REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Civil Suit 813 of 2007

W. M. MUIRURI

DEPUTY REGISTRAR HIGH COURT NAIROBI.....…PLAINTIFF

VERSUS

O. P. NGOGE T/A

O.P. NGOGE & ASSOCIATES, ADVOCATE….....……..DEFENDANT

R U L I N G

The Plaintiff herein **W M Muiruri**, a former Chief Magistrate and Deputy Registrar of the High Court, instituted this suit by way of a plaint dated 4th December 2007 seeking general and exemplary damages for libel against the defendant. The cause of action is a letter purportedly written by the defendant to the Hon. the Chief Justice dated 21st December 2006 and copied to several other persons in which the defendant complained about the plaintiff's conduct in proceedings in respect of Nairobi High Court Miscellaneous Application Nos. 670, 671, 672 673 and 679 of 2006.

While denying the plaintiff's claim, the defendant in his defence dated 7th February 2008 contended that the plaintiff could only institute the proceedings through the Attorney General and further that the only bodies competent to hear and determine any dispute touching on the conduct and integrity of the plaintiff in the performance of his public duties as the Chief Magistrate and Senior Deputy Registrar of the High Court are the Judicial Service Commission and the Kenya Anti Corruption Commission hence the suit is misplaced and incompetent. The defendant's further contention was that the letter complained of having been filed in court is subject of judicial proceedings hence immuned or privileged from inquiry by a defamation suit filed by the plaintiff. The defendant further pleaded justification and contended that since the Judicial Service Commission has not summoned him to give evidence before the Commission, any decision arrived at by the same Commission cannot be relied upon in this suit. Among other things, the defendant avers that the office held by the plaintiff was incapable of being defamed.

By a Chamber Summons dated 21st October 2009 expressed to be brought under the provisions of Order VI Rule 13(1)(a) of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act and filed in this Court on 21st October 2009, the defendant herein seeks orders that the plaintiff's suit be struck out with costs as well as the costs of the application. The grounds upon which the application is based are as follows:

(a) That the plaintiff's cause of action to sue if at all has not yet accrued before the Judicial Service Commission established under the constitution has sat and determined the truthfulness or

otherwise of the Defendants complaint lodged against the plaintiff in his capacity as Deputy Registrar of the High Court. Hence the plaintiff's suit does not reveal any cause of Action against the Defendant at this moment in so far as his claim is based on the Defendants complaint pending before Judicial Service Commission.

(b) That this Honourable court lacks Jurisdiction to usurp the powers of Judicial Service Commission by hearing and determining the plaintiffs claim based on the complaint written by the Defendant and directed at the Chairman of Judicial Service Commission to take Disciplinary action against the plaintiff and which complaint is still pending.

(c) That the doctrine of separation of powers does not allow the Honourable Court to take over the roles and duties of Judicial Service Commission to discipline errant inefficient and incompetent and/or corrupt Judicial Officers upon a complaint ledged by a Citizen/Defendant herein.

(d) That impartiality and independence of the Honourable Court cannot be guaranteed to the Defendant/Applicant during hearing of the plaintiffs suit before the Judicial Service Commission has formally sat to determine the truthfulness or otherwise of the Defendants complaint against the plaintiff. Further the plaintiffs suit cannot be determined impartially by his colleagues working with him in the same station where he has the leverage to access and talk to Judges in his capacity as Deputy Registrar. Moreover as a Deputy Registrar he has the advantage of choosing a favourable Judge to handle his case and to re-arrange the cause List.

(e) That a Judge cannot be sued or sue in respect of matters he was handling as a Judicial officer and this is the reason why the Defendant/Applicant complained against the plaintiff before the Judicial Service Commission to discipline the plaintiff. Otherwise if the Plaintiff did not enjoy any immunity the Defendant would have lodged a suit for legal redress instead of a complaint.

(f) That section 6 of the Judicature Act gives the plaintiff immunity from suits. The plaintiff therefore cannot sue since his suit might provoke the lodgement of a counterclaim.

The application was not supported by an affidavit. However, on 12th June 2012, the defendant swore an affidavit entitled "replying affidavit" in which he was purportedly replying to the contents of a letter dated 6th June 2012 together with annextures thereto. I have been unable to trace the said letter. Accordingly, I will treat the said "replying affidavit" as an affidavit sworn in support of the application. Apart from urging the Court to disqualify the firm of **Guram & Company Advocates** from appearing in this suit on the ground that they have descended into the arena of litigation, it is the defendant's contention that the plaintiff was forced to retire from the judiciary under compulsory retirement which, according to the defendant, vindicates his defence and submissions. It is further contended that the plaintiff concealed the said documents in order to evade cross-examination which action should justify the court in striking out the whole suit. Further, it is contended that the admission that the plaintiff enjoyed immunity thus barring the defendant from filing a counterclaim is enough reason for the Court to down its tools in order to place both parties on equal footing. Since the plaintiff in his statement did not disclose the fact that he had been compulsorily retired by the Judicial Service Commission, the plaintiff is not candid and that the suit was intended to bar the Commission from taking disciplinary action against the plaintiff.

In opposing the application the plaintiff filed the following grounds of opposition:

1. **Defendant's application is an abuse of the Court process.**

2. **Defendant's application is frivolous and mischievous.**

3. **The Plaint raises a reasonable cause of action, is well guided and based on sound legal advice in view of the wide circulation of the libellous letter.**

4. **This cause of action accrued as soon as the Defendant wrote, published and circulated the**

offensive letter.

5. The High Court has unlimited jurisdiction in criminal and civil matters and the Defendants/Applicants petition to the Judicial Service Commission cannot prevent the Plaintiff/Respondent from invoking such unlimited original jurisdiction so that ends of justice are met.

6. The separation of powers doctrine does not apply to this case.

7. The plaintiff is a man of impeccable integrity on early retirement as per attached two letters dated 26.10.2009 and 22.3.2010 and the question of interfering with conduct of this case has not and cannot arise.

8. The immunity from being sued is given to the judicial officer and not to a tortfeaser who breached such an officer's rights in the course of the judicial proceedings.

9. Section 6 of the Judicature Act Cap 8, Laws of Kenya does not bar or prohibit a judge or magistrate from suing in a civil suit for acts or omissions arising from proceedings conduct before him or her.

The plaintiff further swore an affidavit on 20th June 2012 in which he deposed that his advocates have conducted the matter to the best of their ability and with high professional standards. He further avers that the reasons for his retirement have never been disclosed to him by the Judicial Service Commission. On the concealment, it is the plaintiff's position that there is no such concealment since the retirement letter was written after the discovery of the list of documents. He similarly denied the allegations that he was seeking to bar the Commission from investigating the petition. It is his position that his retirement being a matter of fact need not to have been stated in the statement.

The application was prosecuted by way of written submissions which were highlighted. According to the defendant, although the High Court has unlimited original jurisdiction as well as supervisory jurisdiction over subordinate courts and tribunals, that cannot be interpreted to give the wrong impression that the High Court has Constitutional powers to usurp the powers and constitutional obligations of subordinate Courts and other state organs exercising judicial or quasi-judicial authority under the Constitution. It is submitted that this suit arose from a complaint made by the defendant against the plaintiff to the Chairman of the Judicial Service Commission to investigate and take disciplinary action against the plaintiff in line with Article 172(1)(c) of the Constitution. By lodging this suit before the said complaint was acted upon by the Commission, it is submitted that the plaintiff wanted this Court to usurp the constitutional roles and powers of the Judicial Service Commission conferred by Article 172(1)(c) of the Constitution. This, it is contended, is unacceptable and the Court lacks the jurisdiction and must down tools forthwith in accordance with the principle of separation of powers. By lodging this suit, the plaintiff, in the defendant's view, wanted the Court to investigate the truthfulness or otherwise of the contents of the defendant's complaints, a jurisdiction which the High Court lacks since the High Court can only exercise supervisory jurisdiction over decisions made by the Commission. It is further submitted that due to the complaints from the defendant and other advocates made against the plaintiff, the plaintiff was forced to retire in public interests and hence he has no reputation capable of being violated. Having concealed these material facts, it is submitted that the plaintiff has soiled his hands and has thus undermined the provisions of Articles 10 and 159 of the Constitution. Since the plaintiff has been sacked from the judiciary, it is submitted that the Commission longer has supervisory jurisdiction over the plaintiff and hence the suit is unfounded. Since the plaintiff enjoyed immunity from being sued, it is submitted that this suit was meant to provoke the defendant into filing a counterclaim and hence further curtail the independence of the Judiciary and usurp the powers of the Commission. In order to uphold its independence, it is submitted the Court must down its tools and dismiss the suit. However, in the event that the suit is not dismissed, the defendant states that he will require leave of the court to file a counterclaim against the plaintiff.

On his part the plaintiff submitted that the defendant's complaint went beyond ordinary and fair

complaint as it was widely circulated to prominent political as well as diplomatic personalities. Since the High Court's jurisdiction is unlimited, it is submitted that the same cause of action can be adjudicated in both forums. Since the plaintiff has not received any communication how the complaint was determined, the court cannot down its tools since the letter retiring the plaintiff did not state he reasons for doing so. The provision under which the plaintiff was retired, it is submitted is for compulsory retirement on attaining the retiring age. The plaintiff is, however, unaware of any other complaints as alleged by the defendant. It is further submitted that the plaintiff filed this suit before the determination by the Commission in order not to be time barred. On the issue of immunity, it is submitted that section 6 of the Judicature Act does not prevent or prohibit the plaintiff from filing the case since this case was filed to prevent uncalled for and unwarranted attacks on judicial officers. Accordingly, it is submitted that the plaintiff is properly entitled to seek redress through the tort of defamation.

As indicated at the beginning of this ruling the present application is expressed to be brought under the provisions of Order VI Rule 13(1)(a) of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. Following the promulgation of Civil Procedure Rules, 2010 the said provision became Order 2 rule 15(1)(a) of the Rules. The said provision states that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law. Subrule (2) of the said rule provides that 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. At the time the application was made save for the grounds appearing on the face of the record, in compliance with the foregoing provisions there was no affidavit in support of the application. However, both parties decided for some reasons unknown to court to adduce evidence by way of affidavits. Ordinarily the said affidavits would have been inadmissible and I would not have hesitated to strike out the same. However, since both parties were in breach of the foregoing rule, I will invoke the provisions of Article 159(2)(d) and consider the same.

First and foremost, it is important to note that in an application of this nature the Court must exercise caution in order not to determine the merits of the case in which case its determination may tie the hands of the trial court without the benefit of hearing the evidence. At the interlocutory stage, the court is not in a position to make definite findings of fact or conclusions of law which may have the effect of prejudicing the task of the judge who will ultimately hear and determine the dispute, unless it is important in reaching a decision. The defendant's basis for seeking the striking out of the suit are three-pronged in my view. First, it is the defendant's view that since the issues which form the basis of this suit are matters which were the subject of a complaint made by the defendant against the plaintiff to the Judicial Service Commission, this Court has no jurisdiction to entertain the suit which in effect seeks to investigate the truthfulness of the said complaints. Secondly, it is the defendant's position that since the plaintiff was at the time the said complaints were made immuned from being sued, he could not similarly institute these proceedings as that would amount to unequal treatment being meted to the parties. Thirdly, it is the defendant's position that the plaintiff was guilty of material disclosure.

With respect to the first ground it is important to set out the powers of the High Court vis-à-vis the powers of the Judicial Service Commission under the Constitution. Article 165(3)(b) of the Constitution provides that Subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Article 165(5) of the Constitution provides for the matters whose determination is reserved for the exclusive jurisdiction of the Supreme Court and matters which Courts with the status of the High Court are established under Article 162(2) of the Constitution. Under Article 172(1)(c) on the other hand the Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.

It is therefore clear that under the constitution, there is no express provision baring the High Court from entertaining a matter which is the subject matter of a determination before another body save as stated hereinabove. However, it is trite law that where there is available machinery set out by the law for settling out disputes, those avenues should be resorted to before resort is made to the Courts of law. Whereas the

existence of such alternative forums may not necessarily deprive the High Court of its jurisdiction under the Constitution, the failure to resort to the same may amount to an abuse of the process of the Court. However, for the Court to find that there is an abuse of the process, the Court must be satisfied that the cause of action before it must be the same and the remedies being sought in the cases are capable of being granted in one forum. Again where a decision by the alternative forum may influence the way the High Court is likely to arrive at its determination the High Court may in the exercise of its inherent jurisdiction stay the proceedings before it pending the determination of the other proceedings.

In this case as already stated the suit is for damages arising from allegations made by the defendant to the Chief Justice who also doubles as the Chairman of the Judicial Service Commission. In arriving at its decision, the Commission would naturally be expected to investigate the veracity of the same and make a decision thereon. Similarly, in a suit for defamation the Court is bound to investigate the truthfulness behind the maters complained of and arrive at a decision thereon. To that extent the defendant's position that it would not be appropriate for the two tribunals to proceed with their proceedings concurrently is not without some merit. The problem here, however, is that the matter complained of was purportedly copied to some other personalities whose roles, if any, are not directly connected with the Commission. It may be that the defendant was entitled to copy the same to the said persons. That, however, is a matter for evidence which cannot be determined at this stage of the proceedings.

Again it must be noted that the powers of the Commission are limited to investigation of the conduct of the judicial officer concerned with a view to meting out an appropriate punishment. The fact that the Commission arrives at its conclusion does not bar a person who has suffered loss and/or damage as a result of the acts or omissions of the officer concerned from seeking appropriate remedies from the High Court if such remedies are available. It is highly doubtful whether the Judicial Commission is empowered to grant remedies for defamation in cases where the complaint is found to be unmerited. Further, in this case, the defendant alleges that as a result of the said complaint, the plaintiff was "sacked" and therefore he was justified in publishing what he did publish. The defendant's position is that he was not sacked but that he was retired under a provision which provides for retirement on attaining the age of 50. These are clearly conflicting matters of facts. The circumstances that led to the decision made by the Commission cannot be found from the two letters exhibited without the proceedings of the said Commission. There is no reason why the proceedings of the Commission, if not privileged, cannot be adduced as evidence in this suit to show the decision and the circumstances under which it was arrived at in order to determine the truthfulness of the defendant's publication. The same applies to the argument advanced by the defendant that in light of the decision made by the Commission the defence of justification avails him. I am therefore unable to agree with the defendant that the mere fact that there were disciplinary proceedings before the Commission, this Court was thereby deprived of the jurisdiction to entertain this suit. I am reinforced in this view by the decision in **Mirugi Kariuki vs.Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** in which the Court of Appeal held, *inter alia*, that the Courts are not to abdicate jurisdiction merely because the proceedings are of administrative nature or of an internal disciplinary character.

It is also important to note that part of the defendant's case is that since he was not summoned by the Commission, the proceedings of the Commission should not be relied upon in this case. That again is not an issue which can be decided upon at this stage. In any case if that argument was valid, the defendant's contention that the Commission having decided the matter this Court is thereby deprived of the jurisdiction will fly out of the window as well as the defence of justification based on the said decision. However, that determination will have to await another day.

That leads to the issue of immunity. The immunity granted under section 6 of the Judicature Act is meant to insulate judicial officers in the performance of their judicial duties. It is not an immunity which should be invoked to bar the said officers from pursuing legal remedies which they may deem available to them by law. As to whether or not, by instituting legal proceedings, the officer concerned, is likely to expose himself to a legal claim by way of a counterclaim and thereby be deemed to have waived the immunity is another issue altogether. However, I am not satisfied that the said immunity can justify the striking of the plaint in the circumstances of this case.

On the issue of non disclosure, what is material and what is not must depend on the particular circumstances of the case. 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 b 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 pentitentiae* (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".

Assuming, without deciding, that there was nondisclosure by the plaintiff of the decision made by the Commission, the importance to be attached to that disclosure will only become apparent at the hearing. It is trite law that a Court of law should strive towards sustaining legal proceedings other than prematurely terminating the same. Where, therefore, there is an allegation of non disclosure and the said non-disclosure is curable by an order for further and better particulars, it is only just that such an order is made before the drastic step of prematurely bringing the proceedings to an end is resorted to. It must also be noted that witness statement are not required to be on oath under our Civil Procedure Rules and hence do not acquire the status of evidence for the purposes of the Evidence Act unless they are adopted by the Court as part of the witnesses evidence.

In the exercise of its powers to strike out pleadings there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a suit, that 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. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. 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 brought 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 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.

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".

Taking into account the foregoing, I am not convinced that this suit is *demurrable* and something worse than *demurrable.* I am further unconvinced that the plaint is completely bad to the extent that not even an amendment can save it. The fact that it may not necessarily succeed in light of the defences relied upon by the defendant does not render the suit hopeless, in my view.

As for the issue of counterclaim, the defendant is at liberty to make an appropriate application if he so deems fit.

Accordingly, Chamber Summons dated 21st October 2009 fails and is dismissed with costs.

G.V. ODUNGA

JUDGE

Ruling read and delivered in court this 20th day of September 2012

G.K. KIMONDO

JUDGE

In the presence of:

No appearance for the Plaintiff

Mr. O. P. Ngoge for the Defendant