



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 100 OF 2013

JEFITHA MUCHAI MWAI.....APPELLANT

-VERSUS-

PETER WANGIO THUKU.....RESPONDENT

(An appeal from the decision of the Principal Magistrate's

Court (D.A. Ocharo) at Wanguru, Civil Case No. 155 of 2008

dated 15th April, 2009)

JUDGMENT

1. The appellant herein **JEFITHA MUCHAI MWAI** was aggrieved by the decision of Hon. D. A. Ocharo, Resident Magistrate in **WANGURU SENIOR RESIDENT MAGISTRATE'S CIVIL CASE NO. 155 OF 2008**. The learned trial magistrate dismissed the Appellant's counter-claim for failure by the Appellant to file a verifying affidavit in respect of his counter-claim in that court. Being dissatisfied with the dismissal the Appellant preferred this appeal and raised six grounds as follows:
2. (i) ***That the learned magistrate erred in law by***

misconstruing the letter and spirit of Order VII Rule 1(2) of the Civil Procedure Rules (Cap. 21 Laws of Kenya) and thereby failed to give its proper effect.(sic)

- (ii) ***That the learned magistrate erred in law and fact by***

holding a counter-claim, though a cross-suit, is a plaint and hence requires to be accompanied by a verifying affidavit envisaged under Order VII Rule 1 (2) of the Civil Procedure Rules.(sic)

- (iii) ***That the learned magistrate erred in law and fact by***

literally amending Order VII Rule 1 (2) of the Civil Procedure Rules by virtue of his ruling whereas the mandate lies with legislature and rules committee established under Section 81 of the Civil Procedure Act.

- (iv) ***That the learned magistrate erred in law and fact by***

upholding the preliminary objection by the respondent notwithstanding that the

procedure adopted was irregular and contrary to Order VII r. 10 of the Civil Procedure Rules.

(v) That the learned magistrate erred in law and fact by not holding that the provision of Order VII Rule 3 (2) on which the preliminary objection was based are non-existent in law.

(vi) That the learned magistrate erred in law and fact by failing to distinguish and appreciate the difference between a plaint and a suit under the law and hence delivered unconsidered ruling.

3. The Appellant through his counsel filed written submissions in support of his appeal with the main issue being the competency of his counter-claim in the subordinate court in the absence of a verifying affidavit. Mr. Kahiga for the Appellant submitted that though the Appellant had made a counter-claim of Ksh.70,000/= in the subordinate court, the learned trial magistrate was wrong to interpret the provisions of **Order VII rule 1(2)** of the Civil Procedure Rules to mean that the counter-claim had to be accompanied by a verifying affidavit. He submitted that the requirements of a verifying affidavit was introduced vide a **Legal Notice No. 36 of 2000** which amended the **Civil Procedure Rules** by introducing **Order VII rule 1(2)** that stated that a plaint be accompanied by a verifying affidavit. Mr. Kahiga argued that the rules did not relate to defence or counter-claim which were under Order VIII of the Civil Procedure Rules and were unaffected by the amendments.
4. Mr. Kahiga further faulted the trial magistrate for not making a distinction between a plaint and a counter-claim and treating the two as though they were one and the same thing. He added that the rules committee could have added the counter-claim if it intended that the verifying affidavit was to apply to it as well. He relied on the authority of **MICROSOFT CORPORATION –VS- MITSUMI COMPUTER GARAGE [2001] E.A. p9 460** to argue that the counter-claim should not have been struck out.
5. The Respondent opposed this appeal vide written submissions dated 18th May, 2015 and filed the same date. The Respondent submitted that a counter-claim under **Order VII rule(1) (1)** and **Order VII rule 1(2)** is a suit within an existing suit and that all legal requirements to a plaint equally applies to a counter-claim arguing that the rationale behind the requirement to a verifying affidavit is to ensure that persons lodging suits in court bind themselves to the correctness of their suit by way of swearing an affidavit. In his view there is no reason why a suit by way of counter-claim should be exempted from this legal requirement. The Respondent supported his submissions with the authority in the case of **TRANSAFRICA PORTWAYS LTD. –VS- POSTAL CORPORATION OF KENYA [2006] eKLR** where Justice Ombija struck out a counter-claim for lacking a verifying affidavit pursuant to **Order VII r.1(1)(e)** and **Order VII Rule 1(2)** of the **Civil Procedure Rules**.
6. I have considered the submissions made by both parties in this appeal which really revolves around the interpretation of the legal requirements as contained in the now amended rules under **Order VII Rule 1 (1) (e)** and **(2)** contained in the legal notice No. 36 of 2000.
7. The rules read as follows under **Order VII R. 1(1) (e)**:

“The plaint shall contain the following particulars.....

(e) an averment that there is no other suit pending and that there has been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter.” (emphasis added).

Under **subsection 2** it provided as follows:

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.” (Emphasis added).

The rules above clearly related to a plaint. There was no mention of a defence or a counter-claim.

There was no requirement under the old rules that a counter-claim must be accompanied by a verifying affidavit. I am therefore persuaded to agree with the submissions made by the Appellant that if the rules committee intended to have counter-claims to be verified by an affidavit, nothing could have been easier than for them to say so and include it in the rules.

8. This issue arose in a number of cases and the courts made similar findings that a counter-claim as per the old rules really needed not be accompanied by a verifying affidavit. See the following cases:
 1. **AMREEN KUTBUDDIN MUKADAM & ANOR –VS- ECOBANK KENYA LTD. [2011]eKLR.**
 2. **STEPHEN MARIGI GATHIGI –vs- GABRIEL GATHECA GITURA & 2 OTHERS [2010] eKLR.**
 3. **Leo INVESTMENT LTD –VS TERRY WANJIRU KARIUKI [2009] Eklr.**
9. 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. This was informed partly by the reasons given by the Respondents in opposition of this appeal (which is the need for a defendant raising a counter-claim to verify the correctness of the averments via a verifying affidavit) and also due to confusion and resultant litigation over simple matter that had been left out by the rules committee in 2000. The new rules though noble and desirable cannot be applied retrospectively to the prejudice of the Appellant herein. 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.
10. This Court finds that the learned trial magistrate fell into error when he dismissed the Appellant's counter-claim. The learned trial magistrate even if he had found that the Appellant had not complied with mandatory requirements under the relevant rules, the appropriate action was to strike out rather than dismiss the counter-claim.

In conclusion, this Court finds merit in this appeal. It is allowed. The trial magistrate's order dated 9th April, 2009 is set aside, the preliminary objection by the Respondent therein is dismissed. The case in the subordinate case do proceed on priority basis owing to the age of the case. The Appellant shall have costs of this appeal. It is so ordered.

Dated and delivered at Kerugoya this 17th day of June,2015.

R. K. LIMO

JUDGE

17.6.15

Before Hon. Justice R. Limo

Court Assistant Willy

Maina holding brief for Kahiga present

Kinyua for Respondent absent

COURT: Judgment signed, dated and delivered in the presence of Maina for Kahiga and in the absence of Kinyua Kiama.

R. K. LIMO

JUDGE