



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 287 OF 2009

EMMA TOO.....1ST PLAINTIFF
 JANE TOO2ND PLAINTIFF
 EDWIN TOO3RD PLAINTIFF

VERSUS

VERONICA CHEPWAMBOK TOO1ST DEFENDANT
 ELIZABETH CHEBET ORCHARDSON.....2ND DEFENDANT
 ATTORNEY GENERAL3RD DEFENDANT

RULING

The second Defendant filed this application on 30th September 2009 under the provisions of inter alia Order VI Rule 13 (1) (a) (b) (d) of the now repealed Civil Procedure Rules for the following orders that:-

1. *The Orders of injunction made on 26th August 2009 be set aside.*
2. *The Application dated 24th August 2009, the Plaint dated 24th August 2009 and the suit herein be struck out.*
3. *The 2nd Defendant be awarded costs of the Application, the application dated 24th August 2009 and the suit herein.*

The Application was opposed by the plaintiffs and the 1st Defendant. The plaintiffs took out a Notice of Preliminary Objection on the following grounds:-

1. Under Order VI, rule 13 (1) (a) of the Civil Procedure Rules, no evidence is admissible and so the filing of an affidavit in support of such as application renders the entire application fatally defective.
2. The joining up of an application for the striking out of a plaint with one for the setting aside,

- discharge or varying of an interim injunction renders the application to be confused.
3. Under Order XXXIX, Civil Procedure Rules applications are made by chamber Summons yet the application herein has been made by Notice of Motion which is fatally defective.

I have considered the submissions by Counsel and the authorities presented to the court.

Order VI, Rule 13 (1) and (2) provide as follows:-

“13 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

1. **It discloses no reasonable cause of action, or**
2. **It is scandalous, frivolous or vexatious or**
3. **It may prejudice, embarrass or delay the fast trial of the action, or**
4. **It is otherwise an abuse of the process of the court.**

(2) No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.

The Notice of the Motion dated 1st September, 2009 has an annexed affidavit sworn by Prof. Elizabeth Orchardson on 2nd September, 2009. The grounds set out in the application substantially raise matters of fact and that is why the Applicant decided to make an affidavit in support of the application i.e. to substantiate the grounds based on factual averments. The provisions of Order 13, Rule 13(1) (a) are very clear that no evidence shall be considered or admitted on an application to strike out a pleading on the ground that it discloses no reasonable course of action or defence. The Applicant can only raise pure points of law arising from pleadings.

I therefore agree with Mr. Gikandi for the plaintiffs that the application is incompetent and defective on the ground that through the affidavit the Applicant has introduced evidence in support of the application. Had the application been entirely based on Order VI, Rule 13 (1) (a), this court would have considered to strike out the affidavit and go back to the grounds to ascertain whether there are points of law to support the contention that the plaintiff did not disclose any reasonable action.

However, the application is not restricted to the aforesaid provision but also Order 39, Rule 43 through which the Applicant seeks to set aside the *ex parte* injunction granted on 24th August 2009 (not 26th August 2009 as stated in the application). The affidavit is in support of all prayers and there is no suggestion that it relates to the prayer for setting aside only. Even if there was such a suggestion it is doubtful whether it could be sustainable in law.

I hold that it is inappropriate and un-procedural to combine an application under order VI, rule 13 (1) (a) with one to set aside an *ex parte* order and to combine such applications in one application. The procedures are different in that the former is based only on law while the other allows the admission of evidence.

Applications under Order 13 are to be made by way of Chamber Summons while an application to set aside or discharge an *ex parte* injunction is usually made by way of Notice of Motion. As a result, there is no contemplation that the two can be combined in an omnibus application. Such combination creates uncertainty and confusion. It makes the Respondent unable to exactly know the boundary between the two applications converged in one. The Respondents ought to know what application they are faced with and the applicable provisions of law. To jumble up prayers which ought to have been prosecuted through separate and distinct applications and through different procedural rules is to burden

or vex the Respondents unfairly.

I do not agree that the application strictly ceases to be an application under order VI Rule 13 (1) (a) once there is a combination with other prayers. If that is the case, then there is no explanation for the applicant to have cited the said provision in the first place. Secondly, if that is the case, then under what provision can the court strike out the plaint?

The net result is that I uphold the Preliminary Objections on points of law by the plaintiff and do hereby strike out the application with costs to the plaintiffs and the 1st Defendant.

Dated and delivered at Mombasa on this 28th day of January 2011.

M. K. IBRAHIM

J U D G E

Further Orders

The interim orders which had been granted are extended to the next hearing date. The hearing be fixed at the Registry on priority basis.

Ibrahim, J

Coram:

Ibrahim, J

Court clerk – Mutisya

Mr. Kirui for the 1st Defendant

Mr. Ngetich for the second Defendant.

Ruling delivered in their presence.

Ibrahim, J