



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 744 OF 200**

**CATERING CONCEPTS LTD..... PLAINTIFF**

**VERSUS**

**CASTLE BREWING KENYA LTD..... DEFENDANT**

**RULING**

The sole point for determination in this preliminary objection is whether or not an application by the plaintiff in the original action (who is also the 2nd defendant in the counterclaim) to exclude a defendant's counterclaim may be made after the plaintiff has filed a reply to the defence but not to the counterclaim itself. On the face of it, the matters appears to be a straightforward one for order 8 rule 11 provides-

**"Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counter claim may be exuded, and the court may, on the hearing of such application, make such order as may be just."**

Counsel for the 1st defendant in the original action contends that the plaintiff's application dated 13.8.2002 which seeks the exclusion of its counterclaim from the pleadings is caught by the aforementioned provision of law in that it had on 7th August 2002 filed a reply to the 1st defendant's defence. Counsel for the plaintiff on his part contends that the reply whose filing auld preclude the subsequent filing of an application to exclude a counterclaim by the defendant would be a reply to such counterclaim but not a reply to the defence. These rival contentions call for an interpretation of the word "reply" in the context of order 8 rule 11 of the Civil Procedure Rules. Before I do so, I should set out the sequence of events in this matter.

On 9.7.2002, Catering Concepts Ltd, the plaintiff in the original action, filed an amended plaint impleading Castle Brewing Kenya Ltd as the first defendant and James Gichuki Gichuru as the second defendant in the suit. On 31st July 2002 the 2nd defendant filed a defence to the plaintiff's claim and a counterclaim against the said plaintiff and one Fred Maina who was named as the 2nd defendant to the counterclaim. The plaintiff was named as the 1st defendant to the counterclaim. On 7.8.2002, the plaintiff in the original action filed a reply to the 1st defendant's defence. In the said reply, the plaintiff did not incorporate an answer to the counterclaim but it did specifically plead in paragraph 17 thereof that it will seek exclusion of the said counterclaim as the same ought to be disposed of in an independent suit due to its complexity.

The plaintiff's counsel relies on the provisions of order 8 rule 10 and 17(1) for his contention that the reply contemplated by rule 11 is a reply to the counterclaim and not a reply to the defence. In his submission there is no such pleading as a defence to counterclaim.

Order 8 rule 10 provides-

**"Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit."**

And rule 17 (1) of the same order provides.-

**"A plaintiff shall be entitled to file a reply within seven days after the defence or the last of the defences has been delivered to him, unless the time is extended."**

The first defendant's counsel for his part submits that the reply contemplated by rule 11 is the same as the reply comprehended by rule 17 (1). He submits that there is such a pleading as a defendant to the counterclaim contrary to the plaintiff's Advocate's submissions. He invokes the provisions of order 6 rule 11 and order 8 rule 17 (2) and (3) in aid of his contentions. Order 6 rule 11 provides -

**"The pleading in a suit shall be closed fourteen days after the service of the reply or defence to counterclaim, or, if neither is served, fourteen days after the service of the defence, notwithstanding that any order or request for particulars has been made but not complied with."**

And order 8 rule 17 (2) and (3) provide as follows -

**"(2) No pleading subsequent to the reply shall be pleaded without the leave of the court, and then shall be pleaded only upon such terms as the court thinks fit."**

**(3) Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defences."**

Having considered the above provisions of the Civil Procedure Rules, I take the following view of the matter. The law knows of a pleading called defence to counterclaim. That is manifest from a plain reading of order 6 rule 11 and order 8 rule 17 (3). The plaintiff's Advocate's submission that no such pleading is known to the law is belied by them above provisions of the Civil Procedure Rules. And in my judgement it is that self same pleading which is referred to as a reply to the counterclaim in order 8 rule 10. In other words, the words "reply" and "defence to counterclaim" are used interchangeably in order 8 rule 10 and 17 (3). I also think that the word "reply" in rule 11 of the same order refers to a reply to the counterclaim sought to be excluded and is, accordingly, used interchangeably with a "defence to the counterclaim." There is thus no contradiction between the provisions of order 8 rule 10 and order 6 rule 11 if it is understood that the word "reply" in order 6 rule 11 refers to reply to defence and the word "reply" in order 8 rule 10 refers to defence or answer to counterclaim. The reason why order 8 rule 11 does not countenance the making of an application to exclude the counterclaim after a reply or defence thereto has been filed is, in my opinion, because the pleadings would then have been closed within the meaning of order 6 rule 11 and the stage would then have been set for the trial of the issues joined on the pleadings as at the date of such reply or defence to counterclaim.

Having taken that view of the matter, and it being common ground that the plaintiff had not filed a "reply" or "defence to the counterclaim" pleaded by the 1st defendant but had only filed a reply to the defence, it follows that its application to exclude the 1st defendant's counterclaim from the pleading in the case, is not incompetent. The preliminary objection is accordingly overruled with costs to the plaintiff. The application shall proceed to hearing on the merits.

DATED at Nairobi this 16<sup>th</sup> day of September 2002.

**A.G RINGERA**

**JUDGE**