



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 203 OF 2008

STEPHEN MARIGI
GATHIGI.....PLAINTIFF/APPLICANT

VERSUS

GABRIEL GATHECA GITURA.....1ST
DEFENDANT/RESPONDENT

MOSES SIRONIK MURAYA.....2ND
DEFENDANT/RESPONDENT

NDUNGU MWANIKI.....3RD
DEFENDANT/RESPONDENT

RULING

This application is brought by way of a Chamber Summons dated 13th November, 2009, and taken out under **Order VI Rule 13(1) (a)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. By the application, the Plaintiff/Applicant seeks from the court an order that this Honourable court be pleased to strike out the counterclaim herein with costs to the Plaintiff. He also prays that the costs of the application to be provided for.

The application is premised on the following grounds –

- 1) That the counterclaim as drawn, filed and taken out, is fatally defective at law and must be struck out.**

2) That it is in the interests of justice and fair play that the counterclaim herein be struck out.

Each of the parties filed written submissions. The Plaintiffs contended in their submissions that the Civil Procedure Rules provide that a plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Plaint. Therefore, it was their submission that the Defendants' counterclaim was a suit in its own right and the same ought to be accompanied by a verifying affidavit affirming the correctness of the averments contained in the counterclaim. They further submitted that having been filed without a verifying affidavit, the Defendants' counterclaim was a contravention of the **Civil Procedure Rules** and that it ought to be dismissed. For an authority, they relied on the case of **JAMES FRANCIS KARIUKI & ANOR v UNITED INSURANCE CO LTD, HCCC (Milimani) No 1450 of 2000 (UR)**.

On their part, the Defendants argued in their submissions that whereas the application was predicated on **Order VI Rule 13 (1) (a)** of the **Civil Procedure Rules**, the grounds for the application were not in tandem with the provisions of **Rule 13**. For that reason they submitted that the application was fatally defective. They further submitted that the counterclaim raises a reasonable cause of action and therefore should not be struck out. They relied on **NAZIWA v SERWANIKO & ANOR, (1972) EA 246** in support of these contentions. They also referred to **D.T. DOBIE & CO. (KENYA) LTD v. MUCHINA [1982] KLR 1** and submitted that a cause of action is an action with a chance of success and that the counterclaim herein raises a reasonable cause of action. In the alternative, even if it did not raise a reasonable cause of action, it could be amended in order to be compliant. In the interests of justice, they urged the court to dismiss the application with costs.

I have considered the application and the submissions of the respective parties. Although the Defendants have gone to great lengths to respond to the application, the only issue raised by the applicant's pleadings is narrowed down to whether the counterclaim in this case is defective for want of a verifying affidavit. The answer to that question is in the negative. **Order VII Rule 1 (2)** of the **Civil Procedure Rules** is very clear. For the avoidance of any doubt, it states that –

“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Plaint.”

It is instructive that the rule speaks of **“the plaint”** and **“the Plaintiff”**. It does not mention the defendant or counterclaim anywhere. It therefore applies to plaints exclusively but does not extend to counterclaims. If the intention of the Rules Committee was that the provisions of **Order VII** should apply to counterclaims, mutatis mutandis, nothing would have been easier than for them to say so. But since they did not say so, it follows that counterclaims are not covered and do not fall within the purview of the requirements of **Order VII Rule 1(2)** of the **Civil Procedure Rules**. Counterclaims, therefore, do not have to be accompanied by verifying affidavits.

The Plaintiff's Advocates relied on the case of **JAMES FRANCIS KARIUKI & ANOR v UNITED INSURANCE CO. LTD** (Supra) as an authority for their proposition that failure to accompany a counterclaim with a verifying affidavit renders the counterclaim defective. With respect, that case did not take that direction both on facts and the law. In that case there was a verifying affidavit. Unfortunately for the Plaintiff, that affidavit was sworn by a partner in the firm of Advocates acting for the Plaintiff instead of being sworn by the Plaintiff himself. This was a travesty of **Order VII Rule 1 (2)** which requires that a verifying affidavit should be sworn **“by the Plaintiff”**. Further, it did not reveal the place where it was sworn. This was contrary to the requirements of **Section 5** of the **Oaths and Statutory Declarations Act**. For these reasons, the case relied on by the applicants is distinguishable from the present case and the two are poles apart.

On the other hand, I share the sentiments of Kasango, J. in **PETER NGANGA NJONGE & SERAH MWIHAKI NGANGA vs. EURO BANK LTD. & ORS., HCCC NO. 1489 of 1999**, in which the

learned Judge found, as I do in this case, that the requirements for a verifying affidavit as postulated in **Order VII Rule 1(2)** of the **Civil Procedure Rules** does not extend to cover counterclaims. It is also noteworthy that this application is brought under **Order VI Rule 13(1) (a)** of the **Civil Procedure Rules** which does not invoke the jurisdiction of this court vis a vis verifying affidavits. Failure to invoke that jurisdiction renders the application incompetent.

For the above reasons, I find that the application to strike out the counterclaim has neither basis nor merit and it is hereby dismissed with costs to the Defendants.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 9th day of December, 2010.

L. NJAGI

JUDGE