



**0REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 185 OF 2015**

**GALERIUS INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA.....1<sup>ST</sup> DEFENDANT**

**BOY JUMA BOY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 25<sup>th</sup> May, 2019, the 1<sup>st</sup> Defendant/Applicant seeks leave to annex a verifying affidavit to the Amended Defence and counter-claim dated 28<sup>th</sup> March, 2019 and filed on 3<sup>rd</sup> April 2019 and for the annexed affidavit to be deemed to have been filed and served together with the said Amended Defence and Counter-Claim. The application is supported by the affidavit of Njoroge Mwangi sworn on 25<sup>th</sup> May 2019 and is premised on the grounds:

- i. That by consent of the plaintiff and the 1<sup>st</sup> defendant on 19/3/2019 the 1<sup>st</sup> defendant was granted leave to amend the statement of defence dated 18/9/2015 to include a counter claim and to file further witness statements within 14 days.**
- ii. That the 1<sup>st</sup> Defendant filed her Amended Defence and counter-claim on 3/4/2019 in which she inadvertently failed to annex a verifying affidavit as required under Order 7 Rule 5 (a) of the Civil Procedure Rules.**
- iii. That the failure to annex the verifying affidavit on the amended defence and counter-claim was inadvertent mistake on the part of the advocates and as such a mistake of the advocate should not be visited upon his clients.**
- iv. That it is in the interest of justice that substitutive justice should prevail over procedural technicalities.**
- v. That if the 1<sup>st</sup> defendant is granted leave to annex the verifying affidavit the plaintiff will not suffer any prejudice.**
- vi. That the issues raised by the 1<sup>st</sup> defendant in the Amended Defence and Counter-claim will ventilate the substantive issues in the whole suit.**

2. In response to the application the plaintiff filed a notice of preliminary objection and a replying affidavit dated 24<sup>th</sup> June 2019. It is the plaintiff's contention that the application is incompetent and that the Defence and counter-claim filed without a verifying affidavit contravenes the provisions of Order 7 rule 5 of and should be struck out.

3. The application and the preliminary objection were heard simultaneously by way of written submissions which were duly filed by the parties.

4. I have perused the application, the objection raised and the submissions made. The following are the issues for the court's determination:

- a. Whether a counter-claim filed without accompanying verifying affidavit is a proper suit.**
- b. Whether a verifying affidavit can be filed long after the counter-claim has been filed.**
- c. Whether the 1<sup>st</sup> defendant is entitled to the prayers sought.**

**d. Who pays the costs.**

5. Under Order 4 Rule 2(5) and Order 7 rule 5(a) of the Civil Procedure Rules, a counter-claim must be accompanied by a verifying affidavit to verify the correctness of the averments contained in the counter-claim. Order 4 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 rule 1(1) (f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit on behalf of the others.

(4) Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

(5) The provisions of sub-rule (3) and (4) shall apply mutatis mudandis to counter-claims.”

6. Order 7 rule 5(a) of the Civil Procedure provides as follows:

**“5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by –**

**a) An affidavit under order 4 rule 1 (2) where there is a counter-claim.”**

7. It is clear from the above provisions of the law that a defendant filing a counter-claim is required to file a verifying affidavit at the time the counter-claim is filed, in the same way a plaintiff is required to have his plaint accompanying with a verifying affidavit at the time of filing. The 1<sup>st</sup> defendant herein filed a counter-claim on 3<sup>rd</sup> April 2019 which was not accompanying by a verifying affidavit to verify the correctness of the averments in the counter-claim. This no doubt was in contravention of the provisions of Order 4 Rule (1) (2) and Order 7 Rule 5(a) of the Civil Procedure Rules. The plaintiff filed a notice of preliminary objection on 8<sup>th</sup> April 2019 seeking to strike out the Amended defence and counter-claim for failure to comply with the said provisions of the Civil Procedure Rules. That the notice of motion dated 25<sup>th</sup> May 2019 by the 1<sup>st</sup> defendant was filed after the said objection was raised is in my view, a clear indication that the 1<sup>st</sup> defendant was prompted by the plaintiff’s said objection. In my considered view, the filing of the present application by the 1<sup>st</sup> defendant must have been aimed at circumventing the plaintiff’s move to seek to strike out the counter-claim. The discretion of this court certainly cannot be exercised in favour of the 1<sup>st</sup> defendant as the end result will be to prejudice the plaintiff’s said objection.

8. I have perused the provisions of Order 4 rule (1) (2) and Order 7 Rule 5(a) aforesaid. The same are coached in mandatory terms. It is therefore my finding that the defendant’s counter-claim is improperly before the court for failure to have an accompanying verifying affidavit at the time of filing. The same should be struck out.

9. In the result, the court finds no merit in the 1<sup>st</sup> defendant’s notice of motion dated 25<sup>th</sup> May 2019, and orders as follows:

**a. That the notice of motion dated 25<sup>th</sup> May 2019 be and is hereby dismissed with costs.**

**b. That the 1<sup>st</sup> defendant’s counter-claim contained in the Amended statement of Defence dated 28<sup>th</sup> March 2019 and filed on 3<sup>rd</sup> April 2019 be and is hereby struck out with costs for failure to be accompanied with a verifying affidavit as required under Order 4 rule 1(2) as read with Order 7 rule 5 (a) of the Civil Procedure Rules. Orders accordingly**

**DATED, SIGNED and DELIVERED at MOMBASA this 25<sup>th</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Plaintiff present in person

Kazungu holding brief for Njoroge for defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**