REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3383 OF 1995

JOHN PATRICK MACHIRA

t/a MACHIRA & CO. ADVOCATES ……PLAINTIFF/APPLICANT

-VERSUS-

GRACE WAHU NJOROGE ……..…DEFENDANT/RESPONDENT

RULING

A. INTEGRITY OF AMENDED DEFENCE & COUNTERCLAIM: PLAINTIFF'S PRAYERS AND DEPOSITIONS

The plaintiff's Chamber Summons application dated 4th August, 2004 and filed on 5th August, 2004 was brought under Order ***VI,*** rule 13(1) (b), (c) and (d) of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21). The prayers set out in the application were as follows:

> *(a) that, the defendant's further amended defence and counterclaim, as filed, be struck out and judgment entered for the plaintiff against the defendant in the terms of the plaint;*
>
> *(b) that, the plaintiff's suit be listed for formal proof;*
>
> *(c) that, the costs of this application be provided for;*
>
> *(d) that, such other or further relief be granted as the Court may deem just to grant.*

The detailed grounds in support of the plaintiff's application run as follows:

> (i) that, the Court had, in a ruling of 19th December, 2003 ordered the defendant to ***amend*** and serve her defence to the plaintiff's suit – "by excluding evidence therein stated and leaving only facts failing which the defence would stand struck out without any need for a further order to that effect";
>
> (ii) that, the ***further amended defence and counterclaim*** are not only vague, ambiguous and imprecise, and contrary to the rules of pleading, but the same comprise mere general denials; the same are frivolous, vexatious and an abuse of the process of the Court;
>
> (iii) that, the defendant's counterclaim is prolix and contains evidentiary material;
>
> (iv) that, the further amended defence and counterclaim is muddled up and is in violation of the

provisions of Order ***VI***A rule 7;

(v) that, the defendant has amended her counterclaim without the leave of the Court, and so the amendment is a nullity and merits being struck out;

(vi) that, the defendant was not a party to the sale agreement of 20th January, 1992 in respect of L.R. No. KAJIADO/KISAJU/532, and hence she has not ***locus standi*** in the said transaction – and the same is irrelevant to the defendant's counterclaim;

(vii) that, the defendant's counterclaim, as framed, amounts to a ***disguised suit***, and is frivolous, vexatious, and an abuse of the process of the Court.

In support of the application, ***John Patrick Machira*** on 4th August, 2004 swore an affidavit which bears the following main thrust. The defendant had defamed and assaulted the deponent some time ago – and this led to an interlocutory application dated 20th November, 1995 which resulted in orders of injunction against the defendant. The deponent avers that he does not owe the defendant an alleged sum of Kshs.1.5 million; and so, the defendant's further amended defence and counterclaim filed "are bogus and the same do not raise any triable issues". The deponent avers that as a lawyer of long standing in public and private practice he continues to suffer "embarrassment, humiliation, agony and loss as a result of the defendant's defamation, assault and battery". It is deponed that the defendant has amended her counterclaim without the leave of the Court. It is deponed too that the Court of Appeal, in ***Civil Appeal No. 179 of 1997***, had found as a fact that the defendant had assaulted the deponent, on the claim that the deponent "[stole] her money" which claim was untrue.

B. THE RESPONDENT'S REPLYING PAPERS: MISSING FOCUS ON APPLICANT'S GRAVAMEN

The defendant's replying affidavit and grounds of opposition, both dated 17th January, 2005 were filed on 18th January, 2005.

The defendant's affidavit devotes a large number of its 33 paragraphs to a ***land transaction*** of 1992, bringing together the plaintiff and a certain entity known as Kangemi Unyitaniri Women Company Limited – and in which transaction the deponent was, in a way, also involved. Only towards the end (paragraph 27) does the affidavit come to matter raised in the plaintiff's affidavit. She avers that her further amended defence and counterclaim was authorised in Court to be filed – by ***Waki, J.*** (as he then was), then by ***Kariuki, J***, and then by ***Ransley, J.*** She concludes her affidavit by stating that her defence and counterclaim as further amended, raises triable issues – clearly a statement more of law than of ***fact.***

In the grounds of opposition the defendant has set out a considerable amount of evidentiary material. Indeed, the whole document has not stated ***grounds*** as such, for opposing the plaintiff's application.

C. SUBMISSIONS FOR THE PLAINTIFF

1. Preliminary Contest on Supporting Affidavits and

Replies Thereto

When this matter came up for hearing before me for the first time, on 23rd June, 2005 learned counsel ***Mr. Kamau*** represented the plaintiff, while ***Grace Wahu Njoroge*** the defendant, appeared in person.

Mr. Kamau set out by raising a preliminary objection to the defendant's papers. The main point, in the words of learned counsel, was this: "A party [the defendant in this case] can only file [one reply], either a ***replying affidavit*** or ***grounds of opposition*** but not ***both."*** Counsel urged that the defendant had acted contrary to the stipulations of Order L, rule 16 (1) in filing two replying papers. He urged that both documents be not allowed to remain on the record, and that the two documents as they stood were

incompetent and an abuse of Court process.

The defendant, who it emerged had in the past, in related motions before the Court, held herself out as a lay litigant, thus responded: "*My replies cannot be dismissed … The grounds of opposition and replying affidavit present no problem. Had I not replied an objection* ***would*** *have been raised. My documents are in order. Why is the applicant obstructing progress?*

Ransley, J *had approved the hearing of the application. My documents should not be criticised. This matter should proceed; alternatively the application should be dismissed …"*

2. Court's Ruling on Supporting Affidavits and Replies Thereto

The point now raised had come up before me in many other cases, and this time I had an opportunity to rule upon it as follows:

> "***What is before this Court is the plaintiff's Chamber Summons of 4th August, 2004*** …
>
> ***"Mr. Kamau [counsel for the plaintiff] has set off by questioning the propriety of the defendant's response documents – a replying affidavit and grounds of opposition.***
>
> ***"Mr. Kamau submits that the respondent's papers should be struck out, as they are in conflict with O.L, rule 16(1) which states that a party responding to an application is to file either a replying affidavit or grounds of opposition. The respondent has filed both. Mr. Kamau submits that an abuse of the process of the Court has been committed.***
>
> ***"Responding to that objection, the respondent contends that if she had not thus responded, her position would have been challenged, and she might have been excluded from the hearing of the application. She contended that her papers are perfectly in order.***
>
> ***"The legal issue raised is one which has caused me anxiety in the past, even when all the parties have been represented by advocates. On rough estimates, something like 60% of all responses to applications are, I believe, being filed in the form of both replying affidavits and grounds of oppositions.***
>
> ***"This practice, which appears to be so beloved of advocates, clearly suggests that the restrictions of modes of response in Order L, rule 16(1) are not enjoying legitimacy within the fraternity of legal practitioners. I do not know why that is the case. It is a matter to be addressed, ideally, by the Rules Committee which is at the moment in active business.***
>
> "***What has the Court done about it? I do not know if any of my sister and brother Judges has struck out the responses of a party to an interlocutory application on account of having filed both grounds of opposition and replying affidavit. For my part I have not done it; because I thought it would have been so drastic a decision as to spell grave risks for the ultimate object of the judicial process – to ensure that justice is done.***
>
> "***Against that background I will now order as follows:***
>
> > ***(a) the applicant's objection to the responding papers of the defendant, is disallowed;***
> >
> > ***(b) on the next occasion of hearing, counsel for the applicant will present the Chamber Summons of 4th August, 2004; and at the end, the defendant will respond; following which counsel for the applicant will have his right of reply – and the matter will then be reserved for a ruling on the merits."***

3. Statement of Defence Raises No Triable Issues; Fails to Limit Itself To Fact; Counterclaim Represents a Lateral Suit With New Cause of Action; It is Frivolous, Vexatious and Abusive of

Process: Substance of the Applicant's Claim

On the next occasion of hearing, 3rd October, 2005 the applicant was represented by ***Mr. Njoroge Wachira***, leading learned counsel ***Mr. Kamau***; and the defendant/respondent appeared in person.

Mr. Wachira began by presenting the applicant's prayer documents, and urged that the defendant's further amended defence and counterclaim be struck out and judgment entered in favour of the plaintiff with costs. The main ground proffered is that on ***19th December, 2003 Mr. Justice G.B.M. Kariuki*** had ordered that the defendant do amend her defence and exclude evidentiary material therefrom, pleading only ***facts.*** If there was failure by the defendant to take action as ordered, learned counsel submitted, then the statement of defence would be struck out, by virtue of the Court's empowerment under Order ***VI,*** rule 13(1) of the Civil Procedure Rules. Whereas the Court's orders required the further amended statement of defence to be filed and served within 21 days (from 19th December, 2003) it turned out that the further amended defence was not only not served as required, but was drawn only on ***23rd January, 2004*** – more than one month late. And besides, counsel urged, the further amended defence as drawn was "vague, ambiguous, imprecise; it is only general denials; it is contrary to the rules of pleading." ***Mr. Wachira*** submitted that while the defendant was the beneficiary of "unsolicited leave to amend her defence [thanks to the fact that she was] acting by herself", she "has to-date refused to engage counsel [and] continues to make the same mistakes". Counsel urged that the defendant's statements of defence, of 4th June, 2003 and of 23rd January, 2004 carried the same mistakes, and the further amended plaint had brought no improvement at all. He urged that the numbering of paragraphs in the further amended plaint was ambiguous and confusing, and was in breach of the terms of Order ***VI***A, rule 7. Paragraphs 3-15 of the further amended defence, counsel urged, constituted mere denials of the specific claims in the plaint about ***defamation, assault and battery, false imprisonment and confinement e***xecuted by the defendant. Counsel urged that the defendant's bare denials flew in the face of established matters of fact, and cited the case ***J. P. Machira t/a Machira & Company Advocates v. Wangethi Mwangi & Nation Newspapers***, Civil Appeal No. 179 of 1997 in which the Court of Appeal stated clear factual positions pertinent to the instant matter. The following passage, on this point, appears in the judgment of ***Akiwumi, J.A.:***

> "***On 9th November, 1995 the appellant, J.P. Machira, Esq. A senior and well known advocate … was involved in a physical altercation with one Grace Wahu Njoroge near the eastern entrance to the Law Courts. The photographs that were taken of this incident show Ms. Njoroge holding the collar of the rather surprised appellant and hurling what must be insults at him. These photographs were splashed the next day on the front pages of the widest-circulation English newspaper in the country, the Daily Nation, and its Kiswahili counterpart, Taifa Leo, thus ensuring that even those who could not read English were not going to be deprived of this sensational scoop."***

And in that case the plaintiff had won against the defendants. The Court of Appeal thus decided (judgment of ***Omolo, J.A.***):

> ***"Accordingly, no useful purpose would be served by holding a trial on the merits. That being my view of the matter, I would allow the appeal, set aside the orders made by the superior Court and substitute, them with one allowing the appellant's Chamber Summons, strike out the defence filed and enter interlocutory judgment for the appellant with a further order that the appellant be allowed to formally prove his claim."***

Mr. Wachira submitted that there was proof of the assault and battery which the defendant/respondent herein had committed against the applicant; and therefore no general denials of the kind set out in the further amended statement of defence could stand up, as the basis of trial process.

Learned counsel impugned the ***counterclaim*** part of the further amended statement of defence: they [the pleadings] remain prolix and indulge in narratives and allegations, contrary to the terms of Order ***VI***, rule 3. Counsel urged that the whole counterclaim bore no relation to the design and purpose of the claim itself: "it is like trying [a new suit] through a counterclaim"; whereas the plaintiff has a claim based on

assault, "the claim [under] the counterclaim is based on ***contract***"; there is in the counterclaim a "duplicity of allegations unconnected with the suit"; "[the defendant] ought to have come with a fresh suit". Learned counsel urged the trite principle which governs the prosecution of civil claims: "A counterclaim must contain issues related to the claim in the original suit".

Mr. Wachira urged that the whole defence, as set up in the further amended defence and counterclaim, was: "An abuse of the process of the Court. [The defendant] denies the obvious, and twists the suit to suit herself. She twists facts and makes a counterclaim based on contract."

Giving some background to these proceedings, learned counsel noted that the plaintiff had, on 12th February, 1996 applied for an injunction against the defendant, by virtue of Order ***XXXIX;*** and this came before ***Ole Keiwua, J.*** (as he then was) who made orders restraining the defendant. Subsequently ***Waki, J.*** (as he then was), on 22nd May, 2003 granted the defendant leave to file an amended defence and counterclaim – a grant made yet again, by ***Kariuki, J.*** on 19th December, 2003.

Mr. Wachira submitted that the defendant should not anymore be allowed to act in breach of the law of procedure; for it is some ten years since the plaintiff had been defamed, assaulted and battered, but he has not been able to accomplish his suit for appropriate compensation.

Continuing with his submissions on 1st November, 2005 learned counsel urged that the defendant's counterclaim be dismissed, insofar as it seeks ***contract monies*** in the sum of Kshs.1.5 million which were in respect of a land sale agreement and which had been forfeited in accordance with the applicable land conveyancing rules. And moreover, ***Mr. Wachira*** submitted, to the said land sale contract which is unconnected to the ***tort*** claims in the plaintiff's suit, the defendant herein was not a party and so would have no ***locus standi***. And furthermore, learned counsel contended, even the true interested party in the said land sale agreement, namely ***Kangemi Unyitaniri Women Company Limited***, has never filed suit against the plaintiff herein, following the said forfeiture of the monies in question. It was contended that the said sum of Kshs.1.5 million was not at all a litigious issue as between the ***plaintiff*** and the ***defendant*** herein – because the ***defendant*** had herself never at any time paid such monies to the plaintiff: "So she cannot seek to be refunded what she never paid." Learned counsel submitted that the defendant's contract-based claims in the counterclaim were "frivolous, vexatious, [and an] abuse of the process of the Court".

Mr. Wachira submitted that the defendant's replying affidavit of 17th January, 2005 was an argumentative document without any tangible content. Much of it is devoted to a land sale agreement which had been made between the plaintiff and Kangemi Unyitaniri Women Company Limited; and counsel urged that "the defendant cannot depone to matters of which she has no personal knowledge …. She is pleading on behalf of the company but the company is not a party; [there is even] no evidence to show that the defendant was a member of the company".

Counsel submitted that the statement of defence was only a document of generalisations which carried no triable issue; the document is "scandalous, frivolous and vexatious and ought to be struck out". Contrary to the directions of ***Kariuki, J*** of 19th December, 2003 that the statement of defence would be struck out if it was not amended appropriately, ***Mr. Wachira*** submitted, the document as further amended has not confined itself to statements of fact, as required under the law of civil procedure.

D. LAND-SALE DEPOSIT IN EARLIER TRANSACTION BETWEEN PLAINTIFF AND A CORPORATE BODY WAS WRONGFULLY FORFEITED; IT WAS MY MONEY, SO I COUNTERCLAIM: DEFENDANT'S SUBMISSIONS

The defendant, ***Mrs. Grace Wahu Njoroge*** began on her submissions on 11th November, 2005 but did not conclude until early this year, on 24th March, 2006.

The defendant did not, however, address herself to ***the critical legal issues*** upon which the applicant's case was pegged – such as the failure of the further amended defence to comply with the orders made by

Kariuki, J on 19th December, 2003; the failure of the counterclaim to confine itself to issues raised by the plaint; the grounding of the counterclaim on contract – while the suit is a tortious claim; the contention that the defendant's pleadings are mere denials and fail to raise triable issues; the claim that the defence and counterclaim is frivolous, vexatious and an abuse of Court process.

Therefore, necessarily, this is an application attended with unusual circumstances, and which is bound to raise peculiar problems, in view of the fact that an application before the Court represents an interlocutory stage in the proceedings, and comes with specific prayers for which there ought to be a ***foundation in law or equity.***

Whereas the plaintiff's case rests on a plaint raising ***tort-law*** issues, and therefore clearly founded in law, the defendant's defence (and counterclaim) introduces a ***possible*** parallel suit the nature of which remains unclear, and this is the foundation as well as the very essence of her defence, and of her replies to the plaintiff's application. Whether such a response to a motion in Court can be entertained, is to be considered later and may be a vital factor in the determination of the application before me.

First, I will set out the essential elements in the defendant's submissions.

The defendant set out on a trajectory of ***fact***, and paid little regard to the ***points of law*** canvassed for the plaintiff. She charged that as much as 99% of the representations made in Court by learned counsel ***Mr. Wachira*** was intended to "mislead the Court" and only "1% of it was correct".

The great bulk of the defendant's submissions consisted in an account of the circumstances surrounding the land sale agreement of 1992 between the plaintiff and the company known as Kangemi Unyitaniri Women Company Limited – the transaction which resulted in a forfeiture of Kshs.1.5 million (which had been paid as deposit) in favour of the plaintiff herein. The defendant was making the suggestion that she had had an interest in the said transaction between the plaintiff herein and Kangemi Unyitaniri Women Company Limited (***Unyitaniri,*** for short), and so, Unyitaniri's loss through forfeiture of Kshs.1.5 million was also her loss; for she had availed to Unyitaniri her own land title deed which enabled that company to raise the Kshs.1.5 million to be paid as deposit to the plaintiff herein. It is quite clear that the defendant perceived the moral question liked to the fact that the bank retained ***her*** title deed and ***advanced to Unyitaniri*** Kshs.1.5 million, as the basis of a ***claim in law;*** and it is no less apparent that she believed she could lodge such a claim by ***counterclaim,*** to set-off against the plaintiff who was claiming against her in ***tort law,*** and in relation to a ***different cause of action***. So the defendant spent much time addressing facts pertaining to the aborted land sale of 1992, and proving the financial arrangements whereby Unyitaniri partook of her beneficence. The defendant sought to transform such sheer beneficence, by which her own connexion to the plaintiff was only very ***indirect***, into a basis for a ***direct claim*** against the plaintiff.

So, indirectly on behalf of Unyitaniri, the defendant contended in Court that the said land-sale deposit of Kshs.1.5 million should not have been forfeited because, in the agreement, there was no forfeiture provision. Since her title deeds were mortgaged to raise for Unyitaniri the said sum of Kshs.1.5 million, she remains indebted to-date and is carrying a repayment burden towards the banks. In her words:

"I borrowed from the bank, using my title deeds, in the name of [Unyitaniri]. ***Mr. Wachira*** [counsel for the applicant] said Unyitaniri had not come to ask for the money; ***they could not***, ***because not a penny of theirs was used!*** The Kshs.1.5 million was paid by me, in the name of Unyitaniri. My title deeds were mortgaged, and I am still paying up. I have sold some of my lands for that purpose …"

E. IGNORANCE OF THE LAW CONFERS NO ADVANTAGE UPON A SUITOR: APPLICANT'S REJOINDER

Learned counsel ***Mr. Wachira***, in his rejoinder made on 24th March, 2006 submitted that the defendant's replying affidavit had addressed matters not raised in the application: it was silent on the plaintiff's assertion regarding defamation, assault and harassment – all claims which were not even dealt with in the defendant's pleadings. Consequently, counsel submitted, the defendant could not deny those claims.

Mr. Wachira submitted that the law in Kenya applies to every citizen or non-citizen within the jurisdiction of the Court – be the person in question lawyer or lay person. In Counsel's words: "Rules of procedure and the [provisions of] statute law do not discriminate, [save for cases of] minors and the insane. Ignorance of the law is no excuse". This was in aid of the contention that the defendant had not taken into account the pertinent rules and principles of law, in the formulation and filing of her defence and counterclaim. Counsel urged: "The counterclaim cannot stand, in the face of an action founded on tort. Contracts and torts are two distinct causes of action. She [the defendant] was not a party even in contract. She lacks ***locus standi.*** The action in ***defamation*** is clear and obvious. The defendant's defence is a mere denial of the obvious." Learned counsel urged that the defendant's further amended statement of defence and counterclaim be struck out; that judgment be entered for the plaintiff as prayed in the plaint; that the plaintiff's claim do proceed to formal proof; that the plaintiff be awarded costs.

F. FINAL ANALYSIS AND ORDERS

It is quite clear from the documentation in this application and from the submissions of counsel that, neither in the pleadings in the main suit, nor in the application itself, is issue joined: and thus the setting for the normal judicial resolution of disputes is ***missing.*** I have read the plaint dated and filed on 20th November, 1995 and I have no doubts that it does contain a justiciable gravamen. The essence of the gravamen is found in paragraphs 3, 5, 6, 9, 12 and 13 in which ***defamation*** as a cause of action is elaborated; in paragraphs 7,8,9 and 10 in which the torts of ***assault*** and ***battery*** are alleged; in paragraph 8, in which the tort of wrongful imprisonment is pleaded; and in paragraph 13 in which defamatory material published, is pleaded.

Such claims in tort are to be assumed, at this stage, by the Court to be raised conscientiously and the Court moved to provide just redress; and hence a legal duty rests on the defendant to file focussed responses, in her statement of defence, which ***join issue*** on the claims. Only in that way can the Court, applying the governing Civil Procedure Rules, provide a ***legal solution***.

However, on reading the defendant's further amended defence and counterclaim which the Court in its solicitude graciously allowed her to file, I find that she has not squarely engaged the plaintiff in his case. The further amended defence and counterclaim dated 23rd January, 2004 is a document of bald denials – see paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15; yet those very paragraphs, it is apparent, constitute the backbone of the statement of defence. The effect is that the plaintiff's case passes uncontroverted.

This brings me to the rather puzzling position of the defendant's ***counterclaim***. I have determined as a fact that the counterclaim, just like the statement of defence, does not engage the plaintiff on his pleadings. Whereas the plaintiff's pleadings rest on clear causes of action in ***tort law*** – defamation, assault and battery, false imprisonment – the counterclaim goes off at a tangent and invokes things altogether differing in time and in cause of action: a ***contract*** matter in respect of which a valid gravamen would have had to be framed as a ***separate suit***. The said contract matter, moreover, would have involved as parties persons other than the defendant herein.

So the counterclaim is, in effect, made in vain. In the submission of learned counsel for the plaintiff, the defendant's counterclaim is "a duplicity of allegations unconnected with the suit". Counsel urged: "[This counterclaim] is an abuse of the process of the Court. [The defendant] denies the obvious, and twists the suit to suit herself. She twists facts and makes a counterclaim based on contract".

This is not the first time I have had to deal with a counterclaim that bears no relationship to the pleadings in the plaint. In a recent case, ***John Mungai Itiru & Another v. James Ndung'u Mungai,*** H.C.C.C. No. 3179 of 1997 I had thus remarked:

> "***As I have already remarked, the defendant lacks any defence of substance. But he then raises a counterclaim. A counterclaim, I think, must be the flip-side of the coin to the cause of action which a plaintiff has raised. If a counterclaim is not intrinsically connected to the main claim by the plaintiff, it will in effect be an abuse of the trial process: for such an unlinked claim must be made in a separate claim***.

"***In the instant matter the main cause of action is a classical property-rights claim, which … is so elemental as it touches the very heart of the fundamental-rights guarantees of the Constitution. But what is the defendant's cause of action? A peripheral, contractual-type matter about the construction of a road. This can only be a claim in special damages for breach of contract; it must comply with limitation periods for contractual-type claims; and its special-damages claims must be specifically pleaded and proved."***

Now if a counterclaim must relate to the pleadings in the plaint, is it tenable that a statement of defence which merely denies the plaintiff's claims, can at the same time be joined to a valid counterclaim? I think the principle of the counterclaim would be that there is in the first place a statement of defence bearing ***triable issues***, and so the two elements join together as a contest to the claims in the plaint. From this thinking it must follow that a defence which is a total sham, cannot in law be adjoined to a valid counterclaim.

It is clear from the analysis herein that, I do not think the defendant's further amended defence and counterclaim dated 23rd January, 2004 is a proper defence which merits preservation to the trial stage. Not only does the said defence consist in nothing but bare denials, it wholly fails to engage the plaintiff on the issues raised in the claim. That being the case, the said further amended statement of defence has no basis in law for carrying the counterclaim attached to it.

In support of such a proposition there is relevant case law; and I would draw from the English Case ***Remmington v. Scoles*** [1897] 2Ch.1 (at pages 4-5 ***Romer, J***):

"The Court has an inherent power to prevent the abuse of legal machinery … Undoubtedly, therefore, the Court has power to strike out a statement of claim; but the power of the Court is not confined to that: it applies also to a statement of defence which is frivolous and vexatious and an abuse of the procedure … It appears to me that evidence may be received in a proper case on a motion of this kind to shew that a pleading is an abuse of the process of the Court …

"***Now, what do I find in this case? The defendant is a solicitor. The facts in the statement of claim have substantially all been admitted in prior proceedings. He clearly has no defence whatever to the action, and no substantial defence is shown by the statement of defence; but obviously he wants to delay and hinder the plaintiffs, and for that reason and no other he puts in a statement of defence, denying or refusing to admit every substantial statement in the statement of claim … I think under the circumstances this is not a real defence at all, but merely an abuse of the process of the Court, and I order it to be struck out."***

My analysis of the application papers and of the submissions, leads me to the clear conclusion that the prayers of the applicant must be granted, and I will make ***orders*** as follows:

1. That, the defendant's further amended defence and counterclaim filed herein be and is hereby struck out; and judgment be and is hereby entered for the plaintiff against the defendant as prayed in the plaint.

2. That, the plaintiff's suit by plaint dated 20th November, 1995 shall, on the basis of priority, be listed for formal proof before a Judge in the High Court's Civil Division.

3. That, the defendant shall bear the plaintiff's costs in this application.

DATED and **DELIVERED** at Nairobi this 12th day of May, 2006

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Wachira; Mr. Kamau –

Instructed by M/s S. K. Ritho & Co. Advocates

Defendant/Respondent in person