



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 453 OF 2012**

**DANIEL LEMOMO MATUNGE ..... PLAINTIFF**

**VERSUS**

**JOSEPH C. SUPEYO TUMPES.....DEFENDANT**

**R U L I N G**

1. In the matter herein, the Plaintiff lodged his claim over **L.R. No. Kajiado/Langosua/1569** inter alia and served upon the Defendant.
2. The plaint is dated 26<sup>th</sup> November 2012. The Defendant responded by filing Defence and on page 2 of the Defence inserted what he called “**COUNTERCLAIM**” dated 31<sup>st</sup> January 2013.
3. The plaintiff replied to the same defence and the counterclaim by filing Reply to Defence and Reply to counterclaim dated 7<sup>th</sup> March 2013. In the plaintiff’s reply aforesaid, he never complained and/or impugn or fault the counterclaim herein.
4. However on 18<sup>th</sup> September 2014 the Plaintiff lodged a notice of Preliminary Objection which principally complains of the contravention of **Order 7 Rule 8 of the Civil Procedure Rules** and thus the Plaintiff seeks the same counterclaim to be struck out.
5. The parties herein agreed to dispose the same Preliminary Objection by way of written submissions. It is the Plaintiff’s case that **Orders 7 Rule 8** are mandatory as they are to the effect that;

***“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff together with any other person(s), he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross action, and shall deliver to the court his defence for service on the plaintiff within the period which he is required to file his defence.”***

6. The plaintiff submits that the word used is ‘**SHALL**’ which is in mandatory term where failure to comply with it will render the pleadings invalid in law.

He relied on authorities of:

**NBI HCC 259/05 Wilfred Dickson Katibi versus Barclays Bank of Kenya & 2 Others.**

However in another authority by the Plaintiff namely:

**MSA HCC 233/2010 Bridge-up Container Services Ltd. Versus CFC Stanbic Bank Ltd;**

7. In a Preliminary Objection raised therein for non-compliance with provisions of **Order 7 Rule 8 Civil Procedure Rules, Okwengu J**, upheld the Preliminary Objection but allowed the Defendants therein to amend their pleadings.

The Plaintiff concludes by urging court to strike out the counterclaim.

8. The Defendant opposes the Preliminary Objection and submits that the provisions of **Order 7 Rule 8** is limited to the issues concerning heading of the counterclaim, and such is only a matter of form rather than substance.

9. The Defendant submits that the Preliminary Objection is not well founded as it does not raise a clear point of law fit for consideration as a Preliminary Objection. The Defendant cites the Authority of:

**Mukisa Biscuit Co. Ltd. versus Westend Distributers Ltd. (1969) EA: P.701.**

10. The Plaintiff also cites the Authority of **D.T. Dobie & Co.(Kenya) Ltd. Versus Muchina (1982) KLR 1Pg** which is to the effect that;

*“Only...hopeless and plainly and obvious suit which discloses no reasonable cause of action and which are so weak as to be beyond redemption and incurable by defence should be summarily be dismissed.”*

11. The same line of authorities were cited by the Defendants namely:

- i. Gailey & Roberts Ltd. versus Krishna & Sons Ltd.
- ii. Chandaria & Another versus Solomon Muthama.
- iii. Alfred Gekonge Okongo versus Kenyatta University.

All of them preferring an option of an amendment of pleading rather than striking out of the same.

**Determination:**

The complaint on counterclaim raised is one of the form. A closer look at the content of **Order 7 Rule 8** reveals that the rule prescribes how to format and configure a counterclaim. This is in the realm of making counterclaim have an appeal aesthetically but not affecting the substance.

The counterclaim herein clearly sets the content of the claim against the plaintiff other than the alleged default in configuration in line with **Order 7 Rule 8**, the claim is very clear against the plaintiff.

12. **Judge Okwengu in Bridge-up Containers Ltd. Versus CFC Stanbic Bank Ltd. HCC No.233/2010 MSA** on the Preliminary Objection on non-compliance with **Order 7 Rule 8**, held that;

*“ the defects are not fatal...the ends of justice will be met by giving the defendant an opportunity to amend the Defence and counterclaim.”*

Further **Order 2 Rule 14** outlaws technical objections to any pleadings on the grounds of want of form. **Rule 15** of the same Order mandates court to order amendment or striking out of the pleadings at any stage of proceedings. In the spirit of **Article 159(2)** of the Constitution, I take **Okwengu J**, view and path of opting to amendment rather than striking out.

13. In the same vein I decline to uphold the Preliminary Objection herein, but instead order the Defendant to amend the Defence and the counterclaim in line with the provisions of Order 7 Rule 8 Civil Procedure Rules.

14. The court therefore makes the following orders;

1. The Defence and counterclaim be amended, filed and served within 14 days.
2. Costs of the Preliminary Objection to the Plaintiff in any event.

**DATED, SIGNED and DELIVERED at MACHAKOS this 31<sup>ST</sup> day of OCTOBER, 2014.**

**CHARLES KARIUKI**

**JUDGE**