



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Civil Suit 49 of 2004

TRANSAFRICA PORTWAYS LTD.....PLAINTIFF

VS

POSTAL CORPORATION OF KENYA.....DEFENDANT

RULING

By an application by way of Chamber Summons dated 15th May, 2006, pursuant to the provisions of Order VI, Rule 13 (1) (a) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act, the applicant seeks orders:

- (1) *That the counterclaim dated 28th January 2005 filed herein be struck out for lacking the mandatory verifying affidavit.*
- (2) *Costs of the application to be met by the defendant.*

The application is based on the grounds:

- (a) *That the counterclaim is incompetent as it lacks affidavit verifying the averments thereof as required by Order VII, Rule 1 (1) (d) and (e) and Rule (2).*

The application was served upon the firm of Andhoga Staussi & Co. Advocates for the defendant/respondent.

At the hearing the defendant/respondent was represented by *Mr. Onsongo* who was holding brief for *Mrs Staussi* Advocate. *Mr. Onsongo* sought adjournment which was opposed. Eventually, after hearing both parties, I allowed *Mr. Ashioya* leave to proceed with the application.

For the applicant, it was argued that the counter claim filed herein was filed without an accompanying verifying affidavit. That a counter-claim is a claim within a claim and is the equivalent of a plaint. That since a plaint must comply with the provisions of Order VII, Rules 1 (1) and 2, a *fortiori*, a counterclaim must equally comply with the provisions of Order VII, Rules 1 (1) and 2. For that proposition of law, counsel for the applicant referred me to the case of *PAUL KOINANGE –VS- DONALD B. KIPKORIR & 2 OTHERS (MILIMANI COMMERCIAL COURT – CIVIL SUIT NO.2040/2000.)* where *Onyango Otieno (J)*, as he was then, struck the plaint on the grounds that it was not accompanied by a proper verifying affidavit.

Order VII Rule 1 (2) provides 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 clear from the intent of the said rule that the verifying affidavit accompanying the plaint is required to verify the correctness of the averments in the plaint.

Order VII Rule 2 (1) of the Civil Procedure Rules provides that:

“(1) Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed, except where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant.”

Order VII Rule 2 (2) provides:

“The provision of this rule shall apply to counterclaims.”

A counterclaim is really an independent action by the defendant against the plaintiff. It is a cross-claim.

The principles of pleadings which govern a counterclaim are substantially the same as those which would apply to a statement of claim in a cross-action brought by the defendant against the plaintiff.

A counterclaim like a statement of claim must state specifically the claim made or the relief sought of the defendant.

Just as much as a plaint may be struck out, if it is frivolous or vexatious, so is a counterclaim if it is frivolous or vexatious or discloses no reasonable ground of counterclaim. Or if it contains a matter which is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action.

Thus where the defendant pleads no other defence than a counterclaim, if the plaint is struck out the counterclaim remains. If the counterclaim is struck out the plaint remains to be proceeded with.

Against this backdrop, I am of the persuasion that if the plaint must comply with the mandatory provisions of Order VII Rules 1 (1) (e) and 2 of the Civil Procedure Rules, then by parity of reasoning a counterclaim must equally comply with the mandatory provisions of Order VII Rules 1 (1) (e) and 2 of the Civil Procedure Rules.

The defendant herein has not complied with and/or attempted to comply with the mandatory rule requiring verification of a claim brought by way of a counterclaim [See Order VII Rule 1 (2) of the Civil Procedure Rules]. Mandatory rules of procedure goes towards jurisdiction. This omission, in my humble view, goes towards jurisdiction and thus nullifies the counterclaim. I take the lead from MAWJI V. ARUSHA GENERAL STORE [1970] E. A. 137 at page 138 where SIR CHARLES NEWBOLD, P. had this to say on mandatory rules of procedure:

“I should like to make it quiet clear that this does not mean that the rules of procedure should not be complied with –indeed, they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties.”

As the counter-claim herein lacks the supporting verifying affidavit it does not meet the mandatory requirements of Order VII Rules 1 (1) (e) and Order VII Rule (1) (2) of the Civil Procedure Rules.

Accordingly, I invoke the provisions of Order VII Rule 1 (3) of the Civil Procedure rules and strike out the counter-claim with costs to the applicant/plaintiff.

DATED and DELIVERED at BUSIA this 19th day of October 2006.

N.R.O. OMBIJA

JUDGE Mr. Makali for Ashioya for the plaintiff

N/A for defendant.