



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E012 OF 2020

SALIM VERJEE.....APPELLANT

VERSUS

1. THE ATTORNEY GENERAL

2. MR. RONALD DE MELLO

3. THE INSPECTOR GENERAL OF POLICE

4. HAMISI BAKARI KODZA.....RESPONDENTS

(Being an Appeal from the Ruling of Hon. G. Kiage (Resident Magistrate) delivered on the 16th October, 2020 in CMCC No. 1621 of 2014)

JUDGMENT

1. Before the Court is an interlocutory appeal challenging a Ruling dated **16th October, 2020** by Hon. G. Kiage (Resident Magistrate) wherein the 2nd Respondent was granted leave to file and serve his Verifying Affidavit with respect to the Counter Claim dated 30th January, 2017.
2. The genesis of the matter herein is that the Appellant is the Plaintiff in *CMCC No. 1621 of 2014* and had filed a Complaint dated the **18th August, 2014** seeking as against the Respondents jointly, *special damages, general damages and costs of the suit*. The 2nd Respondent entered appearance on the **29th August, 2014** and filed a Defence and Counter – Claim on the **15th September, 2014**.
3. An amendment to the Complaint was made on the **15th November, 2016** whereby the 4th Respondent was enjoined and the Appellant sought from the Court *special damages of Kshs. 245, 000/=; general damages; costs of the suit plus interest*. To the amended Complaint the 2nd Defendant on **30th January, 2017** filed an amended Statement of Defence and Counter-Claim dated on an even date.
4. The Appellant's main contention is that the main suit in *CMCC No. 1621 of 2014* was heard and parties particularly, the 2nd Respondent closed its case on the **4th October, 2019**. That after the 2nd Respondent closed its case, he purported to have filed an application dated **3rd March, 2020** seeking leave to file and serve his Verifying Affidavit with respect to the Amended Counter Claim dated the **30th January, 2017**.
5. After hearing the parties on the application dated **3rd March, 2020**, the subordinate court delivered its Ruling on **16th October, 2020** and granted leave to the 2nd Respondent to file the said Verifying Affidavit.
6. Being dissatisfied with the said Ruling, the Appellant filed an appeal before this Court and in his Amended Memorandum of Appeal, raised the following grounds: -

1. That the Learned Trial Magistrate erred in law and fact by allowing the 2nd Respondent's Application dated 3rd March 2020 despite the Appellants right to fair trial as enshrined under Article 50 of the Constitution.

2. That the Learned trial Magistrate erred in law and fact by allowing the 2nd Respondents application to file a Verifying affidavit to its counter claim long after the 2nd Respondent had closed his case on 4th October 2019 almost six months before filing the subject matter application on the 4th March 2020.

3. That the Learned trial Magistrate erred in law and in fact by failing to grant the Appellant an opportunity to file his response to the 2nd Respondents' written submissions to the subject matter application.

4. That the Learned trial magistrate erred in law and fact by totally disregarding the submissions and legal authorities filed by the Appellant on the 17th July 2020.

5. That the learned trial magistrate erred in law and fact by failing to consider the legal provisions and relevant issues in question to the detriment of the Appellant.

6. That the learned trial magistrate erred in law and fact by admitting the 2nd Respondent's Verifying Affidavit without the 2nd Respondent requesting for orders to first reopen the proceedings.

7. That the learned trial magistrate erred in law and fact by admitting the 2nd Respondent's Verifying Affidavit without the 2nd Respondent seeking orders to appear before court as the deponent to produce the said affidavit and have it admitted.

7. The Appellant prayed that the Appeal be allowed, the Ruling delivered on 16th October 2020 be set aside ex debito justitiae and costs of the Appeal be provided for.

Directions of the Court

8. On 17th May, 2021, the court indicated that the Appeal be canvassed by way of written submissions. The Appellant's submissions are dated the 16th March, 2021 and filed on 29th March, 2021 while the 2nd Respondent's submissions are dated the 26th April, 2021 and filed on the 27th April, 2021.

9. The 1st, 3rd and 4th Respondents did not participate in the Appeal herein.

The Appellant's submissions

10. It has been submitted by the Appellant that **Order 11 of the Civil Procedure Rules** provides that documents and statements should be filed at least 14 days before the hearing and in the case of a Verifying Affidavit, it should accompany the Counter-Claim.

11. In the case herein, it is stated that the 2nd Respondent filed a Statement of Defence and Counter Claim dated 15th September, 2014 and amended the same on 30th January, 2017 without filing a verifying affidavit to accompany the Counter-Claim.

12. The Appellant has submitted that the Appellant closed his case on the 2nd March 2018 while the 2nd Respondent closed his case on 4th October 2019. It is also submitted that during cross examination by the Appellant, the 2nd Respondent indicated that he did not know what a verifying Affidavit is. After the hearing of the 1st and the 3rd Respondents case, on the 10th February, 2020, the 2nd Respondent made an oral application in which he expressed his wish to file a verifying affidavit, to which the Appellant objected while stating that they cannot seek such leave after the close of their case.

13. It was on the trial court's guidance that the 2nd Respondent then filed an application dated 3rd March, 2020 and sought for leave to put in a verifying affidavit. The application dated 3rd March, 2020 is said to be bad in law and irregular as it was not supported by an affidavit, but was nevertheless allowed by the subordinate court.

14. The Appellant has stated that the case relied on by the trial court of is that of **Jefitha Muchai Mwai v Peter Wangio Thuku [2015] eKLR**, where Justice R. K Limo held that where a verifying affidavit has not been filed the same can be cured by the provisions of **Article 159 of the Constitution** and the party should be allowed to file the same does not apply in the case herein but instead is more persuaded by the case of **Galerius Investments Limited v County Government of Mombasa & Another [2020] eKLR**, where Justice C. K. Yano faced by a similar scenario dismissed the Defence and Counter Claim for not being accompanied by a Verifying Affidavit on the reasoning that **Order 4 Rule (1) (2) and Order 7 Rule 5 (a) of the Civil Procedure Rules** are couched in mandatory terms that a Defence and Counter Claim must be accompanied by a Verifying Affidavit.

15. The court has been urged to find that the Appeal has merit and the same be allowed with costs.

The 2nd Respondent's submissions

16. The 2nd Respondent has submitted that the instant Appeal lacks merit and has not met the threshold for setting aside a Ruling as it has not shown how the trial court misapprehended the law in determining the application dated 3rd March, 2020.

17. It has been submitted that the trial court correctly applied the case of the superior court in its finding that a Counter Claim that is not accompanied by a verifying affidavit can be cured by the provisions of **Article 159 of the Constitution**, and the strength of the omission being a technicality.

18. The 2nd Respondent has thus urged the court that the spirit under **Article 159 of the Constitution** enjoins the court to try as much as possible to sustain causes of action in court rather striking out suits for reasons that are merely technical and curable by a step that does not

prejudice any party. According to the 2nd Respondent, the omission of not filing a verifying affidavit is not fatal to the Counter Claim and the same amounts to a mere procedural technicality which was cured by the trial court allowing the 2nd Respondent to file the said verifying affidavit.

19. Reliance has been placed on the cases of **Michael Muuthoka Makau (Suing as Personal Representative of the Estate of Ernest Daudi (Deceased) v Simon Nganga Mbugua & 2 others; Monarch Insurance Company Ltd (Interested Party) [2018] eKLR; Joseph Okoto v Edwin Dickson Wasunna [2013] eKLR and Bridge-Up Container Services Ltd v C.F.C. Stanbic Bank Ltd [2011] eKLR**, where the courts allowed the filing of a verifying affidavit that was omitted when the Defence and Counter Claim were filed under **Article 159 (2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act**.

20. Further, the 2nd Respondent has submitted that the Appellant has not demonstrated what prejudice he has suffered pursuant to the said Ruling or that the Ruling was erroneous or unconstitutional. It was also stated, that the Appellant's verifying affidavit did not form part of the 2nd Respondent's defence hence, the Appellant's right to a fair hearing was not in any way affected by the Honourable Court's Ruling in which the 2nd Respondent was granted leave to file his verifying affidavit.

21. It has finally been submitted by the 2nd Respondent that the issues raised by the Appellant in the supporting affidavit have not been raised as a ground of appeal and that the Appellant should not be allowed to raise the same during submissions. Further that it was a typographical error that goes into the root of the matter.

22. The Court was urged to dismiss the instant Appeal with costs to the 2nd Respondent.

Analysis and determination

23. I have carefully considered the pleadings and submissions filed herein by each party and I find the only issue that arises for determination being: -

Whether the trial court erred in granting leave to the 2nd Respondent to file a Verifying Affidavit to the Counter Claim long after 2nd Respondent has been heard and closed his case

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24. The Appellant's main contention is that the 2nd Respondent was granted leave by the trial court to file a verifying affidavit to his Defence and Counter Claim long after the parties had been heard and closed their cases.

25. It is the Appellant's case that the Appellant's Counter Claim is defective for being non-compliant with **Order 4 Rule (1) (2) and Order 7 Rule 5 (a) of the Civil Procedure Rules** of the Civil Procedure that is mandatory in nature and requires a Counter Claim to be accompanied by a verifying affidavit.

26. **Order 4 Rule (1) (2)** of the **Civil Procedure Rules** provides that: -

"... (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 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 counter-claims.

(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"

27. **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."

28. Therefore, 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.

29. I agree with the finding in the case of **Jefitha Muchai Mwai v 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...”

30. 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 inadvertent transgressions and unintentional omissions by the parties. In the case of **Microsoft Corporation vs. 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 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....”

31. As evidenced by the parties, the suit before the trial court as is already at an advanced stage, where parties have already given their respective evidence. In the circumstances, it would be unjust to strike out the 2nd Respondent’s Counter Claim whilst they sought leave to put in their verifying affidavit and the same was granted by the trial court in regard to the provisions of **Article 159 (2) (d) of the Constitution of Kenya**.

32. It has not been denied that the lack of the verifying affidavit has occasioned delay in the suit herein, but on his part, the Appellant has not shown any prejudice that he has suffered or stands to suffer which cannot be remedied by an award of costs.

33. In view of the above arguments it is evident that the ends of justice were met by the trial court when it allowed the 2nd Respondent to provide an appropriate verifying affidavit.

34. This Court thus finds that the learned trial magistrate was right in allowing the 2nd Respondent’s application, by granting him leave to file a verifying affidavit which has not been shown to have prejudiced the suit before the trial court.

35. In conclusion, this Court finds no merit in the appeal dated **15th January, 2021** and the same is hereby dismissed with costs to the 2nd Respondent. I further direct that the case before the subordinate court do proceed on priority basis considering the age of the matter.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF AUGUST 2021.

D. O. CHEPKWONY

JUDGE