



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 72 OF 2008**

**OIKO CREDIT, ECUMENICAL DEVELOPMENT COOPERATIVE  
U.A.....PLAINTIFF**

**VERSUS**

<b>NANDI TEACHER CO-OPERATIVE SAVING &amp; CREDIT LIMITED.....</b>	<b>1<sup>ST</sup></b>
<b>DEFENDANT</b>	
<b>HENRY K. BIRGEN.....</b>	<b>2<sup>ND</sup></b>
<b>DEFENDANT</b>	
<b>PAUL K. KORIR.....</b>	<b>3<sup>RD</sup></b>
<b>DEFENDANT</b>	
<b>BENJAMIN K. KORIR.....</b>	<b>4<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>BEN K. RUGUTT.....</b>	<b>5<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>SAMUEL KIRWA.....</b>	<b>6<sup>TH</sup></b>
<b>DEFENDANT</b>	

**RULING**

By this application dated 22<sup>nd</sup> March, 2011, M/s Nandi Teachers Cooperative Savings & Credit Society Limited (hereinafter “the applicant”) seeks the striking out of the plaintiff’s application dated 28<sup>th</sup> October, 2010 and further that all proceedings in this suit be stayed. By the application dated 28<sup>th</sup> October, 2010, thereafter the plaintiff’s application (an order is sought) dismissing the defendant’s counter claim for being scandalous frivolous, vexatious and an abuse of the court process.

This application is premised on four grounds expressed on the face of the application as follows:

- 1) That there is an active appeal at the Court of Appeal filed by the plaintiff challenging the applicant’s counter-claim which is the subject of the plaintiff’s application.**
- 2) That this application is *res judicata* by virtue of the ruling delivered on 28<sup>th</sup> April, 2010.**
- 3) That the application is *sub-judice* given the said appeal.**

#### **4) That the applicant will be heavily prejudiced if the plaintiff's application is heard.**

The application is brought under sections 3A, 6 and 7 of the Civil Procedure Act, Order 51 Rule 1 and Order 42 Rule 6(1) of the Civil Procedure Rules. There is an affidavit in support of the application sworn by one Alfred Ngetuny the Chairman of the applicant which is on elaboration of the above grounds. The application is opposed and there is a replying affidavit sworn by one Betty Kirai the Legal Officer of the plaintiff. In the affidavit the plaintiff acknowledges that it has lodged a Notice of Appeal against the ruling of 25<sup>th</sup> April, 2010 but that these proceedings have not been stayed that as it desires a speedy disposal of the counter claim it sought particulars thereof failing which it sought the striking out of the counter claim which application is neither *res-judicata* nor *sub judice*.

The application was canvassed before me on 12<sup>th</sup> October, 2011 and counsel restated the positions taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and counsels submissions. Having do so, I take the following view of the matter, Mwilu J. by her ruling aforesaid struck out the defences on the grounds that the same raised no triable issue and entered judgment for the plaintiff as prayed in its plaint. The Learned Judge until the trial of the counter claim. It is plain therefore that a trial of the counter-claim is to be told. The counter-claim as cross claim however, is still subject to rules of procedure. The ruling did not bar either party from seeking particulars or taking any other step to prepare the counter-claim for trial. The plaintiff contends that it sought particulars of the counter-claim which were not supplied. That was a step towards preparing the counter-claim for trial. It cannot be faulted for that request indeed the applicant does not seem to have challenged that request for particulars. If the applicant's default to supply, particulars triggered the plaintiff's said application, the same cannot be said to be *res judicata* by reason of the ruling of Mwilu J. aforesaid. The cases relied upon by the applicant are clearly distinguishable from this case. In the premises the plea of *res judicata* is misconceived and is therefore dismissed.

Is the plaintiff's application caught by the *sub judice* rule? That with respect to the applicant, cannot be the case given the clear provisions of Order XLI Rule 4(1) of the rules which then applied. The opening words of the rule read as follows:

**"4(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order....."**

The applicant has not alluded to any order having been given staying these proceedings for the premises the applicant's reliance on the *sub judice* rule is also clearly misconceived.

How about the allegation of prejudice? The applicant contends, in paragraph 15 of its supporting affidavit, that should the plaintiff's application be heard and its counter-claim struck it may not have an opportunity of being heard on merit. That may very well be the case but any litigant must accept to lose or succeed and as long as the process is fair, I detect no prejudice. If the applicant desired a stay of the ruling of Mwilu J. it should have sought an order to that effect.

The upshot is that I find there is no substance to this application and I dismiss it with costs.

Order accordingly.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2011**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:  
Mr. Keter H/B for Mr. Songok for the Respondent.

**F. AZANGALALA**

**JUDGE**

**23<sup>RD</sup> NOVEMBER, 2011**