REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

Civil Suit 259 of 2005

WILFRED DICKSON KATIBI ……………..………………..…....…………PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA …………...…………………..…...…1ST DEFENDANT

PHILEMON LAMECK IMO ………………………..…….………..2ND DEFENDANT

STANDARD CHARTERED BANK (K) LTD ………………...…......3RD DEFENDANT

The Plaint was filed on 16th

RULING

The Plaint was filed on 16th May 2005. Simultaneously with the Plaint, was filed a Chamber Summons seeking an interlocutory injunction to restrain the defendants from disposing the suit property.

The 1st and 3rd defendants filed their respective replying affidavits on 3rd June 2005. Meanwhile, the plaintiff had sought and obtained leave to file a supplementary affidavit. He then filed the said supplementary affidavit on 15th June 2005. The 2nd Defendant had filed his replying affidavit on 27th May 2005. Thereafter, all the three defendants filed supplementary affidavits, whilst the plaintiff filed yet a further supplementary affidavit.

When the plaintiff's application dated 16th May 2005 came up for hearing on 20th June 2005, the plaintiff indicated that the suit property had already been transferred. He therefore notified the court that the application had been overtaken by events, to the extent that it sought to restrain the transfer of the suit property. However, the plaintiff was still keen to prosecute his application to restrain the defendants from evicting him from the suit property.

Initially, the parties were in agreement that the matters in issue, in the application did not touch on the 1st defendant. Therefore, the 1st defendant was permitted to withdraw from the proceedings on the application. However, as soon as the plaintiff commenced his submissions, it became obvious that the same had a direct bearing on the 1st defendant. Therefore, the application was adjourned, so as to allow the 1st defendant be present in court whenever the application was being canvassed. The order for adjournment of the plaintiff's application was made on 19th July 2005. But, because the said adjournment was at the behest of the plaintiff, the court did not extend the interlocutory orders, for the maintenance of the status quo.

On 9th August 2005, the 2nd defendant filed an application for the eviction of the plaintiff from the suit property. The said application was premised on the fact that as from 1st April 2005, the 2nd defendant was the registered proprietor of the suit property. Prior to the application by the 2nd defendant, he had filed his Defence, and Counter-claim, on 4th August 2005.

The plaintiff then filed a Notice of a Preliminary Objection, on 24th August 2005. Basically, it was contended that the 2nd defendant's Defence and Counterclaim were fatally defective, for non-compliance with the mandatory provisions of Order 8 rule 7 of the Civil Procedure Rules. The said rules stipulate that a counter-claim should have a title similar to the title in a Plaint.

At that point in time, the 2nd defendant submitted that the preliminary objection was based on a technicality, which could be corrected by way of an amendment to the counter-claim, so that it could reflect the title thereto. The plaintiff did not raise any objection to the court giving leave to the 2nd defendant to amend the Counter-claim. Subsequently, the 2nd defendant filed an Amended Statement of Defence and Amended Counter-claim on 7th September 2005.

Notwithstanding the said amendments, the plaintiff still believes that his preliminary objection is valid. The said objection is in the following words;

> **"That the 2nd defendant's amended statement of defence and amended counter-claim of the 2nd defendant offends the provisions of Order 6A rule 7 (1) and the same is fatally defective, and should be struck out with costs to the plaintiff."**

It was the plaintiff's contention that the amended defence and counterclaim were fatally defective because they did not cite the rule pursuant to which they were amended, or the order of the court which granted the 2nd defendant leave to effect the amendments.

When responding to the preliminary objection, the 2nd defendant contended that when he sought leave to amend the counter-claim, it was not on the basis of the preliminary objection, but only because of a desire to bring out the real matters in controversy between the parties, and also for correcting any defects in the pleadings.

From my reading of the record herein, as already brought out when reciting the history of this case, the 2nd defendant's application for leave to amend the counterclaim was prompted by the preliminary objection. And, to quote Mrs. Mureithi, advocate for the 2nd defendant;

> **"I apply for the amendment to incorporate the particulars into the title of the counter-claim."**

Now, that was one of the very reasons given by the plaintiff in his preliminary objection; the failure by the 2nd defendant to have the title to the counter-claim, as stipulated by order 8 rule 7.

In the light of the foregoing, the 2nd defendant cannot be right to submit, as he has done, that his sole intention in amending the counter-claim was to bring out the real issues in contention between the parties. And that fact seems to have been grudgingly conceded at the tail-end of the submissions by the 2nd defendant, when he said that the amendment was also intended to correct any defects in the pleadings.

I am aware that courts often remind themselves that the power to strike out pleadings should be exercised only sparingly, in the clearest of cases. Therefore, the 2nd defendant urged me not to strike out the counter-claim. He cited the case o**f M/s RAMJI MEGHJI GUDKA LTD.–VS- ALFRED MORFAT OMUND MICHIRA & 2 OTHERS, CIVIL APPEAL NO. 335 OF 2001,** as authority for the proposition that courts should be slow to strike out pleadings.

First, I note that the said decision was on an appeal arising from an application to strike out the defence and counter-claim. Therefore, the Court of Appeal said that;

"At that stage the learned Judge had to consider the pleadings and satisfy himself that the defence

filed was a sham, frivolous, vexatious or scandalous. Strong arguments were put before him to show that the defence of the 1st respondent raised triable issues."

I have no doubt whatsoever that the foregoing proposition of law is accurate. But, I do also remind myself that in this matter, I am not dealing with an application to strike out the Defence and Counter-claim. The issue before me is a preliminary objection, which ought therefore to be determined only on the basis of the applicable law. In determining the point raised by the plaintiff herein, the court should not delve into the merits or otherwise of the Defence and Counter-claim.

The point raised by the 2nd defendant, in answer to the preliminary objection was that he was entitled to amend his defence and counter-claim, without leave of the court, as the pleadings had not been closed.

On a strict interpretation of the rules, the 2nd defendant is right. He may well have been entitled to amend his defence and counter-claim without leave of the court. However, the fact is that he did seek, and was given leave to amend the defence and counter-claim.

But first, let us revert to the issue of amendment of pleadings, in principle. Order 6A makes provision for the amendment of pleadings. Rule 1 stipulates that a party may, without leave of the court, amend any pleadings of his once, at any time before pleadings are closed.

Rule 3 provides that the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just, and in such manner as it may direct, allow any party to amend its pleadings.

By virtue of Order 6A rule 8, the court is empowered to entertain either an application by way of chamber summons or even one made orally, if it is for leave to amend pleadings. Accordingly, when this court heard the 2nd defendant's oral application for leave to amend his defence and counter-claim, it was in keeping with the rules. Order 6A rule 7(1) provides as follows;

> **"Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made."**

As I have already noted, the 2nd defendant sought and was granted leave to amend the defence and counter-claim. Therefore, by virtue of O. VIA rule 7 (1) of the Civil Procedure Rules, the Amended Defence and Counter-claim ought to have been endorsed with the date of the order allowing the amendment.

But, even if there had been no order, so that the amendments were effected pursuant to the provisions of Order 6A rule 1 (1), the 2nd defendant was still obliged to endorse the pleading with the number of the rule pursuant to which the amendment was made. As it is, there is neither an endorsement of the order which allowed the amendment or an endorsement of the rule pursuant to which the amendment was made. Therefore, the 2nd defendant has definitely flouted the provisions of Order 6A rule 7 (1) of the Civil Procedure Rules.

In **ALICE WANJIRU NJIHIA –VS- JOHN K. RUKUNGA & ANOTHER HCCC NO. 1835/99**, the Hon. Ang'awa J. upheld a preliminary objection, on the grounds that the defendant had failed to comply with the provisions of Order 6A rule 7(1) of the Civil Procedure Rules. That decision was made on 1st July 2002.

> A few months before that, on 17th January 2002, the Hon. Mwera J. held as follows, in **STOCKMAN ROZEN KENYA LTD. –VS- DA GAMA ROSE GROUP OF COMPANIES LTD. [2002] 1 KLR 572 at 576,**
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> **"We have all agreed that the plaintiff amended the plaint before the close of pleadings**

as provided for by Order 6A (1) of Civil Procedure Rules. The amendment was done at Nairobi on the 23.9.2001. This was not done pursuant to the court's order allowing the amendment. So the plaintiff did not have to endorse the date of such an order…. But the plaintiff was enjoined to endorse on the amended plaint the number of the rule in pursuance of which the amendment was made. The endorsement is mandatory. The word used is "shall". That means failure to comply has fatal effects."

A similar position was taken by the Hon. Mwera J. in **PAN AFRICAN BANK LIMITED (IN LIQUIDATION) –VS- ABRAHAM KIPSANG KIPTANUI, HCCC No 106 of 1997,** wherein he held as follows;

"The court heard that the order to amend was given on 17.6.2002 but it was not endorsed on the amended plaint. The provision of law reproduced above is couched in mandatory terms. Failure to comply with it renders the pleadings invalid in law and ought to be cleansed from the record."

When faced with those formidable authorities, the 2nd defendant asked the court to apply substantive justice, instead of going along with technicalities. I am afraid that the rules of procedure cannot be looked at simply as technicalities. They provide a set up within which the judicial system can systematically dispense justice. If rules were disregarded, as being mere technicalities, our judicial systems would soon be clogged shut by disorderly and radar-less actions.

In conclusion, I uphold the preliminary objection and thus order that the Amended Statement of Defence and Amended Counter-claim of the second Defendant be and is hereby struck out. The costs of the preliminary objection dated 24th November 2005 are awarded to the Plaintiff.

Dated and Delivered at Nairobi this 31st day of January 2006

FRED A. OCHIENG

JUDGE