



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 943 OF 1999**

**COMMUNICATIONS COMMISSION OF KENYA. .... PLAINTIFF**

**VERSUS**

**BENJA INVESTMENT LIMITED. .... 1<sup>ST</sup> DEFENDANT**

**GEOFFREY CHEGE KIRUNDI**

**T/A KIRUNDI & CO. ADVOCATES. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The issue before the court at this point in time is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of Defence and Counter claim herein marked “SKK3” which is the copy found in the court file, and also found in the file of the Defendant, differed substantially from the copy found in the file of the Plaintiff.

The copy of the Defence and Counterclaim allegedly obtained from the court file by the firm of Ahmednasir Abdikadir & Co. who are now acting for the Plaintiff, is the one marked as “SKKI”.

It is common ground between the parties and as recorded by the court, that the two Defences and Counter claim i.e. “SKK3” and “SKKI” differ in substance. The court had sent them to the Forensic Documents Examiner who stated inter alia, that: -

- a) The pages of “SKKI” and SKK3” came from different originals and that the pages on the two documents are different.
- b) That paragraphs 19 on “SKK3” did not contain contents numbered as (e) – (j) which are found on “SKKI”.
- c) That there is a misalignment of prints, spacing and differences in contents on paragraph 9 and 14 – 25.
- d) That the documents of Defence and Counter claim in the hands of the Plaintiff are not copies of those original documents in the court file and they are not copies of the documents in possession of the Defendants.

Both parties have requested this court to find out and rule as to which of the Defence and Counter Claim copy, should be relied upon by the court and the parties during the hearing of this very old suit. Clearly the delay in hearing and concluding this suit has been caused, to a great extent, by this issue. Either side has submitted both in writing and orally on the issue to assist the court to clear this hurdle.

I have carefully perused the documents in the court file record. I have also studied the Forensic Expert's Report and considered the submissions from both sides. The following points are observed: -

1. The copy of Defence and Counterclaim marked as **"SKK3"** is found in the Court file and has the original handwritten court fees assessment of the court registry. That would tend to suggest that it was the copy originally filed by the Defendants and paid for by the Defendant. The copy marked **"SKKI"** does not have those calculations and tends to suggest that it never was the original copy filed by the Defendant.
2. The copy **"SKK3"** is commonly found in custody of the court and that of the Defendants who filed it. It also is accepted as the correct copy of the defence filed by them originally. The Plaintiffs cannot logically be in a position to argue that it is not the copy originally filed by the Defendant who all along has asserted it to be the correct Defence that they had filed.
3. Examination of **"SKK3"** confirms the fact that the Defendants denied the claim against them and logically laid the basis for the counter-claim. It would be illogical to file a Counterclaim by the Defendants if the alleged admissions on **"SKKI"** came from them.
4. A proper understanding of the admissions on **"SKKI"** tends to suggest that whoever filed or adopted the defence and Counterclaim **"SKKI"** intended to remove or take away any major defences that the Defendants had mounted on **"SKK3"** which copy, as herein above stated, the Defendants had properly filed and paid for. It makes little sense for the Defendants to tamper with the defences they had just filed without seeking leave of court to amend it in order to include the alleged admissions.
5. It is noted that the Plaintiffs filed an application for summary judgment much later after the Defence and Counterclaim **"SKK1"** had come into the hands of the Plaintiff. This tends to suggest that the Plaintiffs intended to base their application for summary judgment on the **"SKKI"** which carried the alleged admissions. Indeed the Plaintiffs had to withdraw the application without explanation when they faced the presence on record of **"SKK3"**. In the courts view, it would only be the Plaintiff who would stand to benefit from the intended judgment who would have cause to file **"SKKI"** with the alleged admissions.
6. The Plaintiffs did not explain where they obtained **"SKKI"** from. If from the court file, they did not demonstrate seeking and obtaining leave of court to do so. If they sneaked into the court file, they have not so explained although they have not denied doing so after it was so suggested in the submissions by the Defendants. They have neither explained the source of the copy **"SKKI"** which they alone hold. Did they get it from the client? If so, the client has not explained the source of **"SKKI"**. But there is no allegation on record that they got it from the Defendants in the normal or regular way through service. If the Plaintiffs obtained the copy from the court file, who gave it to them or did they take it without courts permission; and finally, why is **"SKKI"** not regularly in the court file?

It is suggested by the Defendants in their submissions that the firm of Ahmednasir Abdikadir & Co. conspired with court officers to unlawfully and unprocedurally have access of the court file. If that is so and if the copy of **"SKKI"** was thereafter found in the file, the court should be forgiven to think and probably conclude that that might be the occasion when **"SKKI"** was sneaked into the file, probably by an officer from the same firm. There is cause to think so.

Having made the above conclusions arising from the facts and circumstances coming out of the court record, the court has to open up this suit for hearing, one way or the other. The exact truth as to the origin of **"SKKI"** may never be exactly known. But the suit must be opened up for a hearing and final determination. Such a hearing should be fair to both sides. The best position is that a party who is the Defendant should be given opportunity to file his full defence and prosecute it as much as the Plaintiff will file his claim as complete as possible and prosecute it without hindrance.

In this case the Defendants were served with the claim and they filed their defence in the form of “SKK3”. They have never accepted filing any other Defence and Counterclaim apart from the “SKK3”. They should be allowed to own their said Defence and prosecute it. The court accepts their version of facts; that they could not have filed “SKKI” which made admissions after filing “SKK3” which did not have such admission.

Furthermore, the 2<sup>nd</sup> Defendant was an advocate who knew the court processes well. The court agrees that he could not find reason to sneak a second Defence to the file without seeking court leave, especially since he had nothing to gain by doing so.

Also, it is easier to conclude, which this court does, that the correct copy of Defence and Counterclaim between “SKKI” and “SKK3” is the “SKK3” because it holds the handwritten assessment of court fees by the court officers who assesses court fees. This shows that “SKK3” was filed in court. The same cannot be said of “SKK1”.

In conclusion, this court rules that the right Defence and Counterclaim upon which this court and parties will process to a hearing when Order 11 is complied with shall be “SKK3”. Orders are made accordingly.

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**D A ONYANCHA**

**JUDGE**

Dated and Delivered at Nairobi this 19<sup>th</sup> day of November, 2015.

.....

**JUDGE**