



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 1175 OF 2001**

**KENYA RE-INSURANCE  
CORPORATION.....PLAINTIFF**

**- VERSUS -**

**OFFICIAL RECEIVER, as Interim Liquidator of KENYA NATIONAL ASSURANCE  
COMPANY**

**LIMITED (in  
liquidation).....DEFENDANT**

**RULING**

1. The application before me seeks the striking out of the counter-claim which was filed in court on 3<sup>rd</sup> August 2005.
2. The plaintiff asserts that the Counter-claim was fatally defective because the defendant did not comply with the provisions of Section 228 of the Companies Act.
3. The said statutory provision reads as follows;

**“When a winding up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceeded with or commenced against the company except by the leave of the court and subject to such terms as the court may impose”.**

4. Mr. Asinuli, the learned advocate for the plaintiff, submitted that the defendant ought to have obtained leave before filing the counter-claim because the counter-claim was filed after a Receiver had already been appointed over the affairs of the plaintiff.
5. But the defendant expressed the view that Section 228 of the Companies Act would only have been applicable to this case if it is the defendant who had commenced these proceedings. As the suit was filed by the plaintiff, the defendant’s contention was that Section 228 did not apply to the defendant.
6. Secondly, the defendant contends that the application before the court is just an afterthought, considering that it was filed more than 10 years after the counter-claim was filed in court.
7. I was therefore invited to invoke the provisions of sections 1A and 1B of the Civil Procedure Act, as read together with Article 159 of the Constitution, so as to give effect to the overriding objectives.
8. The court’s attention was drawn to the fact that the plaintiff had only brought this application after

- the plaintiff's own suit was dismissed for want of prosecution.
9. In any event, it is the defendant's position that the court had actually given it leave to file the counter-claim.
  10. The plaintiff concedes that the defendant had sought and obtained leave to amend the defence. However, the plaintiff emphasizes that the leave was granted pursuant to Order 6A Rule 3 of the Civil Procedure Rules. In those circumstances, the leave which was granted by the court was said to have had no connection with the requirement laid down by Section 228 of the Companies Act.
  11. In answer to that argument, the defendant submitted that the failure to cite the statutory provision which the applicant was relying upon could not render the application defective. That submission was informed by the provisions of Order 51 of the Civil Procedure Rules.
  12. Although the defendant did not specify the Rule it was relying upon, I presume that it is Rule 10 (1) which provides as follows;

**“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.**

13. In this case, the defendant seems to be suggesting that its application for leave to amend the defence and to file a counter-claim could not have been objected to just because the specific rule which the defendant was basing on it, had not been cited. If that be defendant's position, then it is necessary to remind the defendant that the plaintiff raised no objections to the application for leave to amend the defence.
14. Indeed, the plaintiff had no opposition at all to the application, and the court granted leave on that basis.
15. The defendant's application dated 15<sup>th</sup> June 2005 had cited Order VIA Rules 3 and 8 of the Civil Procedure Rules.
16. Order VIA Rule 3 had basically stated that the court could, at any stage of the proceedings, grant leave to any party to amend his pleadings.
17. Meanwhile, Order VIA Rule 8 stipulated that applications made under Order VIA should be made by summons, but also that the court could hear and determine oral applications made in court.
18. Therefore, it is clear that the defendant had cited the rules which were applicable to its quest for leave to amend the Defence and also to file the counter-claim. Therefore, the defendant cannot now suggest that there was an attempt to defeat some application because there had been a failure to cite the applicable provisions of law.
19. Furthermore, a reading of the affidavit in support of the application dated 15<sup>th</sup> June 2005 reveals that at no time did the defendant call to its mind the provisions of Section 228 of the Companies Act when it was preparing or when it was canvassing that application.
20. In **BISAI & ANOTHER Vs KENYA COMMERCIAL BANK LIMITED [2002] 2 E.A 346**, Mwera J. (as he then was) expressed himself thus;

**“In order to commence any action or proceedings against the 3<sup>rd</sup> defendant which was in liquidation, the plaintiffs were obliged, mandatorily, by the Companies Act to first obtain leave from the court.**

**That the leave ought to be sought before bringing an action or proceedings, and not after, and cannot operate retrospectively. That non obtaining of the said leave is of a very fundamental nature, and not merely procedural. It went to the jurisdiction of the court”.**

21. From the said decision, I find that the overriding objectives cannot therefore remedy the defect arising from a failure to obtain leave under section 228 of the Companies Act.
22. In **MWETHAGA Vs THABITI FINANCE CO. LIMITED & OTHERS C.A No. 120 of 1998**, the Court of Appeal reiterated that the provisions of Sections 228 and/or 241 of the Companies Act were mandatory. Therefore, when the plaintiff failed to comply with those statutory provisions or any of them;

**“This renders the suit incurably defective and incompetent in law”.**

23. In those authorities cited above, the court was dealing with cases filed by the plaintiff. The question that must now be confronted head-on is whether or not the provisions of Section 228 of the Companies Act also applied to counter-claims.
24. Logically, it might appear onerous to demand that a defendant must first seek and obtain leave to lodge a counter-claim after he had been served with the plaint and summons.
25. The defendant may even be inconvenienced by the fact that his defence should be filed within the prescribed time-limits, yet if he also wanted to file a counter-claim, he would have to first obtain leave of the court.
26. Notwithstanding the possibility of such inconveniences, the law is very clear about the need for leave to be sought and obtained before an action can be commenced or proceeded with against a company in respect to which a winding up order had been made or over which an interim liquidator had been appointed.
27. In **DEPOSIT PROTECTION FUND BOARD Vs SUNBEAM SUPERMARKET LIMITED & 2 OTHERS**, Hccc No. 3099 of 1996, Ringera J. (as he then was) said;

**“As regards the prayer to strike out the counter-claim, I would accede to the same as leave to plead the same was neither sought nor given in accordance with section 228 of the Companies Act. The counter-claim was in effect a cross suit against a company in liquidation”.**

28. More recently, Ogola J. came to the same conclusion in **TRADE BANK LIMITED & ANOTHER Vs. ELYSIUM LTD & 2 OTHERS** Hccc No. 1848 of 1997. This is what the learned Judge said;

**“In my considered view, the counter-claim is a suit on its own. Sections 228 and 241 of the Companies Act apply mutatis mutandis. The Defendant must seek the leave of the court to sue or continue any proceedings which involve a company under liquidation”.**

29. I am in total agreement with my learned brothers whose decisions I have cited above.
30. Accordingly, as no leave was sought or obtained by the defendant before filing the counter-claim, the said counter-claim is fatally defective. It is therefore struck out.
31. The costs of the application dated 4<sup>th</sup> March 2014 are awarded to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day of November 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Asinuli for the Plaintiff

Wakwaya for the Defendant

Collins Odhiambo – Court clerk.