REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 742 of 2006

KENYA ANTI-CORRUPTION COMMISSION…...……..APPELLANT

VERSUS

AMBROSE RACHIER…..……..……...RESPONDENT

(An appeal from the ruling and order delivered on 3rd October, 2006 by the Hon. T.W.C. Wamae, Senior Resident Magistrate, in Nairobi Chief Magistrate's Court, Civil Case No.5019 of 2006)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by the Kenya Anti-Corruption Commission (hereinafter referred to as the appellant). The appellant which is a statutory corporation, sued Ambrose Rachier (hereinafter referred to as the respondent). As per the "*statement of claim*" filed on 10th May, 2006, the appellant sought to recover from the respondent a sum of Kshs.585,000/= allegedly unlawfully received by the respondent for consultancy services. It was alleged that the respondent who was appointed the chairman of a taskforce considering legal issues relating to HIV/Aids pandemic in Kenya, unjustly enriched himself by receiving payments as a consultant, for the same task for which he was appointed and remunerated as chairman of the taskforce.

2. The respondent filed a "*statement of defence*", and "*an amended statement of defence"*, in which he questioned the appellant's *locus standi* to institute the proceedings. The respondent admitted having been appointed as chairman of the taskforce by the Hon. The Attorney General, but contended that although he was informed that he would be entitled to a sitting allowance and per diem, there was no communication made to him about the source or rates of the sitting allowance or per diem.

3. The respondent averred in his defence that following a resolution made by the taskforce to appoint qualified members of the taskforce as consultants, to carry out a thorough desktop research, the respondent was requested and he agreed to undertake the consultancy work. The respondent performed the consultancy as requested and was paid the sum of Kshs.585,000/= for the work which he performed for several days both locally and abroad. The respondent maintained that his appointment was approved by the World Bank and the National Aids Control Council through whom all the payments in respect of the consultancy were made. The respondent therefore denied the appellant's claim.

4. By a chamber summons filed on 8th July, 2006, the appellant sought to have the respondent's "*statement of defence"* dated 26th June, 2006 filed in court on 26th June, 2006 and served upon the appellant on 6th July, 2006 together with the amended statement of defence amended and filed on 6th July, 2006, and served upon the appellant on 6th July, 2006 struck out. The appellant further urged the court to enter judgment against the

respondent as prayed in the plaint.

5. The application which was brought under Order VIII Rule 20 and Order IXA Rule 2(1) of the Civil Procedure Rules, was anchored on two main grounds, Firstly, that the "*statement of defence"* dated 26th June, 2006 filed in court on 26th June, 2006 and served upon the appellant together with the "*amended statement of defence*" on 6th July, 2006, were fatally defective and ought to be struck out. Secondly, that the "*statement of defence"* and the "*amended statement of defence*" aforesaid, are nullities and an abuse of the due process of law.

6. At the hearing of the application, counsel for the appellant maintained that although the defence and amended defence were filed on 26th June, 2006, they were served on 6th July, 2006. It was submitted that the defences were filed out of time and they were therefore not valid. The lower court was urged to strike out both defences and enter judgment in favour of the appellant. Counsel relied on ***Civil Case No.2047 of 2000 Wilfred Odhiambo Musingo vs Herbal Agencies Ltd***. Counsel for the appellant maintained that the appellant was competent to institute the proceedings and that the suit was properly before the court.

7. In response to the application, the respondent filed a notice of preliminary objection raising the following grounds:

(i) That the court lacked jurisdiction to entertain the application.

(ii) That there was no proper suit before the court.

(iii) That the application and the entire suit offended the provisions of the Anti-Corruption and Economic Crimes Act as well as those of the Civil Procedure Act and Rules.

(iv) That the application was incompetent, misconceived and lacked merit.

8. Counsel for the respondent admitted that the original defence was filed out of time, but maintained that the amended defence was filed on time. Counsel submitted that striking out the original defence would not serve any useful purpose, because the original defence had already been superseded by the amended defence. It was further submitted that the court's jurisdiction had not been properly invoked as the power to strike out pleadings was only given under Order VI Rule 13 and Section 3A of the Civil Procedure Rules. Counsel for the respondent further maintained that there was no proper suit before the court, as the appellant had initiated his suit through a "*statement of claim"* which was not a prescribed mode for filing a suit. In support of his submission counsel for the respondent relied on the following cases: -

- ***HCCC No.1348 of 2001 Kenya Union of Domestic Hotels & others vs Kilimanjaro Safari Club.***
- ***Re-Delphis Bank Ltd HCCC No.250 of 2001.***

The court was therefore urged to strike out the suit for being incompetent.

9. In her ruling delivered on 3rd October, 2006, which ruling is the subject of this appeal, the trial magistrate held that although it was true that the "*statement of claim"* was a pleading, the appellant had not cited any rule that allowed him to bring his suit otherwise than by a plaint, or why it had not paid due regard to the rules and procedure. The trial magistrate therefore upheld the preliminary objection in that regard. The trial magistrate found that there was no proper suit before the court and therefore struck out the suit with costs to the respondent.

10. Being aggrieved by that ruling, the appellant has lodged this appeal citing 11 grounds as follows:

(i) The learned Magistrate erred in law in holding that the institution of a suit as "*a statement of claim*" is distinct from institution of a suit as "a plaint".

(ii)

The learned Magistrate erred in law in failing to appreciate that under Section 2 of the Civil Procedure Act, Chapter 21, Laws of Kenya a "*statement of claim*" is a recognized description of a pleading that initiates a plaintiff's claim to which a defendant may respond by way of a statement of defence.

(iii) The learned Magistrate erred in law in failing to appreciate that a "plaint" and a "*statement of claim*" are both pleadings which refer to one and the same thing.

(iv) The learned Magistrate erred in law in holding that since the plaintiff's suit was commenced by way of "*statement of claim*" rather than by way of "plaint", it was thereby fatally defective.

(v) The learned Magistrate erred in law by holding that the plaintiff had breached the Civil Procedure Rules by instituting its suit as a "*statement of claim*" instead of instituting it as a "plaint."

(vi) The learned Magistrate erred in law in holding that the plaintiff's suit was not a proper suit under the Civil Procedure Act and the Rules made thereunder.

(vii) The learned Magistrate erred in law in making a drastic and a draconian order of striking out the plaintiff's suit when it could have been cured by way of amendment, if she held as she did, that it was "*statement of claim*" instead of being a "plaint."

(viii) The learned Magistrate erred in law in upholding a preliminary objection which, in effect was non-existent, as she had earlier ruled that the issues raised therein could only be raised in response to the plaintiff's application dated 19th July, 2006.

(ix) The learned Magistrate erred in law in upholding the defendant's "preliminary objection" that is inconsistent with Order VI Rule 6 of the Civil Procedure Rules.

(x) The learned Resident Magistrate erred in law for abusing her inherent jurisdiction and discretion by striking out the plaintiff's suit.

(xi) The learned Magistrate erred in law and in fact in failing to allow the plaintiff's application dated 19th July, 2006.

11. Mr. Ngaa who argued the appeal on behalf of the appellant compressed the 11 grounds of appeal into two main limbs. Firstly, whether there is any difference between the "*statement of claim*" and a plaint as a way of instituting a civil suit. Secondly, whether instituting a suit by describing it as a "*statement of claim"* is a fatal defect which cannot be corrected by way of an amendment. Mr. Ngaa refereed to ***Black's Law Dictionary 8th Edition*** which defines a plaint as "***a complaint, especially one filed in a replevin action***" and a complaint as "***the initial pleading that starts a civil action and states a basis for a court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief***."

12. Mr. Ngaa argued that a plaint is a complaint which is the initial pleading that commences a civil action, and states the basis of the court jurisdiction, the basis of the plaintiff's claim and the demand for relief. Mr. Ngaa drew the court's attention to the definition of a "*statement of claim*" as contained in ***Black's Law Dictionary*** as:

"(i) Complaint

(ii)

A plaintiff's initial pleading in a civil case."

He therefore maintained that a "*statement of claim"* and a plaint referred to one and the same thing. Mr. Ngaa further drew the court's attention to the description of "*statement of claim*" contained at ***page 28 of Bullen & Leake's Precedents of Pleadings*** which description complies with the definition given in ***Black's Law Dictionary***. He therefore urged the court to find that a "*statement of claim*" was no different from a plaint.

13. Mr. Ngaa also referred to ***Halsburys Laws of England, 4th Edition vol.36(1)***, in which pleadings is defined. He noted that the same definition is adopted in the Civil Procedure Act which defines pleadings to include a petition or summons, and the statement in writing of the claim or demand of any plaintiff and the statement of defence or counterclaim. Mr. Ngaa argued that the "*statement of claim"* in writing essentially means a plaint, and the two were therefore synonymous. Referring further to the description of claim at paragraph ***47 of Halsburys Laws of England, Vol.36(1)***, Mr. Ngaa maintained that the term "*statement of claim"* is simply descriptive and does not therefore affect the cause of action.

14. Finally Mr. Ngaa argued that Order IV Rule 1 of the Civil Procedure Rules, provides for suits to be instituted by filing of plaint, or in such manner as may be prescribed and therefore a "*statement of claim*" being a pleading, the suit was properly instituted. He noted that the respondent did in fact describe his defence as "*defendant's statement of defence*" and the amended defence as the "*defendant's amended statement of defence*". Mr. Ngaa pointed out that at paragraph 3 of the defence, the plaint was admitted. Relying on the case of ***D.T. Dobbie & Company Ltd vs Muchina [1982] KLR 1*** and ***Sabayaga Farmers Cooperative Society Ltd vs Mwita [1969] EA 38***, counsel submitted that the lower court ought not to have struck out the suit but should have given the appellant time to amend the plaint.

15. Mr. Arwa who appeared for the respondent opposed the appeal. He submitted that the main question for consideration was whether the proceedings instituted by the appellant amounted to a suit as defined in the Civil Procedure Act, and the Civil Procedure Rules. Mr. Arwa maintained that in order to answer that question, the court should not go beyond the Civil Procedure Act and Civil Procedure Rules. He noted that Section 2 of the Civil Procedure Act defines a suit as all civil proceedings commenced in any manner prescribed. He noted further that the word "prescribed" is defined in the Civil Procedure Act as "prescribed by the rules" and "Rules" is defined to mean rules and forms made by the rules committee to regulate the procedure of the court.

16. Mr. Arwa further noted that Order IV Rule 1 of the Civil Procedure Rules, prescribes specific methods of commencing a suit such as by plaint, originating summons, notice of motion, petitions and chamber summons. Mr. Arwa referred to ***Civil Procedure and Practice in Uganda by Ssekaana Musa and Salima Namusobia Ssekaana, chapter 9*** of which outlines the modes of commencement of a suit. Mr. Arwa further referred to ***Mansion House Ltd vs John Stansbury Wilkinson EACA Vol.21 1954-98***, wherein the Court of Appeal held that a suit is any civil proceeding commenced in any manner prescribed by rules ordinance or Section 81 and that an application otherwise commenced in the Supreme Court is only a suit if a law or special law so provides.

17. The case of ***Mandavia vs Rattan singh***

[1968] EA 146; Mityana Ginners Ltd vs Public Health Officer Kampala [1958] EA 339; Kenya Union of Domestic Hotels & others vs Kilimanjaro Safari Club, all of which held that a suit is a civil proceeding commenced in any manner prescribed by the Civil Procedure Act or Rules were cited. Mr. Arwa argued that the mode of commencing proceedings in England was not relevant to our situation and therefore the authority cited by the appellant in that regard was not useful.

18. Mr. Arwa noted that although a plaint in civil law is defined as a complaint or petition, the word complaint was not used in our law nor is a petition the same thing in our law as a plaint. He further noted that the definition of a pleading was not the same as that of a suit. He maintained that pleading referring to "*statement of claim*" was not prescribed in the Civil Procedure Rules for instituting a suit. Mr. Arwa argued that the fact that the defence was described as "*statement of defence*" did not cure the defect in the plaint. He argued that the court could only permit an amendment, if the court had jurisdiction to allow such an amendment, and such jurisdiction would only be available if there was a suit before the court. He noted that in this case, there was no suit before the court and no application for amendment was made to the court. Mr. Arwa distinguished ***D.T. Dobbie vs Muchina*** (supra), maintaining that there was no proper suit before the court.

19. I have carefully considered the application which was made before the trial magistrate. I have noted the arguments which were advanced in favour of and against the application, and the ruling of the trial magistrate. I have also given due consideration to the grounds set out in the memorandum of appeal and submissions by counsel for each party as well as the authorities cited. The main issue which was raised by the preliminary objection was the competence of the suit filed by the appellant. Firstly, is the competence of the suit regarding the manner of commencing the suit. And secondly, was the competence of the appellant to initiate the suit.

20. As regards the manner in which the suit was commenced, it is common ground that the appellant initiated the suit through what was described as a "*statement of claim"*. Section 2 of the Civil Procedure Act as read together with Order IV Rule 1 of the Civil Procedure Rules, provides for a suit to be commenced by way of a plaint, or in such other manner as may be prescribed by the rules. It is evident from a careful perusal of the Act and Rules, that there is no express procedure provided for instituting a suit by way of "*statement of claim*."

21. Mr. Ngaa convincingly argued that a "*statement of claim*" in writing essentially means a plaint. That may well be so. However, as neither the Civil Procedure Act nor the Civil Procedure Rules refers to "*statement of claim*" or uses those words to be synonymous with a plaint, a party cannot ignore the express provisions provided, and substitute a plaint for a "*statement of claim."* I find that the appellant wrongly instituted its suit by way of "*statement of claim*" instead of plaint, and to that extent, the appellant's pleadings were defective.

22. The question is, whether the trial magistrate was right in striking out the appellant's suit because of this defect. In addressing this question, it is worthy of note that the defect is essentially cosmetic as the words "*statement of claim*" simply describes a plaint. The use of the description "*statement of claim*" did not mislead the respondent regarding the appellant's

claim nor did it result in any prejudice to the respondent. The defect was not a fatal defect.

23. As was stated by Madan J.A. in ***D.T Dobbie & Co. (Kenya) Ltd vs Muchina*** (supra), striking out a suit is a very drastic action which should be exercised very sparingly and the court should aim at sustaining rather than terminating a suit. Indeed, the obligation of the court to administer substantial justice was recently enshrined in our law through Section 1A and 1B of the Civil Procedure Act as amended. This is an appropriate case in which substantial justice would have been achieved by allowing the appellant to amend the plaint. It matters not that the appellant did not make an application for an amendment.

24. Under Order VIA Rule 5 of the Civil Procedure Rules the court has a general power to amend pleadings to enable it determine the real question in controversy between parties. The trial magistrate had therefore the power to order the amendment of the pleadings on its own motion. Moreover, under Section 3A of the Civil Procedure Act, the inherent powers of the trial court to make such orders as may be necessary for the ends of justice was not limited by the provisions of the Civil Procedure Act or Civil Procedure Rules. Clearly, the trial magistrate did not address or consider its discretion. I find therefore that the trial magistrate was wrong in striking out the appellant's suit.

25. With regard to the competence of the appellant to initiate the proceedings, the trial magistrate addressed and overruled this limb of the objection. Section 6(3)(a) of the Anti-Corruption and Economic Crimes Act, establishes the appellant as a statutory body corporate capable of suing and being sued. Thus, the appellant had the legal capacity to sue. There was a dispute as to whether the appellant's claim was lodged under Section 7(1)(h) of the Anti-Corruption and Economic Crimes Act or Section 55 of the Anti-Corruption and Economic Crimes Act. Therefore, the question as to whether the appellant had a proper cause of action against the respondent was not one that could be addressed as a preliminary issue as the facts relating to the appellant's cause of action needed to be established by the court. The trial magistrate therefore properly overruled that limb of the preliminary objection.

26. The upshot of the above, is that I allow this appeal, set aside the order of the trial magistrate striking out the appellant's claim and substitute thereof an order for the appellant to amend their pleadings within 21 days from the date hereof. The file of the lower court shall be forthwith remitted back to the lower court for the appellant to take appropriate action. The costs of the appeal are awarded to the appellant. Those shall be the orders of this court.

Dated and delivered this 26th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Abwodha H/B for Ngaa for the appellant

Gitonga H/B for the respondent

Eric – C3ourt clerk