



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2066 of 2007**

**LEO INVESTMENT LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**TERRY WANJIRU KARIUKI.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me is the chamber summons dated 18/03/2009 brought by the Plaintiff/Applicant. The same is expressed to be brought under Order VII Rules 1 (3) and 10 of the Civil procedure Rules and section 3A of the Civil Procedure Act seeking ORDERS:-

1. *THAT the Honourable court be pleased to struck (sic) out the Defendant's counter-claim filed herein on 5<sup>th</sup> December 2006.*

2. *THAT the Defendant do pay the costs of the counter-claim and this application.*

2. The application is supported by the affidavit of Rahim Chatur dated 18/03/1009 and on the grounds that:—

(i) *The entire counter-claim violates the clear provisions of the Civil procedure Rules*

(ii) *The counter-claim amounts to one outright abuse of the court process.*

(iii) *The counter-claim is bad in law*

(iv) *The counter-claim is fundamentally defective.*

3. In his supporting affidavit Mr. Rahim Chatur, who says he is one of the directors of the Plaintiff Company says that the Defendant's counter-claim cannot stand because according to advice received from his advocate on record, the Defendant has not filed a verifying affidavit to support the counter-claim. Mr. Chatur urges this Honourable court to strike out the counter-claim for lack of a verifying affidavit.

4. The application is opposed. The Replying Affidavit sworn by the Defendant Terry Wanjiru Kariuki on 21/05/2009. She says that according to advice received from her advocate, on record:—

a. *Order VII of the Civil procedure Rules Cap.21 does not have any bearing on defences and counter-claim only on plaints (sic)*

b. *Order VIII of the Civil Procedure Rules Cap. 21 sets out the procedure of Defences and counter-claim and there is no provision of filing a Verifying Affidavit to a defence OR a Defence and counter-claim.*

c. *Order VII Rule 1 (3) is only available to a Defendant not a Plaintiff and this is on a Defendant challenging a plaint by the Plaintiff who has not filed a Verifying Affidavit.*

d. *The counterclaim is proper on the record. (sic)*

5. To throw light on the arguments put forth by parties, Order VII Rules 1 (3) and 10 provide:—

*“1 (3) The court may of its own motion or on the application of the Defendant order to be struck out any plaint which does not comply with sub-rule (2) of this rule.*

*“10. Applications under this Order shall be by summons in chambers.*

Subrule 2 of rule 1 provides:—

*(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint:*

It is to be noted that there is no corresponding provision under rule 1 to rule 2 (2) which says that the provisions of rule 2 dealing with money suits “shall apply to counter-claim.”

6. Order VIII of the Civil procedure Rule deals with Defence and counter-claim. Rules 6 and 7 thereof are relevant and they provide —

*“6. where a Defendant by his defence sets up any counter-claim which raises questions between himself and the Plaintiff, together with any other persons, he shall add to the title of his defence a further title similar to the title in the plaint setting forth the names of all persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence.” (emphasis is mine)*

At the hearing of the application both counsel made submissions regarding their respective positions on the matter. Mr. Oyugi, advocate who appeared for the Plaintiff/Applicant argued that in the absence of a Verifying Affidavit as provided under Order VIII Rule 2 of the Civil Procedure Rules, the Defendant’s counter-claim must fail. Rule 2 of Order VIII provides that a counterclaim, whether it is for a liquidated or unliquidated amount, “*shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim*”. The rule does not make provision similar to what is provided by Order VII Rule 1 (2) which Rule requires the plaint to “*be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.*”

7. Mr. Oyugi also referred to rules 7 (supra) and 17 of Order VIII. Rule 17 deals with subsequent pleadings after the filing of a defence. In my view, this rule is not relevant to the issue before court. Mr. Oyugi referred the court to two cases:- Apidi –vs- Shabir V Another [2003] KLR 588. The issue in that case was the lack of a Verifying Affidavit in terms of Order VII Rule 2 of the Civil Procedure Rule and the court held that the “*Lack of a Verifying Affidavit to verify the averments contained in the amended plaint rendered the suit a nullity*”. The contest in the instant suit is whether a Defendant ought or should file a verifying affidavit to verify the correctness of the averments contained in the counter claim.

8. In the case of Bishop Joshua Gawo & Others (Applicants) and Nairobi City Council & Others (Respondents Court of Appeal at Nairobi – Civil Application No. NAI 345 of 2000, the issue that arose was the mandatory requirement that the plaint should be accompanied by a verifying affidavit. In the case, the Plaint was not accompanied by a verifying affidavit, as a result of which the plaint was struck

out for failure to comply with Order VII Rule 1(2) of the Civil Procedure Rules. Again, the issue in the instant suit is not the plaintiff but the counter claim which is not accompanied by a Verifying Affidavit.

9. On his part, Mr. Kahuthu advocate for the Defendant/Respondent argued that the rules cited by the Applicant affect Plaintiffs and plaintiffs and not Defendants and counter claims. He argued that if the Rules Committee intended that provisions similar to Order VII Rule 1(2) of the Civil Procedure Rules apply to counterclaims the Committee would have said so clearly and plainly. Mr. Kahuthu urged the court to disallow the application so that the case, both original and counterclaim, can be determined on the merits.

10. On the basis of the law and the submissions made by both counsel, I am persuaded to agree with Mr. Kahuthu advocate for the Defendant/Respondent that if the Rules Committee wanted the requirement for a Verifying Affidavit to verify the averments in a counterclaim an appropriate provision would have been made. In the absence of such a provision I would have no basis for granting the orders sought.

11. In the result, the Plaintiff's application dated 18/03/2009 and filed in court on 19/03/2009 be and is hereby dismissed with costs to the Defendants/Respondents.

Orders accordingly.

Dated and delivered in Nairobi this 17<sup>th</sup> day of September, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Muindi for Oyugi For the Plaintiff/Applicant

Mr. Kahuthu for the Defendant/Respondent

James Nyagah – Court clerk