



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 482 of 2011**

**ELSEK & ELSEK CONSTRUCTION LTD. ::::::::::::::: PLAINTIFF/APPLICANT**

**- VERSUS -**

**THE PRESBYTERIAN UNIVERSITY OF EAST AFRICA**

**REGISTRED TRUSTEES ::::::::::::::: DEFENDANT/RESPONDENT**

**R U L I N G**

1. Before the court is the application dated **11<sup>th</sup> February 2013** which seeks the following orders:-
  - 1) That the Defence and Counter-claim dated 4/6/2012 be struck out for non-compliance with the law, to wit, Order 7 Rule 1, 3 and 5 of the Civil Procedure Rules 2010.
  - 2) That in the alternative and without prejudice to prayer number 1, the Defendant/Respondent be ordered to file and serve within a period to be specified by the court the following documents:-
    - a) An affidavit under Order 4 Rule 1 (2) of the *Civil Procedure 2010*.
    - b) *A list of witnesses to be called at the trial.*
    - c) *Written statement signed by the witnesses except expert witnesses.*
    - d) *Copies of the documents to be relied on at the trial.*
  - 3) That time for filing the reply to the Defence and the Defence to the Counter-claim be enlarged.
  - 4) That the time for the Pre Trial Directions be extended accordingly.
2. The application is premised on the grounds set out therein and supported by affidavit of **MR. MBUTHI GATHENJI** dated 11<sup>th</sup> February 2013 with annexures thereto.
3. The application was served upon the Defendants but there has been no response thereto and on 11<sup>th</sup> March 2013 I allowed the Applicant to proceed with the same.
4. It is submitted for the Applicant that the Defence and Counter-claim dated 4/06/2012 should be struck out for non-compliance with the law to wit, Order 7 Rule 1, 3 and 5 of the Civil Procedure Rules 2010. Order 7 Rule 5 specifically requires that a Defence and Counter-claim filed under Rules and 2 shall be accompanied by:-

- a) *An affidavit under Order 4 Rule 1 (2) where there is a counter-claim.*
- b) *A list of witnesses to be called at the trial.*
- c) *Written statements signed by the witnesses except expert witnesses.*
- d) *Copies of documents to be relied on at the trial.*

5. It appears that the Defence and Counter-claim dated 4/6/2012 has not complied with the provisions of the law and on the basis the Applicant submits that the same should be struck out.

6. I have looked at both the law and the Defence and Counter-claim. It is clear that the same is not filed as required under the law. However, striking out the Defence and Counter-claim may be a draconian remedy. Out of an abundance of caution I direct the Defendant/Respondent to adjust its pleadings to enable the Plaintiff to traverse the defence. In that regard I allow prayer 2 of the application.

7. I also herewith enlarge the time for filing the reply to the defence and the Defence to Counter-claim by 21 days after the Defendant/Respondent complies with the Order 2.

8. The Defendant shall have 14 days from the date of this Ruling to comply with Order 2. Accordingly the time for Pre-Trial Directions is extended and the same shall be completed within 60 days from the date of this Ruling.

9. The costs of this application shall be in the cause.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 15<sup>TH</sup> DAY OF APRIL 2013**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

*Gathenji for the Plaintiff/Applicant*

*No appearance for the Defendant/Respondent*

*Teresia – Court Clerk*