



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 348 OF 2014

JARED KIRPOTICH BIWOTT:.....1ST PLAINTIFF

STEPHEN CHERUIYOT:.....2ND PLAINTIFF

VERSUS

JONATHAN KIBE:.....DEFENDANT

RULING

INTRODUCTION

This is a ruling in respect of an application brought by way of notice of Motion dated 12th June 2015 where the plaintiff/applicants are seeking for the following orders:

1. THAT statement of defence and counter claim be struck off.
2. THAT the verifying affidavit sworn by Jonathan Kibe the Defendant herein and dated 19th December, 2014 be struck off.
3. THAT costs for this Application be provided for.

This matter came up on 29th May 2017 for hearing of the application whereby Counsel for the plaintiff opted to canvass the application by way of written submissions. Counsel filed submissions on 21st June 2017 and the court gave a ruling date.

Plaintiff's Counsel's Submissions

The Plaintiff's Counsel filed written submissions on 21st June 2017 in support of the application striking out the defence and counterclaim. She relied on her supporting affidavit sworn on 12th June 2017. She submitted that the Respondent was served by way of registered post through the advocate on record M/W. Kigen but he did not file any response to the application.

Plaintiff's counsel listed three issues for determination of the application namely:

1. Whether the statement of defence and counterclaim have been served on the plaintiff.
2. Whether the verifying affidavit is defective.

3. Whether any pleadings required by the law to be accompanied by an affidavit stands on its own having the affidavit struck off.

Miss Tum Counsel for the plaintiff further submitted that while the defendant/ respondent filed a statement of defence and counterclaim, the same was never and has not been served on the Plaintiff as required by the law within a stipulated period of time. She urged the court to strike out the respondent's statement of defence and counter claim.

Counsel also took issue with the fact that the verifying affidavit sworn by Jonathan Kibe and dated 19th December, 2014 was not commissioned and therefore it was defective. She stated that a deponent in an Affidavit should swear before a commissioner for oaths and in this case the affidavit is defective as it was not commissioned as provided for in the law. She urged the court to strike off the respondent's verifying affidavit.

In response to issue number 3 as to whether a suit would stand without a verifying affidavit, Counsel submitted that it is crystal clear that all pleadings that are required to be accompanied by an affidavit should be accompanied by affidavit sworn by the deponent stating the facts in the pleading. It was her submission that upon striking out the verifying affidavit, the pleading will have no legs of to stand on.

Counsel referred the Court to Order 7 rule 1 of the Civil Procedure rules 2010 which states that:-

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

Counsel further relied on Order 10 rule 3 of the Civil Procedures rules 2010 provides that:-

Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.

Miss Tum Counsel for the plaintiff/Applicant also submitted that Order 2 rule 15 (1) of the Civil Procedure Rules 2010 also provides that at any stage of the proceedings the court may Order to be struck out or amended any pleading on the ground that:-

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may Order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Order 7 rule 5 of the Civil procedure rules 2010 states that: -

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by:

(a) An affidavit under Order 14 rule 1(2) where there is a counterclaim

(b) A list of witness to be called at the trial;

(c) Written statements signed by the witnesses except expert witnesses; and

(d) Copies of documents to be relied on at the trial.

It was further submitted that Order 4 rule 1(2) of the Civil Procedures rules 2010 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) and in this case the verifying affidavit was not commissioned rendering it defective. Similarly Order 4 rule 6 of the Civil Procedures rules 2010 states that the court may on its own motion or on the Application by the Plaintiff or the Defendant Order to be struck out any Plaint or counterclaim which does not comply with sub rule (2) (3) (4) and (5) of this rule.

Counsel therefore urged the court to strike off the defendant's statement of defence, the verifying affidavit and the counterclaim.

Analysis and determination

There are many judicial precedents that have been churned out in respect of similar applications to strike out pleadings. It would be my singular duty to follow suit and not divert from the norm as required by law and practice.

Under Article 159 2 (d) the courts are required to administer justice without undue regard to procedural technicalities. This does not mean that the courts should ignore glaring defects that go to the root of the dispute. The current application is grounded on rules of procedure in the Civil Procedure Rules 2010 which are meant for orderly presentation and adjudication of cases.

Following the enactment of **Sections 1A and 1B** of the Civil Procedure Act, and **Article 159** of the Constitution 2010, the trend has been that courts try to sustain rather than to strike out pleadings on purely technical grounds. I subscribe to the view of Ringera J (as he then was) that lapses in procedure and form which do not necessarily affect the jurisdiction of the court, or the dispute at hand should not make a case fatal to the extent of it being struck out at a preliminary stage. The question to ask is whether by proceeding with the case would occasion a miscarriage of justice or prejudice to the other party.

Striking out of pleadings is provided for under the law and procedure but courts should use these provisions sparingly in order to do substantive justice. In the case of **Grace Ndegwa & Others v. The Hon. The Attorney-General** Civil Appeal No.228 of 2002, the Court made it clear that the goal of justice dictated a departure from extreme attachment to forms of documents.

In **MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE LTD & ANOTHER (2001) KLR 470, at page 481**, Ringera J. (as then was), noted that the plaintiff had attempted to comply with the rule requiring verification of a plaint, but he had fallen short of the prescribed standards. The learned Judge proceeded to strike out the defective affidavit and then ordered the plaintiff to file a fresh verifying affidavit which was compliant.

Further in the case of **Jamii Bora Bank Limited v Ernst & Young LLP [2017] eKLR**, Ochieng J observed that:

'the competence of the plaint is not determinable by the presence of a valid Verifying Affidavit. Whilst a Plaint may be supported with a valid Verifying Affidavit, it could still be incompetent or liable to striking out for other reasons. The converse is also possible, that there was a defective Verifying Affidavit or an affidavit which was a nullity, purporting to support a competent plaint. If the court found the verifying affidavit to be defective or a nullity, that, of itself, would not render the plaint a nullity'.

The learned Judge also stated that when called upon to strike out a plaint on the grounds that the verifying affidavit was defective or was a nullity, the court should exercise its discretion on the basis of the following considerations;

(a) Would the maintenance of the suit occasion prejudice to the defendant that cannot be

compensated by an award of costs? or

(b) If it is maintained would that fact go to jurisdiction? or

(c) If it is maintained would that fact otherwise have a fundamental effect or impact upon the adversary?

If the above questions are answered in the affirmative then the court can strike out the offensive pleadings. I find that the following questions cannot be answered in the affirmative in the current case.

Let me now deal with the issue of failure to serve defense and counterclaim upon the plaintiff within the stipulated time. Munyao J stated in the case of **Priscilla Jeruto Kisoso & Kiporot Ole Totona Alias Singo Arap Totona & 3 others [2016] eKLR** that the Civil Procedure Rules prescribe when pleadings and documents may be served, but it does not say that it is “illegal” or “forbidden” to serve such documents thereafter. A party is at liberty to apply for service out of time and such application must be considered on reasons given. It is not a case of “illegality” and the court has discretion.

I have considered the application and the submissions of the Counsel for the plaintiff and find the application must fail.

Having said that, I will exercise my discretion in this case, strike out the defective verifying affidavit and allow the defendant to file a fresh verifying affidavit. I also order that the defendant do serve the plaintiff with his defense and counterclaim within the next fourteen (14) days from the date of this ruling and I allow the Plaintiffs corresponding leave of fourteen (14) from the date of service of the defense and counterclaim upon them to file a reply to defense and defense to counterclaim.

I will award costs to the plaintiff as the defendant is the one who necessitated the filing of this application. I further order that the plaintiff do serve the defendant with this order within the next 7 days.

Orders accordingly.

Dated and delivered at Eldoret on this 24th day of July, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Miss Tum for the Plaintiff/Applicant

Mr. Koech – Court Assistant