



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 599 OF 2010**

**PETER O. NGOGE T/A O.P. NGOGE & ASSOCIATES ADVOCATES...PLAINTIFF**

**VERSUS**

**COFFEE BOARD OF KENYA.....1<sup>ST</sup> DEFENDANT**

**CRYSTAL VALUERS LTD.....2<sup>ND</sup> DEFENDANT**

**RACHIER & AMOLLO ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In their Notice of Motion dated 2<sup>nd</sup> May 2018, the defendants (applicants) approached this court seeking the following substantive orders:
  - i. THAT this Honourable Court be pleased to set aside its interlocutory judgment and all consequential orders against the defendants on the basis of the amended plaint.*
  - ii. THAT the plaintiff's amended plaint dated 17<sup>th</sup> March, 2017 be struck out.*
  - iii. THAT costs of the application be borne by the plaintiff.*
2. Alongside the motion, the applicants filed a notice of preliminary objection dated 2<sup>nd</sup> May 2018 in which they raised the following grounds:
  - i. There is no proper interlocutory judgment for this Honourable Court to exercise its discretion to entertain a formal proof hearing.*
  - ii. The interlocutory judgment is irregular as the judgment was entered on a pleading filed without leave of the court.*
  - iii. No reasonable cause of action has been disclosed as against the 3<sup>rd</sup> defendant.*
  - iv. As a consequence, this Honourable Court lacks jurisdiction to proceed with formal proof hearing in the matter.*
3. The application is premised on Sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15; Order 10 Rule 11 and Order 51 of the Civil Procedure Rules. It is premised on grounds stated on its face and the depositions made in the supporting affidavit sworn on 2<sup>nd</sup> May 2018 by the applicant's learned counsel, Mr. Ken Wakwaya. Learned counsel also swore a supplementary and further affidavit dated 3<sup>rd</sup> July 2018 and 17<sup>th</sup> June 2020 respectively.
4. The applicants contend that the plaintiff/respondent filed the instant suit against the 1<sup>st</sup> and 2<sup>nd</sup> applicants on 7<sup>th</sup> December 2010; that they entered appearance on 15<sup>th</sup> December 2010 and subsequently filed their defence and counterclaim on 24<sup>th</sup> January 2011; that the defence and counterclaim was served on the respondent on 31<sup>st</sup> January 2011 but it subsequently mysteriously disappeared from the court file.
5. It is thus the applicant's case that pleadings in the suit closed 14 days after 31<sup>st</sup> January 2011 and that therefore, the amended plaint filed on 17<sup>th</sup> March 2017 without leave of the court was irregularly filed and is for that reason incompetent. The applicant's further contended

that after irregularly filing the amended plaint, the respondent sought and obtained interlocutory judgment against the 3<sup>rd</sup> applicant following which the case was fixed for formal proof hearing on 2<sup>nd</sup> May 2018.

6. The applicants further asserted that besides being irregularly filed, the amended plaint did not disclose any cause of action against the 3<sup>rd</sup> applicant; that it was also frivolous and vexatious and should be struck out. In addition to seeking striking out of the amended plaint, the applicants requested the court to review and/or set aside the interlocutory judgment.

7. In resisting the motion, the respondent filed a replying affidavit on 18<sup>th</sup> June 2018 and grounds of opposition on 2<sup>nd</sup> July 2020. He also filed what he titled “*Reply to the defendant’s supplementary affidavit*” on 10<sup>th</sup> February 2018.

8. In his response, the respondent averred that there was no interlocutory judgement on record entered against the 3<sup>rd</sup> applicant. He also denied the applicants claim that they had filed and served him with a statement of defence and counter claim.

9. The respondent maintained that the stamps appearing on the face of the statement of defence and counter claim exhibited by the applicants in support of the application were forgeries as there was no such pleading in the court file; that had they filed the defence and counter claim as alleged, they would have produced a receipt to confirm payment of filing fees which they have failed to do to date.

10. It is the respondent’s further contention that he did not require to obtain court’s leave to file the amended plaint because when he filed it, there was no defence on record; that in any event, he was permitted by the Hon. Deputy Registrar of this court to amend his plaint without leave of the court after the applicants failed to file and serve him with their defence and counterclaim; that the case was properly fixed for formal proof on 2<sup>nd</sup> May 2018 since there was no defence on record when the hearing date was fixed.

11. The respondent also denied the applicants claim that the amended plaint was frivolous and vexatious pointing out that it raised serious questions touching on violations of his fundamental human rights and that the application was just a delaying tactic meant to block him from accessing the remedies sought in the amended plaint.

12. In his further affidavit filed on 18<sup>th</sup> June 2020, *Mr. Wakwaya* averred that the replying affidavit and the “*Reply to the defendants supplementary affidavit*” were fatally defective as the same were commissioned by an advocate who had not taken out a practicing certificate for four years preceding the date the affidavits were commissioned; that the affidavits were thus fatally defective and should be struck out; that once the affidavits are struck out, the application will be technically unopposed and should be allowed as prayed.

13. By consent of the parties, the application was canvassed by way of written submissions which were briefly highlighted before me on 22<sup>nd</sup> July 2020. Learned counsel *Mr. Wakwaya* appeared for the applicants while the respondent appeared in person.

14. Having carefully considered the application, all the affidavits filed in support and in opposition to the motion as well as the written and oral submissions made by the parties and the authorities cited by the applicants, I find that five key issues crystalize for my determination in this application. These are:

- i. Whether the two affidavits sworn by the respondent in opposition to the motion are incurably defective;
- ii. Whether there is interlocutory judgment on record against the 3<sup>rd</sup> applicant;
- iii. Whether the amended plaint filed on 17<sup>th</sup> March 2017 is incompetent and fatally defective and if so, whether it should be struck out as prayed;
- iv. Whether the amended plaint discloses a reasonable cause of action against the 3<sup>rd</sup> applicant; and
- v. What orders should be made on costs?

15. Starting with the first issue, the applicants relied on the Court of Appeal decision in ***Kenya Commercial Bank Limited & Another V Kenya Hotels Limited, CA No. NAI 40 of 2004 (UR 24/2004)*** and the persuasive authority of ***Omusutsi V The Returning Officer Mumias East Constituency & 2 Others, EP No. 9 of 2017*** to support their submission that the affidavits sworn by the respondent were incurably defective and ought to be struck out since they were commissioned by an advocate who had not taken out a practicing certificate for four years prior to the date the affidavits were commissioned.

16. Though the Court of Appeal in ***Kenya Commercial Bank Limited & Another V Kenya Hotels Limited, [supra]*** indeed held that affidavits commissioned by an advocate who did not hold a valid practicing certificate were null and void, this legal position appears to have changed following the decision of the Supreme Court in ***National Bank of Kenya Limited V Anaj Warehousing Limited, [2015] eKLR.***

In this case, the Supreme Court held that no instrument or document would become invalid by reason only of having been prepared by an advocate who at the time was not holding a current practicing certificate. The court held that it was the Law Society of Kenya which was better placed to have information regarding which advocates had or did not have current practicing certificates and not litigants; that litigants were not in a position to have that information and should not be blamed or suffer hardship because of the illegal actions of their advocates but that such advocates remained personally liable to their clients under the law.

17. In my view, by analogy, this reasoning by the Supreme Court would equally apply to affidavits which had been commissioned by advocates who at the time did not have a current practicing certificate.

In the premises, I am not persuaded by the applicants' submissions that the two affidavits are fatally defective and ought to be struck out.

18. On the second issue, I have perused the entire court record and I have not come across any proceedings or record in which the respondent sought and obtained interlocutory judgment against the 3<sup>rd</sup> applicant on the basis of the amended plaintiff. I am therefore in agreement with the respondent's submissions that there is no interlocutory judgment on record against the 3<sup>rd</sup> applicant which can be reviewed or set aside. Prayer 2 of the motion is therefore, with respect, misconceived.

19. Regarding whether or not the amended plaintiff is fatally defective, the starting point is a consideration of the law governing amendment of pleadings. The law is set out in *Order 8 Rules 1 and 3 of the Civil Procedure Rules*. *Rule 1 (1)* provides that a party may, without leave of the court amend his pleadings once at any time before pleadings are closed. This means that once pleadings are closed which is 14 days after filing and service of the defence or reply to defence whichever is applicable, a party desiring to amend his pleadings must under *Rule 3* seek and obtain court's leave to do so.

20. In this case, the respondent countered the applicants' claim that the amended plaintiff was incurably defective for having been filed without leave of the court by asserting that when he filed the amended plaintiff on 17<sup>th</sup> March 2017, the applicants had not filed a defence in response to the original plaintiff; that therefore, pleadings had not closed and he was thus not required to seek court's leave before filing the amended plaintiff and that in any event, he was permitted by the Hon. Deputy Registrar to file the amended plaintiff.

21. The applicants have on the other hand maintained that they filed a statement of defence and counterclaim which they served on the respondent on 31<sup>st</sup> January 2011 but the same later mysteriously disappeared from the court file alongside another pleading.

22. Upon perusing the court record, I note that the Hon. Deputy Registrar vide letter dated 12<sup>th</sup> June 2018 noted that the respondent by letter dated 9<sup>th</sup> March 2012 had requested for a date for formal proof on grounds that the defendants had failed to file a defence; that the Deputy Registrar gave directions that a date be fixed for formal proof and that it was after this direction that the respondent filed an amended plaintiff and took out fresh summons to enter appearance.

23. The letter also confirms that the defence and counterclaim filed by the applicants or a receipt showing payment of filing fees for the same were missing from the court record. However, there is nothing in the letter or in the court record to show that the Hon. Deputy Registrar permitted the respondent to file an amended plaintiff.

24. The applicants have exhibited as annexure marked KW-1, a copy of the statement of defence and counterclaim which they claim they filed and served on the respondent but which is still missing from the court record. I have examined the same and noted that it bears a court stamp indicating that it was filed on 24<sup>th</sup> January 2011. It also bears a stamp evidencing service of the same on O P Ngoge & Associates of P O Box 3430-00200 Nairobi on 31<sup>st</sup> January 2011.

25. It is a cardinal rule of the law of evidence that he who alleges must prove. Having maintained that the applicants did not file the exhibited statement of defence and counterclaim and that the two stamps embossed on the copy availed to the court were infact forgeries, it was incumbent upon the respondent to tender evidence to prove his allegation that the two stamps were indeed forgeries which he failed to do.

26. The fact that the applicant failed to attend the Hon. Deputy Registrar to clarify on the issue regarding filing of the statement in defence and counterclaim or to produce a receipt evidencing payment of filing fees is not by itself proof that the pleading was not filed and served as shown on the face of the exhibit marked KW-1. I say this because in the ordinary course of business, documents do at times get lost or misplaced and this cannot be used as evidence that they never existed in the first place.

27. I entirely agree and associate myself with the finding of this court in *SABCO Millers Limited V Geothermal Development Limited, [2019] eKLR* where the court on being confronted with a situation similar to the one in this case stated as follows:

***“I have no reason to doubt the authenticity of the court stamp appearing on this document, nor has any party raised any issue regarding the validity of said stamp. For one reason or other this document is not in the court file. I cannot tell whether this omission was due to human error or by design. All I can say is that unfortunately it is not a new thing for court documents to be found missing from the original file...”***

28. In the absence of evidence that the stamps on the exhibit marked KW-1 were forgeries, I have no reason to doubt the authenticity of the aforesaid stamps as well as the applicants' contention that they had indeed filed and served the respondent with their statement of defence and counterclaim before the respondent filed his amended plaintiff.

29. Going by the date shown on the copy of the applicants' statement of defence and counterclaim as the date on which the respondent was served with the pleading, that is, 31<sup>st</sup> January 2011, it follows that pleadings in this case closed on or about 15<sup>th</sup> February 2011. The respondent was therefore enjoined by the law to seek and obtain court's leave before amending his plaintiff about six years later on 17<sup>th</sup> March 2017 which he did not. My finding then is that the amended plaintiff was irregularly filed and is not properly on record.

30. Having made that finding, the next question that begs an answer is this: is the amended plaintiff fatally defective as to warrant its striking out or is the omission to obtain court's leave before filing it curable?

31. It is now settled law that striking out pleadings is a draconian act which should be the last resort of a court. Given the circumstances in which the amended plaintiff in this case was filed, it is my considered view that it would not be in the interest of justice to strike it out since its filing can be regularized without occasioning the applicants any prejudice considering that the applicants can be given an opportunity to file

an amended statement of defence and counterclaim. I therefore decline the applicant's invitation to strike out the amended plaint.

32. Regarding whether the amended plaint discloses a reasonable cause of action against the 3<sup>rd</sup> applicant, the Court of Appeal in ***DT Dobie & Company (K) Limited V Joseph Mbaria Muchina & Another, (1980) eKLR*** defined a reasonable cause of action as one which from a perusal of the plaint appears to have some chance of success and it is not hopeless or too weak as to be beyond redemption by way of an amendment. In this case, having perused the lengthy amended plaint, I am satisfied that the claims made against the 3<sup>rd</sup> applicant therein are sufficient to constitute a reasonable cause of action as defined in the ***DT Dobie case [supra]***.

33. In the end, I find merit in the Notice of Motion dated 2<sup>nd</sup> May 2018 and it is hereby allowed on the following terms:

i. The directions issued by this court on 3<sup>rd</sup> November 2017 directing that the case proceeds by way of formal proof are hereby set aside.

ii. The amended plaint filed on 17<sup>th</sup> March 2017 is hereby deemed to have been properly filed and is admitted as part of the court record.

iii. The applicants are hereby granted leave to file and serve an amended statement of defence and counterclaim within 14 days from today.

34. On costs, the order that best commends itself to me is that each party shall bear his or its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>st</sup> day of October 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ongoro holding brief for Mr. Wakwaya for the Applicants

No Appearance for the Respondent

Ms Mwinzi: Court Assistant