



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC CASE NUMBER 63 OF 2019

**TECLAH JEPKIRUIWILSON TUWEI (Administrators of the estate of the late
MALAKWEN ARAP CHERUIYOT).....PLAINTIFF/RESPONDENT**

-VERSUS-

KIMAIYO CHIRCHL.....DEFENDANT/APPLICANT

RULING.

This ruling is in respect of an application by way of Notice of Motion dated the 8th September, 2020 by the defendant/applicant seeking for the following orders;

- a) That the Honourable court be pleased to grant the Defendant/Applicant leave to file and serve a Verifying Affidavit in support of the Amended Counter-claim filed on 4th September 2020.
- b) That costs of this application be in the cause.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application and the provisions of Order 7 Rule 1 (5) (1), Section 1, 1B, 3A and 18 (1) b(1) of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010.

It was counsel's submission that the applicant is the Plaintiff in the Counter-Claim and that the Defendant filed his Statement of Defence and Amended Counter-claim on 4th September .2020. Despite the Verifying Affidavit having been prepared and executed by the Applicant, the same was erroneously not attached to the Defence and Counter-Claim on the date the same was filed which mistake was attributed to the cyber café where the documents were prepared and the said mistake was not intentional as the same had already been executed and commissioned ready for filing.

Counsel submitted that Order 7 Rule 1 (5) of the Civil Procedure Rules stipulates that a counter claim shall be accompanied by an affidavit to verify correctness of the averments thereof and urged the Court to consider the spirit of the Constitution and in particular Article 159 of the Constitution of Kenya which directs that matters ought to be determined on merit and not on the technicalities. That the Plaintiff will not be prejudiced in any way if the orders sought are granted as the same is only to verify the correctness of the Amended Counterclaim.

It was Mr. Omboto's submission that the Defence and Counter Claim was served on 5th September 2020 and thus the application herein has been brought without inordinate delay as it has been filed only three (3) days upon filing of the Amended Counter-claim and only one (1) day after service upon counsel for the Plaintiff.

Counsel relied on the case of **Jefitha Muchai Mwai —vs- Peter WangioThuku (2015) eKLR**, where Justice R.K Limo noted that failure to file a verifying affidavit with a counter-claim is not fatal as the defect can easily be remedied by filing and serving a verifying affidavit. The court held as follows:

..In any event, courts of law in the spirit of Article 159 of the Constitution should try as much as possible to sustain causes rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party. If a party inadvertently leaves out a verifying affidavit or any other document like statement, he/she could be given a chance to file one and the matter can proceed for determination on merit

Counsel further stated that this matter is yet to proceed to hearing and it will not prejudice the plaintiff in any way. Further in the case of **Microsoft Corporation —vs- Mistumi Computer Garage (2001) E.A pg. 460.** Justice Ringera (as he then was) held 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 fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint 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...the purpose for verifying the contents of the Plaint may be attained by rejecting a defective Affidavit and ordering that a fresh and complying one be made and filed on record..

Similarly in the case of **Peerai General Trading & Contracting Company Limited, Kenya & Another —vs- Mumias Sugar Company Limited (2016) eklr.** Justice Olga Sewe held that;

' . . .I take the view that even if I were to find that the Verifying Affidavit in question is defective in form, which is not the case herein as pointed out herein above, such a defect cannot and should not warrant the striking out of the suit as sought in the present application

Mr Omboto urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent opposed the application and submitted that there exists no provision to file a Verifying affidavit independent of the main document/Pleading and that the application dated 8th September 2020 is incurably defective as **Order 7 Rule 5 (a)** states that the pleading "**shall be accompanied by**" the Verifying affidavit meaning that the documents should be filed together. Further a Counterclaim is a cross suit and therefore **Order 7 Rule 8 Civil Procedure** Rules ought to be complied with.

Counsel urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issue for determination is as to whether the application has merit. It is not in dispute that the defendant/applicant herein filed his Statement of Defence and Amended Counterclaim on 4th September 2020 and failed to attach the verifying affidavit. It is also trite that it is a requirement by virtue of the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010 that a Counter Claim must be accompanied by a verifying affidavit. The applicant stated that the failure to file the verifying affidavit alongside the defence and counter claim was not intentional and was occasioned by a mistake at the cyber café.

It is on record that the Defence and Counter Claim was served upon the Respondents on 5th September, 2020 and upon the applicant's advocates realizing the mistake, they immediately filed the application herein on 6th September, 2020 which was just one day after the service was effected.

The issues regarding the provisions of law which the current application is premised upon are procedural technicalities which do not go to the root of the matter and in the spirit of the provisions of Article 159 of the Constitution of Kenya, 2010 the protestations raised by the Respondent cannot change the substratum of the case.

Order 7 Rule 5 (a) of the Civil Procedure Rules states as follows;

“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.”

That provision of Order 4 Rule 1 (2) of Civil Procedure Rules is as follows;

“1.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment contained in rule 1(1) (f) above”.

That Rule 1(1) (f) of the Procedure Rules states as follows;

“ 1. (1) The plaint shall contain the following particulars-

a.

b.

c.

d.

e.

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.”

The Defendant is actually the Plaintiff in the counterclaim and a Defendant filing a counterclaim is required to file a verifying affidavit at the time the counterclaim is filed, in the same way a Plaintiff is required to have his plaint accompanied with a verifying affidavit at the filing stage

Whereas it is a requirement that the applicant ought to have filed a Verifying Affidavit alongside the Defence and Counter Claim, the said omission was not fatal and should not lead to the striking out of the suit as urged by the Respondent herein.

I am persuaded by the finding by Justice Limo in **Jefitha Muchai Mwai v Peter Wangio Thuku [2015] eKLR** where it was held as follows;

*“It is of course instructive to note as conceded by the Appellant that the rules now have been amended through legal notice No. 151 of 10th September, 2010. Under **Order 4 Rule 2(5)** and **Order 7 Rule 5 (a)** of the **Civil Procedure Rules**, a counter-claim now must be accompanied by a verifying affidavit....In any event courts of law in the spirit of **Article 159** of the Constitution should try as much as possible to sustain causes in court rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party. 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.”*

There is always room to remedy such omissions before the hearing and judgment of a case. In view of the above, I am inclined to allow the applicant’s application as prayed. Accordingly, the Defendant/Applicant is hereby granted leave to file and serve a Verifying Affidavit in support of the Amended Counter-claim filed on 4th September 2020 within 14 days. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2021

M. A. ODENY

JUDGE