



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 688 OF 2004

THE CO-OPERATIVE BANK OF KENYA LTD..... PLAINTIFF

VERSUS

KARANJA MUNGAI DEFENDANT

R U L I N G

1. The Plaintiff filed a Notice of Motion on 30 January 2012 asking this Court to strike out the Defence herein on the grounds that it does not disclose a reasonable defence in law. That Application is brought principally under the Provisions of **Order 2 Rule 15 (1) (a)** of the *Civil Procedure Rules*. By **Rule 15 (2)**:

“no evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made”.

2. In response to the Plaintiff’s said Application, the Defendant, Karanja Mungai represented by the firm of Amolo & Kibanya, Advocates, swore a Replying Affidavit on 14 February 2012 filed herein on 16 February 2012. The Advocates also filed a Statement of Grounds of Opposition later on 24 February 2012. This was after the counsel for the parties had appeared before me on 23 February 2012. On that day, Mrs. Kuria holding brief for Mr. Mukuria for the Plaintiff objected to the Replying Affidavit having been filed as **Rule 15 (2)** supra had detailed that no evidence should be brought on an application brought under **Rule 15 (1) (a)**. The fact that, after that hearing before me, the Defendant’s advocates filed Grounds of Opposition is indicative that they too may have anticipated that the Replying Affidavit would be struck out.

3. This then is the Preliminary point that this Court must now decide as to the Plaintiff’s said Application. Mrs. Kuria submits that the rule that no evidence shall be admissible on an application under **Order 2 Rule 15 (1) (a)** applies equally to the Defendant/Respondent as it does to the Plaintiff/Applicant. Mr. Omolo, for the Defendant, holds the view that the rule applies only to the Plaintiff/Applicant and that there is nothing untoward or in breach of the rule for the Defendant to have filed his Replying Affidavit.

4. In her submission on the point before me on 12 March 2012, Mrs. Kuria referred me to the case of **Mosi vs. National Bank of Kenya** [2001] KLR 333 at page 335 as per Ringera J. wherein he stated at line 12:

“I remind myself that when a Court is considering to strike out a pleading on the ground of non-

disclosure of a cause of action or defence, the Court is enjoined to look at the pleadings only as no evidence is admissible to support an application under order VI Rule 13 (1) (a)”.

Of course, **Order VI Rule 13 (1) (a)** is now **Order 2 Rule 15 (1) (a)** of the *Civil Procedure Rules 2010*. Mr. Omolo in commenting upon Ringera J’s words stated that one has to look at the context of the material quoted in the authority detailed immediately below Ringera J’s words, in reference to the authority of *Halsbury’s Laws of England*. Such relates only to a pleading which does not disclose a cause of action – a reaction to a Plaintiff. Mr. Omolo submitted that the rationale of the decision that Ringera J made was that he was only making a recollection not a finding on how he saw the procedure to be. Mr. Omolo noted that no prejudice had been occasioned to the Plaintiff by the filing of the Replying Affidavit.

5. For my part in reviewing Ringera J’s quoted words in the **Mosi** Case, I note that he stated:

“as no evidence is admissible to support an application” (underlining mine).

He did not say that no evidence is admissible in opposing such an application. I am supported in this contention by the Ruling of Emukele J in **Drum Publications (E.A.) Ltd. vs. Media 24 & 4 Others** [2003] eKLR. The learned Judge in his Ruling considered a number of sources in relation to the law in this connection including the Supreme Court Practice in England. However, he adopted the finding of Madan JA (as he then was) in **D. T. Dobie vs. Muchina** [1982] K.L.R. 1:

“..... I would sum up. It is relevant to consider all averments and prayers when assessing under Order VI Rule 13 whether a pleading discloses a reasonable cause of action and also the contents of any affidavit that may be filed in support of the pleading that a pleading under subrule 13 (2) as hereafter set out, while evidence by affidavit is not submitted in the case of the first application, it is permitted in the case of the second application”.

To me that phrase at the end of the quote means that is the Applicant who is precluded from adducing any evidence in an application to strike out but that the Respondent is not precluded from doing so.

6. Further along in his Ruling in the Drum Publication case, Emukule J referred to the provisions of **Order L (now Order 51) Rule 16 (1) (now Rule 14 (1))** which now reads:

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents:

- (a) A notice of preliminary objection: and/or;**
- (b) Replying affidavit; and/or**
- (c) A statement of grounds of opposition”.**

The learned Judge concluded that taking a combination of Madan J.A.’s said Ruling along with the provisions of **Order L Rule 16 (1)**, the affidavits which had been sought to be struck out in that suit were admissible. Since Emukule J’s decision which was delivered and grounded under the old rules, the Chief Justice acting on the recommendations of the Rules Committee has clarified the grounds of opposition to applications in the High Court in the new **Order 51 Rule 14** of the *Civil Procedure Rules*. To my mind the addition of the words “and/or” at the end of **Rule 14 (1) (a)** and **(b)** make the Respondent’s options even clearer than under the old Rules. I find therefore that the Respondent herein has a choice of three open to him. He has opted for two out of three, namely, he has filed a Replying Affidavit and a Statement of Grounds of Opposition to the Application. I have no hesitation in stating that I consider him to be entitled to rely upon both.

7. Accordingly, I dismiss the Plaintiff’s Preliminary Objection and allow the Defendant’s said Affidavit dated 14 February 2012 to stand. The Defendant will have the costs of the Preliminary Objection.

DATED and DELIVERED at NAIROBI this 20th day of March 2012.

**J. B. HAVELOCK
JUDGE**