

**OVERDRIVE CONSULTANTS
LIMITED.....PLAINTIFF**

VERSUS

**THE KENYA POWER & LIGHTING COMPANY LIMITED.....1ST
DEFENDANT**

MOHAMED M. AL AMIN.....2ND DEFENDANT

RULING

The Plaintiff has raised a Preliminary Objection through a Notice dated 9th March 2010 contending that the 2nd Defendants application dated 11th November 2009 is fatally defective and ought to be struck out on the grounds that:

“a) It is supported by the Second Defendant’s affidavits contrary to the provisions of the Civil Procedure Rules;

b) The said application is premature and the orders sought are incapable of been granted at this stage of the proceedings without full trial.”

The Preliminary Objection was orally canvassed before me on 28th July 2010. The Plaintiff took offence with the use of an affidavit to ground an application under Order 6 Rule 13(1)(a). The use of evidence is precluded by Order 6 rule 13(2). The 2nd Defendant in response stated that the application was grounded on rules (1)(a), (b), (c), and (d). That the use of evidence was admissible under subrules (b), (c) and (d), that the objection lacks merit. I take the view that this objection should have been argued in opposition to the application. It is plain and clear that the application dated 11th November 2009 is brought under subrules (b), (c) and (d) where use of affidavit evidence is not precluded. Subrule 2 of rule 13 of Order 6 does not preclude the lumping of grounds (b), (c) and (d) together with subrule (a). The caution is on the court not to consider evidence where no reasonable cause of action is alleged. Only a consideration of the pleadings. The grounds in support of sub rule (1) (a) have been stated on the face of the application. Paragraph 6 of the supporting affidavit is not offensive. It alludes to the fact that “the suit and the application do not disclose any cause of action against the 2nd Defendant”. Any cause of action is not the same thing as “any reasonable cause of action” (See *D.T. Dobie* case).

For these reasons I find that the Preliminary Objection dated 9th March 2010 and filed on 10th March 2010 lacks merit and is hereby overruled with costs to the 2nd Defendant. The Chamber Summons application dated 11th November 2009 will proceed for hearing on merit.

Dated AND Signed At Nairobi ON This 6TH Day Of AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND Delivered At Mombasa on This 30TH DAY Of AUGUST 2012.

J.W. MWERA

JUDGE

Delivered in the presence of: