



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC NO. 233 OF 2010

BRIDGE-UP CONTAINER SERVICES LTD.....PLAINTIFF

VERSUS

C.F.C. STANBIC BANK LTD.....DEFENDANT

RULING

1. By a notice of motion dated 4th February, 2011, the plaintiff seeks to have the defendant's counterclaim dated 25th August, 2010 struck out with costs. It is contended that the counterclaim is defective as it has no title nor is it supported by a verifying affidavit. The defendant has filed grounds of opposition objecting to the application, contending that there was no legal requirement for a verifying affidavit at the time the defence and counterclaim was filed. It is maintained that the application is incompetent as it purports to apply the Civil Procedure Rules 2010 which were not in force at the time the defence and counterclaim were filed. Thus the application is frivolous, vexatious and an abuse of the court process.
2. Relying on *Nahyer Shariff Hassan Alwi vs. Housing Finance Company Limited & 2 Others - Civil Suit No. 269 of 2009* it was argued that a counter claim is a cross suit which has a separate life from the plaint. It should therefore be supported by a verifying affidavit as required under Order VII Rule 2 (2) of the former Civil Procedure Rules.
3. I have given due consideration to this application. I take note of the fact that the defence which raises the counterclaim was filed on the 26th August, 2010. This was before the Civil Procedure Rules 2010 came into effect. Nonetheless a counterclaim is a statement of claim by the defendant against the plaintiff. It bears all the characteristics of a plaint except that it is a claim brought up after the plaintiff's

claim, and filed partly in response to the plaintiff's claim.

4. Notwithstanding the fact that Order VII Rule 2 of the former edition of the Civil Procedure Rules which provided for the swearing of a verifying affidavit made no reference to a counterclaim, a counterclaim being the document initiating the counter suit against the plaintiff, must of necessity be accompanied by the verifying affidavit, verifying the correctness of the averments contained in the counterclaim. Order 7 Rule 5 (a) of the Civil Procedure Rules 2010 has only reinforced this position by specifically providing for a verifying affidavit. Therefore the filing of the counterclaim without a verifying affidavit renders the defendant's counterclaim defective. It is also evident that Order 7 Rule 8 of the Civil Procedure Rules 2010 makes specific provides for title of counterclaim. The defence filed has not complied with this provision.

5. In my view, the above defects are not fatal. It is evident to me that the ends of justice will be met by giving the defendant an opportunity to amend the defence and counterclaim and provide an appropriate verifying affidavit. Accordingly, I decline to grant the motion dated 4th February, 2011. I order that the defendant shall file an amended defence and counterclaim within 7 days from the date hereof. The defendant shall pay costs of the motion to the plaintiff.

6. Those shall be the orders of this court.

Dated, Signed and delivered this 31st day of October, 2011.

H. M. OKWENGU

JUDGE

In the presence of:

Sitonik H/B for Gikandi for the Plaintiff

Oduor for the Defendant

Kiponda Court Clerk