

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 2 OF 2017

1. THE TOWN CLERK NYAMIRA TOWN COUNCIL.....1ST PLAINTIFF

2. NYAMIRA TOWN COUNCIL.....2ND PLAINTIFF

-VRS-

THE CHIEF EXECUTIVE OFFICER

LOCAL AUTHORITIES PROVIDENT FUND.....DEFENDANT

RULING

This is a ruling on the preliminary objection raised by Counsel for the plaintiff on the defendants "Amended Defence and Counterclaim" filed herein on 9th November 2016. The gist of the preliminary objection is that the same is an abuse of the court process for being filed without leave of the court.

I have considered the oral submissions of Counsel and I am satisfied that the preliminary objection has merit. The defendant first filed his defence on 14th July 2011. The said defence had no counterclaim. It seems that no reply to defence was filed which means that pleadings closed fourteen days after service of the defence – see Order 2 Rule 13 of the Civil Procedure Rules. It is clear therefore that this so called Amended Defence and Counterclaim was filed long after the pleadings had closed, to be precise after five (5) years and this without the leave of the court as none has been exhibited. This is contrary to the Provisions of Order 7 Rule 17 (2) of the Rules which states: -

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

As for amendment Order 8 Rule 1 (1) of the Civil Procedure Rules give a party a right to amend any pleading once at any time before pleadings are closed. In effect any party desiring to amend a pleading before close of pleadings must seek the leave of the court. Contrary to the submission by Counsel for the defendant a counterclaim cannot stand on its own. It is inherently conjoined to a defence. This as can be seen in Order 7 Rule 3 which states: -

“(3) A defendant in a suit may set – off, or set up by way of counter claim against the claims of the plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit.....”

Order 8 Rule 7 requires any party wishing to rely on a counter-claim to state so in his defence. A counterclaim cannot therefore be filed separately from a defence. The only instance it can stand alone is provided for in Order 7 Rule 13 which states: -

“(13) If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”

The defendant in this case did not obtain the leave of this court before filing the “**amended defence and counterclaim**” or even the counterclaim as he should have done. Accordingly, the preliminary objection is merited and is allowed and the impugned defence and counterclaim are struck out. The costs of the preliminary objection be to the plaintiff.

It is so ordered.

Signed, dated and delivered at Nyamira this 8th day of November 2018.

E. N. MAINA

JUDGE