



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 5 OF 2015.

**MICHAEL MUUTHOKA MAKAU (Suing as personal representative of the Estate
of ERNEST DAUDI (DECEASED)).....PLAINTIFF**

VERSUS

SIMON NGANGA MBUGUA.....1ST DEFENDANT

STEPHEN NDIRANGU.....2ND DEFENDANT

KEVIN NJOROGI.....3RD DEFENDANT

AND

MONARCH INSURANCE COMPANY LTD.....INTERESTED PARTY

RULING

1. The cause of action herein, according to the plaint arose on 5th May, 2014. On that day the deceased, **Earnest Mweu Daudi**, was travelling in motor vehicle Reg. No. KAM 997Z when due to the negligence of the driver of the said vehicle the same rolled as a result of which the deceased sustained fatal injuries.

2. By an application dated 6th May, 2016, the interested party herein sought to be joined to these proceedings in that capacity. The said application was based on the ground that one **Joseph Njenga Maina** insured motor vehicle Reg. No. KAM 997Z with the said interested party and that at the time of the accident the said insured was in breach of the insurance policy and that the breach necessitated the filing of Machakos HCC No. 27 of 2015. It was the said interested party's case that if this suit proceeded and judgement was entered it stood to be highly prejudiced. According to the copy of the plaint annexed to the affidavit in support of the said application, the interested party was seeking a declaration that it was not bound to indemnify the insured in respect of any claims that would be made against the said insured arising from the said accident.

3. By a ruling dated 12th June, 2017, the Court granted the said application and joined the interested party herein as such to these proceedings.

4. This ruling arises from preliminary objections raised by the Plaintiff herein in which it is contended that:

1) The Statement of Defence and Counter-Claim are defective and bad in law.

2) The interested party has made prayers similar to the content of its counter claim herein in the High Court Civil Suit No. 27 of 2015 which is still pending before this court.

3) The Statement of Defence and Counter Claim offend the letter and spirit of section 6 of the Civil Procedure Act which codifies the general sub-judice rule.

4) The Statement of Defence and Counter-Claim is not supported by a verifying affidavit and hence does not conform with

the provisions of Order 4 Rule 1 (2), (5) and (6) and Order 7 Rule 5 (a) of the Civil Procedure Rules.

5) The Statement of Defence and Counter-Claim is an abuse and a waste of the court's judicial time and is solely meant to defeat the overriding objective of the court as per the provisions of Sections 1A & B of the Civil Procedure Act.

5. On behalf of the Plaintiff, reliance was placed on section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

6. According to the Plaintiff, the pleadings in the Interested Party's Counter-Claim offend the *sub-judice* rule because they are the same prayers sought in the Interested Party's Suit HCCC No. 27 of 2015.

7. The plaintiff further relied on Order 4 Rule 1 of the *Civil Procedure Rules*, and Order 7 Rule 5 of the *Civil Procedure Rules* and submitted that the essence of these provisions is to make it mandatory for a Statement of Defence and counter-claim to be accompanied by a verifying affidavit sworn by the Defendant in affirmation of the contents of the counter-claim. The Interested Party did not swear a verifying affidavit in support of its counter-claim which therefore must be struck out for being defective *ab initio*. In this respect the Plaintiff relied on **Bridge-Up Container Services Ltd vs. C.F.C. Stanbic Bank Ltd [2011] eKLR**, where it was held that:

“A counterclaim being the document initiating the counter suit against the plaintiff, must of necessity be accompanied by the verifying affidavit, verifying the correctness of the averments contained in the counter-claim. Order 7 Rule 5 (a) of the Civil Procedure Rules 2010 has only reinforced this position by specifically providing for a verifying affidavit. Therefore the filing of the counterclaim without a verifying affidavit renders the defendant's counterclaim defective.”

8. On the same note the Plaintiff cited **Priska Onyango Ojuang' & Another vs. Henry Ojwang Nyabende [2018] eKLR** where it was held that:

“where a claim of is commenced through a plaint or counterclaim filed without an accompanying verifying affidavit in accordance with Order 4 Rule 1 (2) of Civil Procedure Rules, then such a claim is improperly before the court and is liable to be struck out on the court's own motion, or on being moved by a party to the proceedings.”

9. Based on the foregoing, it was the Plaintiff/Applicant's prayer that the Interested Party's Statement of Defence and Counter-Claim dated 5th September 2017 be struck out of this proceedings herein with costs to the Plaintiff/Applicant.

10. The objection was however opposed by the interested party based on the decisions in Mombasa HCCC No. 233 of 2010 – **Bridge-Up Container Services Ltd vs. C F C Stanbic Bank Ltd**, Nairobi ELC No. 1000 of 2012 – **Joseph Okoto vs. Edwin Dickson Wasuna** and Kerugoya HCCA No. 100 of 2013 – **Jefitha Muchai Mwai vs. Peter Wangio Thuku** in which it was held that the failure to file a verifying affidavit with a counterclaim is not fatal and that the defect can easily be remedied by filing and serving a verifying affidavit.

11. It was submitted that in the instant case the interested party's statement of defence and counterclaim raised serious triable issues that can only be determined at the hearing of the case hence it would be highly prejudicial to the interested party if the same is struck out as sought by the plaintiff.

12. The interested party therefore urged the court to disallow the objection and to allow the interested party to file a verifying affidavit.

Determination

13. In **Oraro vs. Mbaja [2005] 1 KLR 141** in which **Ojwang, J** (as he then was) expressed himself as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach

of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"... The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

14. In my view the issues such as *sub judice* and competency of the pleadings may properly be raised as preliminary objections as long as the facts are not in dispute. This, in my view was the position adopted by **Waki, J** (as he then was) in **Total Kenya Limited vs. Fanana Investments Limited Nairobi HCCC NO. 743 of 1999** in which he held that:

"The parties in this suit are the same as the parties in Kisumu Case except that Total is the defendant in Kisumu and Fanana is the plaintiff there. Whichever way one looks at it, there is no substantial difference between the two suits as they have the same substratum. With proper pleading through a counterclaim in the first suit, there is no reason why the issues in both suits cannot be determined in one sitting. As the law requires in such circumstances that the latter suit be stayed, the application to stay the suit is granted with costs in cause."

15. In this case it is not contested that the counterclaim by the interested party was filed without a verifying affidavit. Order 7 rule 5 of the **Civil Procedure Rules** provides that the defence and counterclaim filed under rule 1 and 2 shall be accompanied an affidavit under Order 4 rule 1(2) where there is a counterclaim. Although the word used is "shall" it is now trite that the mere use of the word "shall" cannot oust the jurisdiction of the High Court because the word is not necessarily mandatory. However, procedural rules ought not to be ignored with impunity. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**, without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

16. It was however appreciated by **Ringera, J** (as he then was) in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** that:

"Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue".

17. It was therefore held in **Dominion Farm Limited vs. African Nature Stream & Another Kisumu HCCC No. 21 of 2006** that whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.

18. The Court further recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103**.

19. What then is the option available? As was stated in the Court of Appeal in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** *the Court now has wider powers and will not automatically strike out proceedings but will before doing so, look at available alternatives. Order 4 rule 1(6), gives the court discretion when it comes to striking out a pleading based on such omission. In exercising this discretion, the most important consideration, in my view, is that of justice and unless the omission has occasioned the defendant prejudice, the court, as always, should lean towards sustaining a suit.*

20. *It is therefore clear that the decision whether to strike out a pleading is an exercise of discretion and the law is clear that a preliminary objection ought not to be raised where what is sought is an exercise of judicial discretion. Whereas in issues where what is alleged is lack of jurisdiction, the Court has no option, where it is contended that the application is incompetent for failure to comply with the rules of procedure, a default which the Court may waive in the exercise of its discretionary powers, that ought not to be raised as a preliminary objection. See **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**.*

21. In the premises I agree with the decisions in Mombasa HCCC No. 233 of 2010 – **Bridge-Up Container Services Ltd vs. C F C Stanbic Bank Ltd**, Nairobi ELC No. 1000 of 2012 – **Joseph Okoto vs. Edwin Dickson Wasuna** and Kerugoya HCCA No. 100 of 2013 – **Jefitha Muchai Mwai vs. Peter Wangio Thuku** in which it was held that the failure to file a verifying affidavit with a counterclaim is not fatal and that the defect can easily be remedied by filing and serving a verifying affidavit.

22. In the premises I am not prepared to allow the preliminary objection based on the omission to file the counterclaim with a verifying affidavit.

23. As regards the fact that the counterclaim herein is replica of the interested party's suit in Machakos HCCC No. 27 of 2015, it is clear that

the interested party's claim in both matters is substantially the same. The interested party ought to have elected which matter to proceed with instead of adopting a two pronged attack on the same issue. To adopt such a procedure may not only lead to an embarrassment but may be considered as playing lottery with judicial process. Section 6 of the *Civil Procedure Act* provides that:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

24. In **Kibona vs. Tanscan Timber Co. Ltd Mbeya HCCC No. 8 of 1999 [1995-1998] 1 EA 121,** it was held that:

“A counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant although they retain their titles as shown in the plaint and since a counterclaim is a suit distinct from the plaintiff's suit, it must be headed by the term “Counter Claim” in bold capital letters which implies that although it is contained in a written statement of defence it is also a suit to which a written statement of defence is required.”

25. Similarly, it was held in **Samaki Industries (Nairobi) Ltd vs. Samaki Industries (K) Ltd (2) [1995-98] 2 EA 369** that:

“It is trite law that a counterclaim is substantially a cross suit and should be treated for all purposes for which justice requires it to be so treated, as an independent action.”

26. It follows that the doctrine of *sub judice* must apply to a counterclaim with equal force just as it applies to a claim. It follows that a plaintiff cannot be allowed to proceed with his suit on one hand and a counterclaim over the same or substantially the same cause of action at the same time. In the premises the order which commends itself to me and which I hereby grant is that the interested party's counterclaim herein be and is hereby stayed pending the hearing and determination of Machakos HCCC No. 27 of 2015.

27. Those are the orders of the court.

Read, signed and delivered in open Court at Machakos this 3rd day of December, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Mahugu for Miss Karanja for the Interested Party

CA Geoffrey