



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 285 of 2009

PAUL IMISON:.....PLAINTIFF

- VERSUS -

JODAD INVESTMENTS:.....DEFENDANT

R U L I N G

1. This is a Ruling on the **Chamber Summons** application dated **27th November 2009**. It is filed under **Section 3A** of the **Civil Procedure Act** and **Order VI Rule 13 (b) (c)** of the **Civil Procedure Rule**. The application seeks the following orders:-

- That the Defendant's defence dated **23rd June 2009** and filed in court on **24th June 2009** be struck out and judgement be entered in the Plaintiff's favour.
- The suit herein be set down for Formal Proof.
- Cost of the application to be provided for.

2. The application is supported by the grounds *inter-a-alia* that:-

a) That on the **25th** day of April 2006, in **HCCC NO. 693 OF 2000, JODADA INVESTMENTS LTD. - VS - PAUL IMISON**, Judgement was entered for the Plaintiff herein and a decree extracted (herein after referred to as the said Judgement and decree).

b) Prior to the said Judgement, the Defendant therein had been enjoying injunctive orders that operated against the Plaintiff herein to his detriment and injury for six years, that is to say, between the **20th** day of April 2000 and the **25th** day of April 2006.

c) In the said Judgement and decree, the injunctive orders were vacated and the Defendant/Respondent's suit dismissed in its entirety. Consequently, Plaintiff/Applicant's counterclaim was allowed and it was contemporaneously directed, *inter-a-alia*, that any Judge stationed at the Commercial Division of the High Court at Nairobi carry out an inquiry as to damages occasioned by the grant of the injunction to the Defendant herein.

d) This suit is only in pursuance of a specific court order against which no defence is tenable.

e) This action only need to proceed to Formal Proof and not full trial as the filing of the defence herein implies.

f) The defence herein is thus:-

i. Frivolous and vexatious.

ii. Will prejudice, embarrass and/or delay the fair trial of this action.

iii. Is an abuse of the court process.

g) The application is further based on the grounds set out in the annexed affidavit of Paul Imison.

3. The application is supported by affidavit of the Plaintiff dated **27th November 2009** with annexures thereto. The application is opposed through grounds of opposition filed on **12th June 2012**. These grounds include allegations that:-

- There is a *bona fide* defence on record.
- The defence raises triable issues.
- The application lacks merit and is calculated to deny the Defendant the opportunity to challenge the Plaintiff's claim.
- The application is an abuse of the court process.

4. The Plaintiff herein **Paul Imison**, was a Defendant in a suit being **HCCC No. 693 of 2000 JODAD INVSTEMENTS LTD. – VS – PAUL IMISON**. The current Defendant was the Plaintiff in that suit. The current suit is merely a reversal of the parties' positions. On **25th April 2006**, Judgement was in that suit, entered for the Plaintiff herein and a decree extracted. Prior to the said Judgement, the Defendant herein is alleged to have been enjoying injunctive orders that operated against the Plaintiff herein to his detriment and injury for a period of six years i.e. between the **20th April 2000** and the **25th April 2006**. In the said judgement and decree, the injunctive orders were vacated and the suit dismissed in its entirety. The Defendant's counter-claim was allowed and the court contemporaneously directed *inter-a-alia* that any Judge stationed at the Commercial Division of the High Court at Nairobi carry out an inquiry as to damages occasioned by the grant of the injunction to the Defendant herein. This suit has been filed in pursuance of the said court order as to the inquiry of damages.

5. The Applicant has submitted that his suit is only in pursuance of a specific court order against which no defence is tenable, and that the action only needs to proceed to formal proof and not full trial. It is submitted that the defence herein is frivolous and vexatious and will prejudice, embarrass and/or delay the fair trial of this action and that it is an abuse of the court process.

6. For the Defendant it is submitted that upon the order of the court aforesaid, the Plaintiff opted to file a new suit in which the Plaintiff pleaded factual circumstances which are alleged to have resulted in loss. The Defendant should therefore be allowed to respond to the new allegations. It is further alleged that the defence raises other triable issues beyond issues of *locus* and *res judicata*.

7. I have carefully considered the application, and the opposing submissions. I have looked at the Plaintiff and at the Defence. The Plaintiff's suit claims special damages of **Kshs.17,113,661.84/=**, general damages and interests. This is not a small claim. It is also clear that the new suit has brought in new issues which will require specific proof.

Without going into any further details, I do not think this is a matter in which I can grant orders to strike out the defence, or allow the suit to proceed to formal proof without a hearing. In the case of **TRAD**

BANK LTD. – VS – KERSAM LTD. & ANOTHER CIVIL CASE NO. 6662 OF 1991, the court observed that pleadings can only be struck out in plain and obvious cases when the pleadings in question are on the face of it unsustainable.

8. I dismiss the application with costs in the cause. I further direct the Plaintiff to file and serve upon the Defendants its **bundle of documents** and **lists of witnesses** within **20 days** from the date of this Ruling. The Defendant shall file and serve their **bundle of documents** and **lists of witnesses** within **20 days** after service by the Plaintiff. This matter must be listed for **hearing** within **20 days** of the completion of pre-trial proceedings envisaged above.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Nyaga H/B for Nyaberi for the Plaintiff

Sijenje H/B for Orina for the Defendant

Teresia – Court Clerk