



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CIVIL SUIT NO. 47 OF 2012**

**ZEPHANIA KHISA SAUL ..... ] PLAINTIFF**

**VERSUS**

**GEORGE CHAYUGA ALIAZA ..... ] DEFENDANT**

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**RULING**

The plaintiff/Applicant brought a notice of motion dated 4th September 2013 seeking two prayers namely:-

1. That both the defence and and counter-claim be struck out with costs.
2. That the defendant, his agents, servants and anybody acting under his instruction be evicted from LR No. Kakamega/Mabusi/416.

The grounds upon which the applicants seeks the orders are that the transaction between the applicant and respondent did not receive consent of land control board within 6 months as required under the Land Control Act. The second ground is that the counterclaim filed by the respondent does not contain a verifying affidavit which is contrary to to the Civil Procedure Rules.

The application is based on the supporting affidavit of James Wafula Masai, Counsel for the applicant who argues that the transaction is null and void for want of consent of the land control board as well as non compliance of the Civil Procedure Rules.

The application was opposed based on the respondent's replying affidavit sworn on 18th September, 2013. The respondent contends that he filed defence and counter-claim in 2009 and later amended the same on 24/9/2010 and that therefore the new Civil Procedure Rules had not come into force and cannot be invoked as they do not operate retrospectively. The respondent also contends that the applicant's application is brought in bad faith and that it is an abuse of the process of court. The respondent argues that the defence and counter-claim ought not to be dismissed but should instead be let to be heard on merits.

I have considered the applicant's application as well as the opposition to the same by the respondent. It is true that as at September 2010, the new Civil Procedure Rules had not come into force. The same came into force in December 2010. But this notwithstanding, the then order VII Rule 1(i) (e) and (2) provided that a plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.

A counter-claim is as good as a plaint and a party to a counter-claim ought to swear an affidavit verifying the correctness of the averments contained therein. Sub rule (3) of the previous rules provided that the court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.

Under the new Civil Procedure Rules of 2010 order 4 rule (6) is similar to the previous order VII Rule 1 sub rule (3) only that the latter specifically mentions a counter-claim. The question which then calls for determination is whether the counter-claim herein should be struck out. The rule requiring either the court to dismiss a plaint or counter-claim which is not accompanied by a verifying affidavit on its own motion or on application by plaintiff is not conched on mandatory terms. The term used is "may". It therefore connotes an element of discretion on the part of the court.

In the present case it is not contested that the transaction between the applicant and the respondent did not receive consent of the land control board. It therefore follows that the same is null and void. The only recourse to such void transactions is claim of refund of money paid by the purchaser. The respondent herein has counter-claimed for the refund of the purchase price. It will therefore be unfair to strike out the counter-claim merely because there is no verifying affidavit. One of the reasons which informed the introduction of the requirement of verifying affidavit was to avoid parties filing a multiplicity of suits. It was meant to make the parties to claims to be responsible for what is averred in the claims. This is a procedural requirement which can be overlooked in the interest of greater justice.

In the circumstances, find that the application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Kitale on this 30th day of January 2014.**

**E. OBAGA**

**JUDGE**

**In the presence of the plaintiff**

**Court clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**30/1/14**