



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Suit 122 of 2011

MAVUNO INDUSTRIES LIMITED.....1ST PLAINTIFF

STEPHEN MWANGI MAINA2ND PLAINTIFF

JOSHUA IRUNGU MAINA.....3RD PLAINTIFF

VERSUS

KEROCHE INDUSTRIES LIMITED..... DEFENDANT

R U L I N G

Before me are two applications. The first application is the Notice of Motion dated 15th November 2011 filed on behalf of the defendant seeking the following orders:

- 1. That the Plaintiffs' Complaint as filed herein be struck out.**
- 2. That the verifying affidavit attached to the complaint and filed herein be struck out.**
- 3. That in the result the suit as against the Defendant be dismissed with costs to the Defendant.**

That application is based on the following grounds:

“(a) the Plaintiffs’ action as filed herein is otherwise an abuse of the court process;

(b) The Complaint filed does not disclose any cause of action.

(c) The complaint is fatally and incurably defective in that it is not supported by any proper verifying affidavit.

(d) The Plaintiff does not disclose certain material facts relevant to these proceedings.

(e) The Plaintiff is otherwise scandalous, frivolous and vexatious; in the circumstances, it is in the interests of justice that the same be struck out;

(f) The Plaintiff discloses no or no known nexus in law between the defendant and the 2nd and 3rd plaintiffs;

(g) The defendant is a total stranger to the 2nd and 3rd plaintiffs and there is no relationship in law or in equity or otherwise, between them and they therefore do not owe each other any rights or duties;

(h) The 2nd and 3rd plaintiffs' plaint herein is incompetent, discloses no cause of action and is frivolous, scandalous and otherwise an abuse of the process of Court".

The second application is similarly a motion on notice dated 18th January 2012 filed on behalf of the plaintiffs seeking the following orders:

"1. THAT this Honourable Court be pleased to enlarge time for the filing an authority under seal of the plaintiff Company allowing its Managing Director to swear a Verifying Affidavit on its behalf should this Honourable Court deem that the same is necessary.

2. THAT in the event that an authority under seal is deemed to have been required to be filed as at the time of filing suit, this Honourable Court be pleased to deem the Resolution filed on 14th December 2011 as properly on record.

3. THAT the Verifying Affidavit sworn by Stephen Mwangi Maina on 13th January 2012 and filed on 16th January 2012 be deemed to be properly on record.

4. THAT in the alternative to prayer 3, this Honourable Court be pleased to enlarge time for filing a Verifying Affidavit in respect of the claim by the 3rd Plaintiff.

5. THAT the costs of this application be in the cause".

The said motion is based on the following grounds:

"a) As at the date of filing this suit, a resolution had been passed by the 1st Plaintiff Company authorizing Stephen Mwangi Maina, the 2nd Plaintiff and Managing Director of the 1st Plaintiff to swear all the relevant Verifying Affidavit.

b) the said resolution was not filed alongside the Verifying Affidavit since it was not thought to be necessary in light of the wording of the Civil Procedure rules 2010. However, an application seeking to strike out the Plaintiff on this basis has been filed by the Defendant.

c) By reason of any inadvertent oversight by the advocates on record for the Plaintiffs it was omitted from the Managing Director's Verifying Affidavit sworn on 1st April 2011 to mention that he was also swearing the affidavit on behalf of Joshua Irungu Maina, the 3rd Plaintiff.

d) The Plaintiff's Advocate only became aware of this oversight by reason of a Notice of Motion dated 15th November 2011 filed by the defendant.

e) The Defendant will not suffer any prejudice whatsoever if the prayers sought are granted.

f) It is in the interests of justice that the orders prayed for are granted and the Plaintiffs case is

heard in its merits.

g) The 3rd Plaintiff ought not to be penalized by reason of an innocent omission by their advocate on record”.

On 18th January 2012 I directed that the two applications be heard together. However, the practice where there are two applications on record, one seeking to summarily terminate the proceedings while the other attempting to keep the proceedings alive, is to start with the one seeking to breathe life into the suit.

Section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

It is therefore clear that in the exercise of the powers conferred upon the court under the Civil Procedure Act and the Rules thereunder, the Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid to ensure **the just determination of the proceedings and the efficient disposal of the business of the Court**. In my view these provisions require the court to adopt a more pragmatic approach in dealing with matters that come before the court.

In STEPHEN BORO GITIHA VS. FAMILY FINANCE BUILDING SOCIETY & 3 OTHERS CIVIL APPLICATION NO. NAI. 263 OF 2009

Nyamu, JA while expounding on the said Overriding Objective stated:

“On 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective... The overriding objective overshadows all technicalities,

precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.

In my view, therefore, the court, when faced with such contradictory and mutually inconsistent applications may well be advised to deal with the application seeking to breathe life into the suit and thereafter deal with the one for bringing the proceedings to an end. This position is in consonance with a long line of decisions that pleadings should only be struck out when they are so hopeless that life cannot be breathed into them by way of amendment.

In the case of SALESIO M’ARIBU VS. MERU COUNTY COUNCIL CIVIL APPEAL NO. 183 OF 2002 the Court of Appeal stated that:

“There was an application before the superior court seeking leave to amend the plaint which application was filed before the preliminary objection was filed. That application was seeking to inject some life into the suit. The learned Judge should have first heard and should have first determined that application before hearing the preliminary objection against the entire suit. That application was trying to bring on board matters that could have been relevant to the claim and was thus seeking to breathe life into the claim. The court in hearing the preliminary objection shut out the amended plaint which could have possibly revealed a different aspect of the case and in doing so, the court threw out the entire case without knowing what it was all about as it left the application seeking to amend the plaint unheard. Had that application been heard and determined before the objection was heard, the objection might have not been entertained in case that application was determined in favour of the appellant. In short, what might have appeared a weak pleading might have had some life injected into it through amendment. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it...The procedure where a court is faced with an application for summary dismissal or striking out a pleading or faced with a preliminary objection to a pleading which seeks to dispose of that pleading, which the other party seeking to amend, is to have the application seeking leave to amend heard first and determined before hearing the application for summary dismissal or for striking out or an objection seeking disposal of the pleading. In that way, the court will ensure that all aspects of the matter are before it before the application for summary dismissal or striking out or the objection seeking to dispose of the pleading is heard and determined”.

A similar holding was made in the case of NOVA INDUSTRIES LIMITED & 2 OTHERS VS. FIDELITY COMMERCIAL BANK LIMITED CIVIL APPLICATION NO. NAI. 315 OF 1998 where the same court held that where, at the time of hearing an application for summary judgement, there is on record an application seeking to amend the defence and counterclaim the application for amendment ought to be heard before the application for summary judgement so that the triable issues raised in the amended defence can be heard. In my view, the same principles apply to the present applications.

Therefore, following in the footsteps of the Court of Appeal I propose to deal with the plaintiff’s application dated 17th January 2012 and to that application I now proceed.

The application is supported by an affidavit of **Beatrice Wairimu Kariuki**, the plaintiff’s advocate.

According to the deponent, at the time of the filing of this suit she was supplied with a resolution by the 1st Plaintiff company authorising the 2nd Plaintiff, its managing director to swear all relevant verifying affidavits. However, she did not deem it necessary to file the same according to her interpretation of **Order 4 rule 1(4)** of the Civil Procedure Rules, 2010, although the same has now been filed. In the verifying affidavit, the deponent states that she inadvertently omitted to state that the 2nd plaintiff was swearing the same on behalf of the 3rd plaintiff, though this had been the intention. However, a second verifying affidavit has since been filed to cure the defect.

In a replying affidavit sworn by **Joseph Muigai Karanja**, a director of the defendant, on 16th January 2012, it is the defendant's position that the defects which have been admitted are the failure to comply with the mandatory provisions of the civil procedure and amounts to a gross abuse of court process and the suit ought to be dismissed since it amounts to opposing an application by way of another application. Further the filing of documents without seeking the leave of the court further amounts to abuse of the court process. If this application is allowed the defendant's earlier application stands to suffer prejudice.

In their submissions the plaintiffs state that from the wording of **Order 4 rule 1(4)** of the Civil Procedure Rules what is required is that a verifying affidavit that is sworn on behalf of a corporation should be sworn by an officer duly authorised under seal of the company to do so. There, however, is no express requirement that the said authority be filed alongside the Plaint and they seek refuge in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR**. With respect to the issue of the verifying affidavit, it is submitted that the plaintiffs intend to file two verifying affidavits one by the 2nd plaintiff on his own behalf and on behalf of the 1st plaintiff and the other by the 2nd plaintiff on his own behalf. The failure to state the place of abode, it is submitted was not intentional and should not be visited on the clients. Reliance is placed on **Mitsui OSK Lines Limited vs. Kenya Ports Authority Mombasa HCCC No. 200 of 2005 [2008] eKLR**, **Zachary Nyayieni Moturi vs. Kisii Bottler Ltd Nairobi HCCC No. 480 of 2004 [2005] eKLR**, **Eustace Mwaniki Nginga vs. Philip Koskei Biego and 9 Others Nakuru HCCC No. 47 of 2003 [2004] eKLR** and **Mohammed Olunga Oduori vs. The Mumias Outgrowers Company Ltd and Another Kakamega HCCC No. 93 of 2001 [2005] eKLR**.

In its submissions on the issues raised in the plaintiffs' application, the defendant contends that **Order 4 rules (2), (3) and (4)** of the Civil Procedure Rules, 2010 are very clear that a verifying affidavit shall accompany the plaint verifying the correctness of the plaint and where there are several plaintiffs, one of them with written authority filed with the verifying affidavit may swear the affidavit on behalf of others; and where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under seal to do so. It is submitted that there is no authority as relates to the 3rd plaintiff in writing authorising the 2nd plaintiff to swear the verifying affidavit on his behalf which has been filed with the verifying affidavit. As relates to the 1st plaintiff, it is submitted that the document filed is a mere resolution not under seal and that there is no indication that the said resolution has been filed with the Registrar of Companies as required. To suggest that an authority is to be filed after filing the verifying affidavit is to misconstrue and negate the cardinal provisions relating to the same and that argument, according to the defendant, is farfetched, frivolous and misplaced. Accordingly the plaint should be struck out.

I have considered the application, the affidavits both in support of and in reply to the application, the submissions of parties and the authorities cited. As rightly submitted on behalf of the defendant under **Order 4 rules (2), (3) and (4)** of the Civil Procedure Rules, 2010 a verifying affidavit shall accompany the plaint verifying the correctness of the plaint and where there are several plaintiffs, one of them with written authority filed with the verifying affidavit may swear the affidavit on behalf of others; and where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under seal to do so. It is not in doubt that the verifying affidavit sworn by **Stephen Mwangi Maina** on 1st April 2011 did not expressly state that the deponent had been authorised by the 3rd plaintiff to swear the said affidavit. Accordingly, the 3rd plaintiff's suit as presented in the plaint was not accompanied by a verifying affidavit. I have also not seen any written authority given by the 3rd plaintiff empowering the 2nd plaintiff to swear the said affidavit on his behalf. Both **Order 1 rule 13(2)** and

Order 4 rule 3(3) of the Civil Procedure Rules require such an authority in writing to be filed. Accordingly, even if the verifying affidavit had purported to have been sworn on behalf of the 3rd plaintiff without the 3rd plaintiff's authority in writing the affidavit would still be worthless as regards the 3rd plaintiff's suit.

Apart from the foregoing the said affidavit, does not strictly comply with the provisions of **Order 4 rule 1(2)** of the Civil Procedure Rules. As opposed to the former rules what is required to be verified under that subrule is only the averment in **Order 4 rule 1(1)(f)** and not the whole plaint.

It is no doubt clear that the plaintiffs fell foul of the foregoing rules. The only issue is the effect of such non-compliance. The plaintiffs contend that they have now filed further verifying affidavit. I have seen a verifying affidavit sworn by **Stephen Mwangi Maina** on 13th January 2012 and filed in court on 16th January 2012. As already indicated without the 3rd defendant's authority the said affidavit would in its material part be worthless. Secondly, I am not aware of any provision under which the said affidavit was filed. One cannot but agree with the defendant that this was an abuse of the process of the court. It is mischievous for a party to sneak a document which should have been filed together with the plaint into the record subsequently without the sanction of the court. Such conduct does not augur well for the orderly administration of justice. That affidavit for the two foregoing reasons is struck out.

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. According to the defendant, a verifying affidavit must be filed with the plaint and not subsequently. Order 4 rule 1(6), however, gives the court discretion when it comes to striking out based on such omission. The defendant is, however, incorrect in submitting that the omission to file one verifying affidavit would necessarily lead to the striking out of the suit. In my view, the only suit that be would affected by such omission in the present case is that of the 3rd plaintiff. 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. The only prejudice alleged herein is that the effect of validating the plaint and the suit would be to pull the rag from the feet of the defendant as it were since it would have the effect of rendering a portion of the defendant's application filed earlier on superfluous. That may be so; however, it does not, in my view justify resort to the draconian option of striking out a suit, especially where the defect would only affect the suit by one of the several plaintiffs. The issue of the place of abode, in my view, is no longer a matter of life and death in light of the provisions of Order 19 rule 7 of the Civil Procedure Rules, 2010 which empower the court to receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.*

The other issue raised is with respect to failure to file a resolution with the verifying affidavit. As properly submitted by the defendant, under **Order 4 rule 1(4)** of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.

With respect to the failure to specify the track under which the case is brought, it must be emphasised that the reason behind the classification of cases in different tracks is to enable the court during the pre-trial

directions and conferences to ensure compliance with the provisions of sections 1A and 1B of the Civil Procedure Act by which are tailored to enabling the court to deal with cases justly including:

- (a) ensuring that the parties are on an equal footing;
- (b) saving expenses;
- (c) dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party;
- (e) ensuring that it is dealt with expeditiously and fairly; and
- (f) allotting it appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In other words the classification of cases is a means to an end and is not an end in itself. The court is, however, not bound to adhere to the classification and status attached to a particular suit by either the advocates or the parties. Under **Order 11 rule 3(1)(g)** the Court is empowered to change the track. Accordingly, whereas parties and advocates should as much as possible comply with the procedures, failure to state the track under which a suit falls is not necessarily fatal to a suit. In any case that omission is capable of being amended and it is trite that where a defect in a pleading is capable of being cured by an amendment the pleading should be resuscitated by such amendment. The same reasoning applies to the requirement in **Order 2 rule 2(2)** of the Civil Procedure Rules that dates, sums and any other number be expressed in figures and not in words. It is important to keep in mind the following wise words of the Court of Appeal in Mwangi vs. Mwangi [1999] 2 EA 234.

“Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgement seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance..When the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation”.

I now proceed to deal with what remains of the application dated 15th November 2011. This application is supported by an affidavit sworn by **Joseph Muigai Karanja**, a director of the defendant on 14th November 2011. After setting out the reliefs set out in the plaint the deponent states that the material pleaded and or disclosed in the plaint does not disclose any cause of action against the defendant. It is contended that the plaint and the suit contravene and or is in violation of the mandatory provisions and requirements of section 15 of the Civil Procedure Act which provides that the corporation can only be sued within jurisdiction where their sole and principal offices are registered, where it is deemed to carry out business and or where the cause of action arose. Since the cause of action herein arose at Naivasha in the Rift Valley province where the registered offices of the defendant are situated within the jurisdiction of the High Court in Nakuru, the filing of this suit is prejudicial to the defendant. It is further deposed that the 2nd and 3rd plaintiffs have no claim against the defendant as there is and/or was no privity of contract between the Applicant and the Respondent either expressly or implied or at all. It is further contended that the 2nd and 3rd plaintiff's suit is a total abuse of the process in that it is premature for failure to send a demand which, according to the deponent, is an essential step in the proceedings hence renders the suit incompetent and incurably defective. The orders sought are, according to the deponent, necessary in the interest of justice.

The application was opposed by the replying affidavit sworn by **Stephen Mwangi Maina**, the 2nd plaintiff herein who also states that he is a director of the 1st plaintiff on 16th January 2012. According to the deponent there is a legitimate and lawful grievance against the defendant by the 2nd and 3rd plaintiffs as a result of a tort committed against them from foreseeable actions of the defendant. The defendant being a person engaged in commercial transactions was and is well aware that bank loans are ordinary part of raising capital for commercial transactions and that such bank loans are almost invariably secured by personal guarantees of company directors and this the plaintiffs are willing to prove by calling a suitable witness at the hearing. It is the deponent's contention that there is no misjoinder of causes of action in view of the provisions of the Civil Procedure Rules 2010 and the plaintiffs are entitled under the Constitution to obtain justice without undue regard to technicalities and further that the application is an afterthought intended to delay the just, expeditious and fair determination of the suit and annexes copies of letters allegedly sent to the defendant's advocates.

In its submissions, the defendant poses several issues arising from the plaint and avers that the plaintiff by its own bundle of documents and specifically the letter dated 11th October 2007 clearly misrepresented statements of facts to the defendant in a bid to induce the defendant to issue the Local Purchase Order. Misrepresentation and misstatements may lead to the setting aside of the contract hence, it is submitted, the defendant was entitled to rescind or avoid the contract. Since the property in the goods could not pass until the defendant had examined the sample, it is submitted that no reasonable cause of action is disclosed. It is further submitted as per the custom, usage and tradition of its trade in the brewing industry, the defendant was entitled to be afforded a reasonable opportunity to examine the goods and to ascertain and compare whether the bulk correspond with the sample by subjecting them to certification by way of laboratory analysis. It is further submitted that delivery of goods that do not correspond with the sample amounts to a fundamental breach and gives the buyer the right to recover damages and treat the contract as repudiated unless the buyer has had a reasonable opportunity to examine the goods and thereafter approve delivery. In light of the fact that the property in the goods had not been transferred to the defendant, the 1st plaintiff has no tenable and legitimate claim against the defendant and the suit must as a consequence fail for no reasonable cause of action. Mere delivery of the goods, it is submitted, does not make the defendant liable. Where the goods delivered do not correspond with the description that amounts to a fundamental breach of a condition entitling the defendant to reject the goods. It is further submitted that the 1st plaintiff has deliberately elected not to disclose all the bags that were allegedly returned by the defendant. There is also an issue as to the propriety of taking loan by the 1st plaintiff after the goods had been rejected. With respect to reference to motor vehicle no. KBD 064Y, it is submitted that there are no supporting documents and no disclosures have been made as regards the chattels mortgage and joint registration thereof as well as letters or correspondences from Credit Reference Bureau. The loan from Equity Bank having been secured almost two years after deliveries had been made there was no legitimate expectation that the defendant was in any way legally bound to pay any price for the substandard goods and/or deliveries hence it is submitted that no legal obligations or rights were in existence as between the 2nd and 3rd plaintiff and the defendant hence they have no reasonable cause of action against the defendant as they are strangers. It is further submitted that no demands were made.

In their submissions, the plaintiffs in light of the LPO and the refusal by the defendant to settle, the plaint cannot be said to disclose no reasonable cause of action. It is further submitted that the claims by the 1st 2nd and 3rd plaintiffs respecting Equity Bank loan should be left to go to full trial as there is a genuine grievance which they wish to ventilate against the defendant. Relying on **D T Dobie & Company Kenya Limited vs. Muchina [1982] KLR 1** it is submitted no case ought to be dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. On the misjoinder, it is submitted **Order 3 rule 5(1)** of the Civil Procedure Rules 2010 allows the joinder of causes of action while rule 8 empowers the court to order separate trials where the causes cannot be conveniently tried or disposed of together. Therefore, it is submitted, any misjoinder cannot be a valid basis for striking out the suit.

On jurisdiction, it is submitted that the High Court has, under the Constitution, unlimited original jurisdiction to entertain any suit whose cause of action arose anywhere within the length and breadth of the Country's borders. It is further submitted that the issue of non-disclosure of material facts is fictitious

and merely intended to delay the expeditious disposal of the suit.

I have now considered the application, the affidavits both in support and in opposition to the application as well as the rivaling submissions and authorities cited. In my view the following sufficiently expounds the principles underlying the striking out of pleadings under **Order rule 15** of the Civil Procedure Rules:

A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

However, the word “scandalous” for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997.**

But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59.**

Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies.(Emphasis mine). See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

A pleading is an abuse of the process where it is frivolous or vexatious or both.

Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended

or to apply for further particulars. See Kemsley vs. Foot (1952) AC 325.

However, in The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant’s defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did”.

In Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”.

On the issue of jurisdiction *Article 165(3)(a)* of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in *Article 162 (2)*. *Article 162(2)* on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in **all**

matters as it used to have in the old Constitution.

However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution is null and void. If, therefore the provisions of **section 12** and **15** of the Civil Procedure Act purported to limit the jurisdiction I would not hesitate to exercise the powers bestowed upon the High Court under *Article 2(4)* of the Constitution and declare it void to that extent. The Civil Procedure Act, however, is not the instrument that confers jurisdiction upon the High Court. In **Riddlesbarger and Another vs. Robson and Others [1958] EA 375**, the East African Court of Appeal held as follows:

“As the Supreme Court has jurisdiction throughout, ‘court’ in sections 13, 14 and 15 of the Civil Procedure Ordinance can only refer to a subordinate court. Since the Ordinance applies only to courts in the territory, and ‘suit’ by definition in section 2 means civil proceedings commenced in any manner prescribed by rules made by the rules committee under section 81 of the Ordinance, the word ‘court’ in these sections can only refer to a subordinate court. In Kenya there is only one Supreme Court with jurisdiction throughout and there is no need for express exclusion since the sections cannot apply to the Supreme Court in Kenya”.

Similarly, I hold that in light of the clear provisions of the Constitution **section 15** of the Civil Procedure Act does not apply to the High Court.

With respect to the issue of demand notice, I am not aware of any provision in law that renders a suit incompetent for failure to send a letter before action. I am aware that such a letter is one of the documents to be included in the documents to be filed with the plaint. However, for obvious reasons it would be unreasonable to make it mandatory that in all cases a letter before action or demand notice be sent. It is recognized that due to the urgency of certain matters it may be irrational to expect that a demand letter be sent before the suit is filed. Failure to send a demand notice, where the suit would have been unnecessary had such a demand been made, nonetheless, is a factor which the court may take into account in exercising its discretion in awarding costs. However, in light of the annexures to the replying affidavit, it is not possible for the court to conclusively find that no demand was sent. That is a matter which must await the trial.

On the issues of non-disclosure the law is clear that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the *ex parte* orders so obtained. However, what is material and what is not must depend on the particular circumstances of the case. I am, however, unaware of any case where a case which is otherwise competent has been summarily dismissed on ground of non-disclosure of material facts. Whether or not the issues raised herein are material can only be determined by the trial. The issue was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

“It is perfectly well-settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of

the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

With respect to misjoinder of causes of action I agree with the plaintiff that the issue is exhaustively covered by **Order 3 rule 5(1)** which provides:

Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

Rule 8 of the said Order provides:

Where it appears to the court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the court may either on the application of any party or of its own motion order separate trials or may make such order as may be expedient.

The defendant is therefore at liberty to move the court for appropriate orders under rule 8 aforesaid rather than seeking to have the suit prematurely terminated.

With respect to whether or not there is a reasonable cause of action disclosed, the provisions of **Order 2 rule 15(2)** provides that no evidence is admissible in support of such a ground. The defendant has, however, relied on such inadmissible evidence purportedly borrowed from the documents filed by the plaintiff. That ground presupposes that the averments in the plaint are correct. If that be the position then I do not see how the averments contained in the plaint can even remotely be said to disclose no cause of action.

As to whether or not there is an abuse of the process of the court, the defendant itself has at the beginning of the submissions identified several issues which are raised in the plaint. It has however, attempted to answer the same, not by way of affidavit evidence, but by submissions based on its interpretation of the documents filed by the plaintiff. One thing must be made clear that documents filed by a party together with his pleadings are not evidence. They may become evidence when they are produced either by consent or at the trial. They may in fact be inadmissible. In striking out pleadings, the case should not be decided on affidavit evidence. In this case misrepresentation and misstatement are raised in the said submissions. The Court of Appeal in **Lucy Momanyi T/A L N Momanyi & Company vs. Nurein M A Hatimy & Another Civil Appeal No. 139 of 2002 [2003] KLR 545; [2003] 2 EA 600** stated that allegations of negligence and misrepresentation made in the plaint must be proved through oral as opposed to affidavit evidence especially when the allegations of negligence and misrepresentation precede and are meant to found the claim for the refund of new sum and without proof of the allegations, the claim as pleaded in the plaint might not be sustainable.

Again the defendant has raised the issue of custom, usage and tradition of its trade in the brewing industry. Custom, usage and tradition are issues of fact which can only be proved by evidence at the trial after they are properly pleaded.

In the premises it would be a travesty of justice to make a determination based on documents which are not even properly before the court. It is bad enough to try a case by affidavits. It is worse to do so based on documents filed by parties to be relied upon at the trial which documents are neither on oath nor have been tested by cross-examination.

I wish to reiterate the Court of Appeal position in **D T Dobie vs. Muchina Case (ibid)** that if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.

I, accordingly, will follow the beaten track paved by **Mitsui OSK Lines Limited vs. Kenya Ports Authority Mombasa HCCC No. 200 of 2005 [2008] eKLR**, **Eustace Mwaniki Nginga vs. Philip Koskei Biego and 9 Others Nakuru HCCC No. 47 of 2003 [2004] eKLR** and **Mohammed Olunga Oduori vs. The Mumias Outgrowers Company Ltd and Another Kakamega HCCC No. 93 of 2001 [2005] eKLR** and direct the plaintiffs to file appropriate verifying affidavits together with appropriate authorities, if any, within 7 days in default of which the 1st and 3rd plaintiff's suit shall stand struck out. It, therefore, follows that the application dated 17th January 2012 is allowed in terms of the orders made herein. The defendants will, however, have the costs of the application. I, however, find no merit in the motion dated 15th November 2011 which I hereby dismiss with costs to the plaintiff.

Ruling read, signed and delivered in court this 2nd day of May 2012

G.V. ODUNGA
JUDGE

In the presence of:

Ms. Beatrice Kariuki for Plaintiffs

No appearance for the Defendant