



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.743 OF 2015**

**[FORMERLY HIGH COURT CIVIL SUIT NO.199 OF 2011]**

**PRISKA ONYANGO OJUANG'.....1<sup>ST</sup> PLAINTIFF**

**JANE MILDRED OJUANG'.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY OJWANG NYABENDE.....DEFENDANT**

**RULING**

1. **Henry Ojwang Nyabende**, the Defendant, vide notice of motion dated 7<sup>th</sup> February 2015, seeks for leave to file and serve a verifying affidavit in support of his counterclaim out of time and before he files his final submission in this matter and costs. The application is based on the five (5) grounds on its face and is supported by the affidavit sworn by Aloys Obunga Aboge, the counsel on record for the Defendant, on the 9<sup>th</sup> February 2015. The application is brought under **Article 159 of the Constitution 2010, Sections 1A, 1B and 3A of Civil Procedure Act**.

2. The application is opposed by the Plaintiffs through the grounds of opposition dated 15<sup>th</sup> July 2016.

3. That on the 23<sup>rd</sup> June 2016 Mr. Aboge and Orengo, learned counsel for the Defendant and Plaintiffs respectively, appeared before the Deputy Registrar and agreed to file and serve written submissions on the said application. Thereafter, counsel for the Defendant filed their written submissions dated 29<sup>th</sup> June 2016. That when the matter came up for mention on the 21<sup>st</sup> November 2017, counsel for the Plaintiffs indicated that they will rely on the grounds of opposition already filed and today's ruling date was fixed.

4. The following are the issues for the court's determinations;

- a. Whether a counterclaim filed without accompanying verifying affidavit is a proper suit.
- b. Whether a verifying affidavit can be filed long after the counterclaim has been filed.
- c. Whether the Defendant is entitled to the prayer sought.
- d. Who pays the costs.

5. The court has considered the grounds on the notice of motion, affidavit evidence, grounds of opposition, the submissions by counsel for the Defendant, the court record and come to the following conclusions;

- a. That the suit was commenced through the plaint dated 8<sup>th</sup> November 2011 and accompanied by among others, the verifying affidavit sworn by Priska Anyango Ojuang, the 1<sup>st</sup> Plaintiff, on the 8<sup>th</sup> November 2011.
- b. That the Defendant opposed the Plaintiffs claim through their statement of defence and counterclaim dated 16<sup>th</sup> November 2011 and filed with the court on the 21<sup>st</sup> November 2011. That filed with the defence and counterclaim were Defendant's list of documents, Defendants list of witnesses and Defendant's list of authorities. That the first two are dated the 16<sup>th</sup> November 2011 while the last one is dated the 18<sup>th</sup> November 2011.
- c. That it is apparent no verifying affidavit was filed with the defence and counterclaim which contravenes the provision of **Order 7**

Rule 5 (a) of the Civil Procedure Rules which states as follows;

“5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-  
a. an affidavit under Order 4 Rule 1(2) where there is a counterclaim.”

That provision of Order 4 Rule 1 (2) of Civil Procedure Rules is as follows;

“1.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment contained in rule 1(1) (f) above”.

That Rule 1(1) (f) of the Procedure Rules states as follows;

“ 1. (1) The plaint shall contain the following particulars-

- a. ....
- b. ....
- c. ....
- d. ....
- e. ....

**f. an averment that there is no other suit pending and that there have been no previous proceedings, in any court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the plaint.”**

d. That the Defendant is actually the Plaintiff in the counterclaim. That a Defendant filing a counterclaim is required to file a verifying affidavit at the time the counterclaim is filed, in the same way a Plaintiff is required to have his plaint accompanied with a verifying affidavit at the stage of filing.

e. 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.

f. That the Plaintiffs gave notice of their intention to move the court to strike out the Defendant’s counterclaim through paragraph 19 of their Reply to Defence and Defence to Counterclaim which states as follows;

“19. Further and in the alternative and without prejudice to the foregoing, the plaintiffs further aver that the Defendants counter – claim is misconceived and bad in law and is further an abuse of the process of the Honorable Court for failing to comply with mandatory provisions of the Civil Procedure Rules and should be struck out with costs.”

g. That counsel for the parties appeared in court on the 17<sup>th</sup> September 2014 and by consent agreed to prosecute the suit through written submissions. That pursuant to that consent, the Plaintiffs’ counsel filed their written submissions dated 23<sup>rd</sup> January 2015 in which at paragraph 20, counsel submits as follows;

"20. The Defendant’s counter claim is not accompanied by a verifying affidavit as required by the Civil Procedure Rules. It is therefore defective and is irregularly before this Honorable Court and should be struck out with costs. It has failed to comply with the mandatory provisions of **Order 4 Rule 1(2) of the Civil Procedure Rules 2010.....**”

h. That the notice of motion dated 7<sup>th</sup> February 2015 was filed a few days after the Plaintiffs submissions were filed. That the said application’s filing must have been aimed to circumvent the Plaintiffs move to seek to strike out the counterclaim. That even if the court had jurisdiction to exercise discretion to allow late filing of verifying affidavit, the Defendant’s has taken rather too long to move the court. That the Plaintiffs closed their case by filing their submissions on the 23<sup>rd</sup> January 2015 and such a discretion cannot be exercised in favour of the Defendant without prejudicing the Plaintiffs case and inordinately delay the finalization of this suit.

i. That having found that the Defendant’s counterclaim is improperly before the court for failure to have an accompanying verifying affidavit at the time of filing, then the same should be struck out with costs.

6. That flowing from the foregoing, the court finds no merits in the Defendant’s notice of motion dated 7<sup>th</sup> February 2015 and orders as follows:

a. That the notice of motion dated 7<sup>th</sup> February 2015 be and is hereby dismissed with costs.

b. That the Defendant's counterclaim contained in the statement of Defence dated 16<sup>th</sup> November 2011, and filed on the 21<sup>st</sup> November 2011, 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) of Civil Procedure Rules.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2018**

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr. Otieno for Ragot for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/2/2018**

21/2/2018

S.M. Kibunja Judge

Joane Court Assistant

Parties absent

Mr. Otieno D for Ragot for the Defendant

Court: Ruling dated and delivered in the open court in the presence of Mr. Otieno D. for Ragot for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/2/2018**