REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 348 OF 2010

BEATRICE WANJIKU MUHOHO SUING AS THE LEGAL REPRESENTATIVE OF FRANCIS MUHOHO NGUGI – DECEASED……..…….....
…….PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL……..……DEFENDANT

R U L I N G

The plaintiff has moved the Court by way of a Notice of Motion dated 18th April 2012 expressed to be brought under Order 51 rule 1 and Order 2 rule 15(1)(a)(b)(c) and (d) of the Civil Procedure Rules seeking orders:

1. That the defence dated 10th August 2006 and filed in court on 24th August, 2006 be struck out as against the Defendant/Respondent.

2. That in the result, judgment be entered in favour of the plaintiff as prayed in the plaint.

3. That the costs of the suit be borne by the Defendant.

The grounds upon which the said application is based are as follows:

a) The Defendant has no reasonable defence:-

i. The defence is a mere denial.

ii. The defence discloses no reasonable defence.

b) It is prejudicial and an abuse of the court process:-

i. It was filed and served out of time.

ii. The Defendant's defence will only serve to delay the fair trial of the action.

iii. It is otherwise an abuse of the process of the Court.

c) In the premise it is in the interest of justice that the defendant's written statement of defence be struck out.

The application is supported by an affidavit sworn by **Beatrice Wanjiku Muhoho**, the plaintiff who is also the administrator of the estate of the deceased on 18th April 2012. It is important to state that this suit was originally Thika CMCC No. 42 of 2006

By the said affidavit, the deponent states that the deceased was unlawfully shot dead by a police officer manning a barrier at Kimuyu Shopping Centre without just cause. In the criminal case No. 64 of 2005 **Republic vs. Samuel Kibutha Kamau& Charles Kibet Mungun,** the 1st accused was found guilty of the deceased's murder. Despite that, it is deposed that the defendant has neglected and/or refused to accept liability and compensate the deceased's estate. Since, in the deponent's view, the defence herein contains mere denials, it is an abuse of the court process and should be struck out in all fairness and in the interest of justice. Attached to the deponent's affidavit are copies of the proceedings and judgement in the said case.

The application was opposed by way of a replying affidavit sworn by **Justus Kariuki Mugo**, an advocate of the High Court practicing as such in the Attorney General's chambers. According to the deponent, the defendant's statement of defence as filed raises reasonable and triable issues and that the delay to file and serve the defendant's statement of defence was inadvertently occasioned by the departure of counsel who had been allocated the file from the State Law Office and therefore it would not be in the interest of justice to punish the Defendant for the transgressions of their counsel more so in the light of Article 159(2)(d) of the Constitution. The matter, according to the deponent should proceed to full trial as the plaintiff will not suffer any prejudice if the Defendant's defence remains on record.

When the matter came up for the hearing of the application both learned counsel agreed that the defendant's application dated 29th May 2012 which was seeking enlargement of time within which to file and serve the memorandum of appearance and defence and that the same be deemed duly filed be allowed. An order to that effect was duly recorded. It follows therefore that this ruling will not deal with the challenge to the said defence based on non-service of the two documents but on whether the said defence deserves a hearing on merits. Counsel further agreed that the Court should rule on the application based on the documents on record.

The cause of action arose from a shooting incident on 29th May 2005 in which it is alleged that the deceased was unlawfully shot dead by police officers manning a barrier at Kimuyu Shopping Centre. It would seem that at the time of the institution of this suit the Murder Case No. 64 of 2005 was yet to be concluded. Hence the defendant herein is sued on behalf of the Government of the Republic of Kenya.

In its defence, the defendant denies the allegations of the shooting incident and contends that the suit is fatally and incurably defective. Damages are similarly denied. The defendant however admits receipt of demand notice but does not admit liability.

I have looked at the defence. Paragraph 3 of the plaint which is denied by the defendant pleaded that the plaintiff was on the fateful day driving along Kenyatta Road when he was unlawfully illegally and without any lawful excuse shot dead by police officers who were manning the said barrier. This is the most important paragraph in the original plaint, with respect to liability. That the deceased was shot dead is not in dispute. That the said shooting was unlawful, illegal and without any lawful excuse is also not

disputed since the person who shot him was found guilty of murder. In his evidence the 1st accused in the criminal case admitted that he was a police office and was based at Kamuyu Patrol Base. This was confirmed by PW 4 **Cpl. Francis Mbinda** who issued him with the firearms. The defence does not specifically deny which part of the said paragraph 3 is denied. In fact what is averred by the said paragraph 2 of the defence is that the defendant is a stranger to paragraph 3 of the plaint and makes no admission of the same. Accordingly that feeble denial, in my view does not constitute any triable issue.

As already indicated above, the rest of the paragraphs of the original plaint deal with quantum of damages rather than liability and since there is an unqualified admission that a demand notice was received, no triable issue arises with respect to the notice.

The original plaint was amended vide an amended plaint filed on 7th May 2009 which amendment was expressed to be under Order VIA rule 5 of the Civil Procedure Rules pursuant to the order issued on 27th April 2009. Although that amendment was limited to the date of death, the defendant did not deem it fit to improve on its defence.

As already indicated the application was primarily under Order 2 rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. The essence of the said principles is that striking out of a suit, is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

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. GoldsMid (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 (12thEdn.) 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. 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. HemanshuSiryakat 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".

In this case the plaintiff has filed the suit on behalf of the estate of the deceased who was clearly a victim of unlawful shooting by a police officer. The culprit, from all the evidence on record, was a police officer duly armed by the authorities. The said culprit was charged and convicted of no lesser offence than that of murder. Faced with this damning evidence the defendant chose to file a general denial. He does not allege anywhere that the culprit was not acting within his authority. He denies even the very fact of the shooting and death of the deceased. A party who denies even obvious averment in the plaint cannot be taken to be a serious party. That type of a pleading is trifling, annoying and hence frivolous. It is a pleading which is only meant to delay the fair disposal of the suit.

It is as a result of the foregoing that a find that the defence filed by the defendant herein on 24th August 2006 is clearly frivolous and vexatious and is simply meant to delay the disposal of the case. To allow this kind of defence to go to hearing would amount to aiding an abuse of the process of the Court and the Court must act to avoid being ensnared into such stratagem. There is no magic in holding a trial simply because it is fashionable to do so.

The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(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" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal dealing with the said objective stated *inter alia* as follows:

"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day". (Underlining mine).

Accordingly the said defence is hereby strike out and the plaintiff directed to proceed and list the matter for assessment of damages. The plaintiff will also have the costs of this application.

Ruling read, signed and delivered in court this 27th day of June 2012.

G.V. ODUNGA
JUDGE
In the presence of:

Mr Odhiambo Mr. Mongeri for Plaintiff

No appearance for the defendant