



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 358 of 2009

LUCY NYOKABI KIARIE.....PLAINTIFF

VERSUS

DAVID WAHOME GITONGA.....1<sup>ST</sup> DEFENDANT  
MARY NYAKIO KANINI.....2<sup>ND</sup> DEFENDANT/APPLICANT  
SETTLEMENT FUND TRUSTEES.....3<sup>RD</sup> DEFENDANT  
KENYA COMMERCIAL BANK LTD.....4<sup>TH</sup> DEFENDANT

RULING

The notice of motion dated 23/11/2012 is brought pursuant to **Order 8** and **7** and **Order 10 Rule 3** of the **Civil Procedure Rules**. The applicant is the 2<sup>nd</sup> defendant, Mary Nyakio Kanini. She seeks orders that the amended plaint dated 22/1/2010, be struck out for failing to comply with **Order 8 rule 7(1)** of the **Civil Procedure Rules**; that the reply to defence and counterclaim dated 23/8/2011, and served on 19/10/2011, on the 2<sup>nd</sup> respondent's counsel, Mwicigi Kinuthia & Co. Advocates, be struck out as it contravenes **Order 7 Rule 11** of the **Civil Procedure Rules** and that the applicant be at liberty to fix the suit for formal proof of the counterclaim. The application is premised on grounds found in the body of the application and the affidavit of the applicant.

It is the applicant's contention that the amended plaint was served on her advocate on 5/7/2011, her advocate filed a defence and counterclaim on 21/7/2011, the plaintiff filed a reply to her defence on 11/9/2011, 52 days later and served it on her advocate on 19/10/2011 35 days later. It is also the applicant's contention that the amended plaint is incurably defective because it does not comply with **Order 8 Rule (7)(1)** of the **Civil Procedure Rules** wherefore she prays that the amended plaint and reply to defence be struck out under **Order 10 Rule 3**.

The application was opposed. Mr. Wahome Ndegwa, counsel for the plaintiff swore a replying affidavit dated 23/10/2012, in which he depones that the respondent fully complied with provisions of **Order 8 Rule 7(1)** and the complaint is baseless. He then admitted that the respondent did not strictly comply with **Order 10 Rule 3** and **Order 7 Rule 11** of the **Civil Procedure Rules** but the provisions are discretionary and the court is required to do substantial justice and exercise its inherent jurisdiction under **Section 1A** of the **Civil Procedure Act** and deem the pleadings to be duly filed and properly on record. Counsel also urged that no prejudice will be suffered by the applicant because she filed a reply to the reply to defence; that this being a land matter, the court should exercise its discretion and hear the parties on merit. **Order 8 Rule 7(1)** of the **Civil Procedure Rules** states as follows:-

**“O.8 r.7(1). Every pleading and other documents amended under this order shall be endorsed with the date of the amendment and with the date of the order allowing the amendment or, if no order had been made, the number of the rule in pursuance of which the amendment was made.”**

I have seen the amended plaint which was brought pursuant to **Order IVA Rule 1** of the **Civil Procedure Rules**. It is dated 22/1/2010 as the date of the amendment. However, it does not contain an endorsement as to the provision under which the amendment was done or the order allowing the amendment as required by Order 8 Rule 7 of the Civil Procedure Rules. The amended plaint did not fully comply with **Order 8 Rule 7(1)** of the **Civil Procedure Rules**. However, the applicant has not demonstrated how the said omission is prejudicial to her case.

The record does confirm that the applicant filed her defence and counterclaim on 14/7/2011. The respondent does not deny that it was served on 21/7/2011. The reply to the applicant's defence was not filed till 14/9/2011. The applicant says that it was a period of 52 days since the service of the defence. **Order 7 Rule 11** provides as follows:-

**“O.7 r.11. Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within 15 days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.”**

According to the above subrule, once one is served with a defence and counterclaim, he is required to reply within 15 days of service of the said defence and serve all the parties to the suit. The subrule is couched in mandatory terms but it does not state what sanction the plaintiff will face in the event he fails to serve the reply in time. In the instant case, the respondent did not file reply till 52 days after service, and even after filing it, did not serve it for 35 days. The delay was indeed inordinate and there has been no explanation for the said delay. Since the respondent did not reply within the requisite time, the applicant was at liberty to apply for judgment on the counterclaim in default of a defence. However, instead of taking that option, the applicant decided to file a reply to defence to counterclaim on 28/12/2011, thus acquiescing to the irregularity. Firstly, since the above provision did not provide any sanction, it means the court has discretion to admit the reply to defence and counterclaim filed out of time. Secondly, having filed a reply to the reply to defence and counterclaim, the applicant overlooked the omission by the respondent. The applicant has not indicated what prejudice the delay has caused to her. I would adopt the reasoning in the decision of **Rogers v Goods [1948] 1 ALL FR 38**, cited in (**The Kenya Rlys Corporation v National Cereals Produce Board CA 62/98**) where the court said:-

**“a party who has appeared but is in default of pleadings should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward. Further, doors of justice must not be closed to an innocent litigant because counsel made a blunder or committed an excusable mistake or innocent omission.”**

The above decision urges the courts to look at the substance nature of the case than lock out parties based on technicalities. In this case, the respondent has already filed a reply to which a reply has been filed. The court cannot ignore the reply to defence and counterclaim. I would agree with J. Kimaru's reasoning in **Rongai Workshop and Transporters Ltd v Fredrick Wanjala & Another [2006]eKLR**, where the applicant sought to have the defence struck out because the defence was filed and served out of time. The court observed that the rule allegedly breached was only meant to hasten the process of litigation by mandating the parties to do certain things within a certain period of time so as not to delay the fast determination of the case and was never meant to be an impediment to the administration of justice. The applicant has failed to demonstrate that she will suffer any prejudice by the said delay. As observed above, she has already filed a reply to the reply to defence. Besides, the dispute herein relates to ownership of land whereby the respondent claims to be the owner and wants the court to declare him as such. In the reply to the counterclaim, the respondent contends that the said land was fraudulently subdivided and illegally allocated to the applicant. These are serious allegations that raise serious triable issues that can only be resolved at a full hearing on the merits, so that each party has their day in court. Under **Section 1A** of the **Civil Procedure Act**, this court is enjoined to do substantial justice to the parties without undue regard to technicalities. Striking out the respondent's pleadings due to a mere delay which seems to be the mistake of counsel would be draconian and prejudicial to the respondent.

I disagree with the applicant's contention that the omissions committed by the respondent go to the root of the suit herein and the court would be committing an injustice if it were to strike out the plaint based on

technicalities rather than considering the whole case on merits.

For the above reasons, I decline to grant the application and it is hereby dismissed. However, because the respondent did not have any explanation for the delay and it is because of the respondent's omission that this application was proffered, I direct that the costs of this application be awarded to the applicant, which in any event, is adequate compensation to the applicant. Thereafter, this suit should be heard and determined on the merits, once the parties have complied with all the preliminaries. It is so ordered.

**DATED and DELIVERED this 30<sup>th</sup> day of January, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Mureithi for the plaintiff

Mr. Kamau holding brief for Mr. Kinuthia for the defendant/applicant

Kennedy – Court Clerk