



**Sankei v Cheruiyot; Humjoli Kebenei Aruasa, Livingstone Bii, Charles Adam Kiprotich Langat & Francis Kipngeno Sigei (in their Capacity as Chairman, Secretary and Treasurer of Botoret Farmers Group) & 4 others (Interested Parties) (Environment & Land Case 270 of 2017) [2023] KEELC 18326 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18326 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 270 OF 2017**

**CG MBOGO, J**

**JUNE 27, 2023**

**BETWEEN**

**TITAME OLE SANKEI ..... APPLICANT**

**AND**

**JOHNSON KIMUTAI CHERUIYOT ..... RESPONDENT**

**AND**

**HUMJOLI KEBENEI ARUASA, LIVINGSTONE BII, CHARLES ADAM KIPROTICH LANGAT & FRANCIS KIPNGENO SIGEI (IN THEIR CAPACITY AS CHAIRMAN, SECRETARY AND TREASURER OF BOTORET FARMERS GROUP) ..... INTERESTED PARTY**

**KAPSET TEA FACTORY COMPANY LIMITED ..... INTERESTED PARTY**

**NYOONYUAT SANKEI ..... INTERESTED PARTY**

**POLOLET SANKEI ..... INTERESTED PARTY**

**FELIX MAINA SANKEI ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is the Notice of Motion application dated March 7, 2023 filed by the applicant herein and is expressed to be brought under Order 2 Rule 15, Order 4 Rule 5, Order 7 Rules 5 & 12, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -

1. That this honourable court be pleased to strike out the defendant/respondent's counter claim dated September 11, 2017.



2. That the costs of this application be provided and be borne by the defendant/respondent.
3. The application is premised on the grounds *inter alia* that the defendant/respondent was granted leave to amend his defence vide a ruling delivered on July 21, 2017 and in doing so the defendant/respondent filed a counter claim which was not accompanied by a verifying affidavit.
4. The application is supported by the affidavit of Mutai K Owen, the counsel for the applicant which was sworn on even date. In his affidavit, the counsel deposed that the plaintiff/applicant instituted a suit against the defendant/respondent claiming that he had trespassed into his parcel of land known as Cis-Mara/Ololunga/197. He further deposed that in amending his defence, the defendant/respondent introduced a counter claim and neglected to accompany the same with a verifying affidavit making it defective.
5. The counsel further deposed that failure to file the verifying affidavit is fatal as the amended defence and counter claim failed to comply with the mandatory provisions of Order 4 Rule 5 and Order 7 Rule 5 of the Civil Procedure Rules.
6. The counsel further deposed that the suit property being property known as Cis-Mara/Ololunga/ 197 had been transferred and subdivided to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> interested parties and as such became non-existent as at September 11, 2017. Also, that the defendant/respondent was aware that the suit land was non-existent before introducing the counter claim in these proceedings. As such, the counter claim is procedurally flawed, frivolous, vexatious, incompetent and an abuse of the court process.
7. The application was opposed by the replying affidavit of the defendant/ respondent sworn on March 28, 2023. The defendant/respondent deposed that Article 159 (2) (d) of the Constitution does cure such an anomaly and it must be noted that he is a lay person to the rules of procedure and matters law and what the court can do is to guide him.
8. The defendant/respondent further deposed that justice shall not be defeated on the altar of technicalities and or procedural lapses and in any case, the litigants should not waste time on an issue which the court can grant leave to file a verifying affidavit.
9. The defendant/respondent further deposed that he be allowed to file a verifying affidavit as the applicant has not demonstrated what prejudice will be occasioned should leave be granted. The defendant/respondent prays that this matter be heard on merit and not dismissed on technicalities.
10. On March 22, 2023, this court directed that the application be canvassed by way of written submissions. The applicant filed his written submissions dated April 14, 2023 in which it raised two issues for determination as below: -
  1. Whether the defendant/respondent's counter claim dated September 11, 2017 is procedurally flawed, frivolous, vexatious, incompetent and an abuse of the court process and ought to be struck out.
  2. Who should bear the costs of the application.
11. On the first issue, the applicant submitted that the defendant has admitted to the fact that his counter claim has not been accompanied by a verifying affidavit and the explanation for doing so is not plausible and as such this court ought to be guided by the maxim that ignorance of the law is no defence.



12. The applicant further submitted that the fact that the defendant/respondent has failed to challenge the issue of a non-existent parcel of land known as Cis-Mara/Ololunga/197 becomes an inescapable conclusion that the counter claim is frivolous, vexatious, incompetent and an abuse of the court process. The applicant relied on the provisions of Order 2 Rule 15, Order 4 Rule 5 and Order 7 Rule 5 of the Civil Procedure Rules.
13. On the second issue, the applicant submitted that given the determination of issues as enumerated in favour of the applicants, they are entitled to costs.
14. The defendant/respondent did not file written submissions. Be that as it may, I have considered the application, the replying affidavit and the written submissions of the applicant and the issue for determination is whether this court ought to strike out the counter claim for lack of a verifying affidavit.
15. Order 7 rule 5(a) of the Civil Procedure Rules provides as follows:
  - “5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by –
    - a. An affidavit under order 4 rule 1 (2) where there is a counter-claim.”
16. My understanding of the above proviso of the law is that, the filing of the counterclaim without a verifying affidavit renders the counterclaim as being defective. However, it is my view, that the said defect is not fatal.
17. I place reliance in the case of *Jefitha Muchai Mwai versus Peter Wangio Thuku* [2015] eKLR, where Justice Limo held: -
  - “...If a party inadvertently leaves out a verifying affidavit or any other document like a statement, he/she could be given a chance to file one and the matter can proceed for determination on merit. If the other party is affected by the attendant delay appropriate costs should adequately address the problem...”
18. While the rules of procedure are to be adhered to, the courts are encouraged not to be slaves to the said rules when faced with unintentional omissions by the parties. In the case of *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another* Nairobi (Milimani) HCCC No 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, Ringera, J (as he then was) stated that:
  - “...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a claim but he 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 or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...”
19. In this case, indeed the defendant/respondent filed an amended defence and counter claim dated September 11, 2017 without a verifying affidavit accompanying the same. However, the



hearing of the case is yet to commence and it would be fair and in the interest of justice that the defendant/ respondent is granted leave to file a verifying affidavit to the counter claim.

20. Arising from the above, the defendant/respondent is granted 7 days from the date hereof within which to file and serve his verifying affidavit to the counter claim. Mention on July 11, 2023 to confirm compliance and for further directions. Costs to be in the cause. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 27TH DAY OF JUNE, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**27/6/2023**

