



**Kiraku v Eastleigh Route Sacco Limited (Civil Appeal E057 of 2021)
[2022] KEHC 11809 (KLR) (Commercial and Tax) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E057 OF 2021**

DAS MAJANJA, J

JULY 22, 2022

BETWEEN

JOSEPHAT MWITI KIRAKU APPELLANT

AND

EASTLEIGH ROUTE SACCO LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of the Co-operative Tribunal at Nairobi dated 7th June 2021 in CTC No. 784 of 2019)

JUDGMENT

1. This is an appeal against the ruling of the Co-operative Tribunal (“the Tribunal”) dated 17th June 2021 striking out the Appellant’s Counterclaim on the ground that the Appellant failed to file a verifying affidavit.
2. Before the Tribunal, the Respondent filed a Notice of Motion dated 9th October 2020 seeking an order that the Appellant’s Counterclaim dated 23rd March 2020 be struck out. It argued that the failure by the Appellant to file the verifying affidavit was fatal as it had failed to comply with the mandatory provisions of Order 3 rule 2(a), (b) and (d) and Order 4 rule 1, 2, 5 and 6 of the *Civil Procedure Rules* and that such failure was prejudicial to the Respondent by causing inordinate delay in the hearing of the case.
3. The Appellant opposed the application on the ground that due to COVID-19 restrictions, it could not swear the verifying affidavit and that the delay in filing the Defence and Counterclaim was occasioned by the difficulties in accessing the registry during the pandemic. That it only filed the same in the month of August 2022 by email and when it did so, it was intent on filing the verifying affidavit and supporting documents later. The Respondent urged the court to consider the justice and fairness of the matter.



4. After dealing with the parties' arguments, the Tribunal held that the fact that Appellant failed to file the verifying affidavit could not be cured and as this was a mandatory requirement and as such the Counterclaim was defective and ought to be struck out. It added that the lack of a verifying affidavit is not a mere technicality that can be wished away as it is part of the pleading hence the counterclaim could only be struck out.
5. The Appellant appeals against the ruling on the grounds set out in its memorandum of appeal dated 19th July 2021. The thrust of the appeal is that the Tribunal failed to exercise its discretion properly having regard to Article 159(2)(d) of *the Constitution*, Rule 4 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009, the overriding objective in sections 1A and 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) in the circumstances of the case. The Appellant argued that the Tribunal erred in holding the failure to file a verifying affidavit was fatal to the case whereas it explained the reasons for failing to file it and had paid court filing fees. It urges the court to give it an opportunity to present its case by allowing the appeal.
6. The appeal was fixed for hearing today, 22nd July 2022. Despite service, neither the Respondent nor its advocate appeared in court to defend appeal. Counsel for the Appellant made brief submissions in support of the appeal along the lines I have summarized above.
7. As this is an appeal against the exercise of the discretion by a subordinate court, this court is guided by known principles. In *Mbogo v Shah* [1968] EA 93, Newbold P., expressed the nature and extent of the appellate court's jurisdiction to interfere with the discretion of the lower court as follows;

A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

8. With the above principle in hindsight, the main issue for determination is whether the Tribunal erred in striking out the Appellant's counterclaim for failure to file a verifying affidavit. The filing of a verifying affidavit is governed by Order 4 of the *Civil Procedure Rules* which provides as follows:

[Order 4, rule 1.] Particulars of plaint.

- (1) The plaint shall contain the following particulars—
 - (a) the name of the court in which the suit is brought; (b) the name, description and place of residence of the plaintiff, and an address for service;
 - (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
 - (d) the place where the cause of action arose;
 - (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
 - (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.
- (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.



- (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.
- (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.
- (5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.
- (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. [Emphasis mine]

Further Order 7 rule 5 of the Civil Procedure Rules provides as follows:

[Order 7, rule 5.] Documents to accompany defence or counter-claim.

5. 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;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11. [Emphasis mine]

9. A cursory glance of the Rule 4 and Rule 7(5) aforesaid, suggests that that requirement for filing a verifying affidavit is mandatory and the court may strike out the plaint or counterclaim either on its own motion or on application of the parties. This issue is not novel and was in fact considered by the Court of Appeal in *Luke Cheruiyot and 37 Others v National Oil Corporation* NRB CA Civil Appeal No. 91 of 2019 [2015] eKLR, where it took the view that failure a verifying affidavit was not fatal and where none has been filed the court may give the party an opportunity to file one. It further explained that the power to strike out is only permissive and not mandatory. The Court observed as follows:

As recently as 11th July, 2014 the position taken by the Court in *Research International East Africa Ltd v Julius Arisi & 213 Others* (supra), was reiterated in the case of *Kenya Oil Company Limited v Javantilal Dharamshi Gosrani* [Nairobi Civil Appeal No. 324 of 2005] (UR). There, we said:

“The provisions of Rule 1(6) of Order 4 (formerly rule 1(3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars.

The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase “the court may...” in Order 1(3) and in the new Order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in *Arisi* case (supra)”

In the end the court dismissed the appeal which was against an order of the High Court refusing an application to strike out the plaint and instead giving leave to the respondent to file a compliant verifying affidavit. In dismissing the appeal, the Court reiterated the principle stated in *D.T. Dobie & Company (K) Ltd v Muchina* [1982] KLR 1 that the discretion of the court to strike out pleadings for various reasons such as failure to disclose



a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from the judgment seat unless the case is hopeless.

10. I hold that the power to strike out a pleading is still discretionary and in this case, the Tribunal ought to have given the Appellant a chance to rectify its position since it had filed a counterclaim and also explained why it failed to file the verifying affidavit. Having taken the position that filing of a verifying affidavit was mandatory, the Tribunal did not address whether the reasons proffered by the Appellant were sufficient or determine whether in fact the Respondent would be prejudiced by an order allowing the verifying affidavit to be filed.
11. For the reasons I stated above, I hold that this is a proper case for reversing the Tribunal's decision for failure to consider the legal position as set out by the Court of Appeal and material facts before it in exercising its discretion. Consequently, I allow the appeal on the following terms:
 - a. The ruling and order dated 17th June 2021 is set aside and substituted with an order dismissing the Respondent's Notice of Motion dated 9th October 2020.
 - b. The Counterclaim shall be deemed as duly filed and served and the Appellant shall file and serve its verifying affidavit within 14 days from the date hereof.
 - c. The Appellant is awarded costs of KES. 15,000.00 being costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2022.

D. S. MAJANJA

JUDGE

Mr Kimakia instructed by Kimakia Magara and Partners Advocates for the Appellant.

