amend their if they deem it necessary despite the directions of the court.
24. I find no basis for striking out the defence on record. The court already made a finding in the ruling dated 1st October 2020 striking out of pleadings is a draconian step that should be applied sparingly.
25. The Application dated August 31, 2021 lacks in merit and the same is accordingly dismissed.
26. The costs to abide the main suit.
27. I direct that the parties comply with Order 11 and the suit be listed for hearing.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
15<sup>TH</sup> DAY OF AUGUST, 2023.**

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**A. N. ONGERI**

**JUDGE**

In The Presence Of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

