



Sticking out defence under Order VI Rule 13(1) and summary judgment under Order XXXV Rule 1(1) (b); circumstances in which court will strike out defence

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL SUIT NO. 21 OF 2009**

EMERG. INVESTMENT LTD ..... PLAINTIFF

VERSUS

LABAN RUTO ..... 1<sup>ST</sup> DEFENDANT  
CECILIA KARIUKI ..... 2<sup>ND</sup> DEFENDANT  
MOSES LANGAT ..... 3<sup>RD</sup> DEFENDANT  
FATUMA ADEN ..... 4<sup>TH</sup> DEFENDANT  
GEORGE KIPCHANGA ..... 5<sup>TH</sup> DEFENDANT  
MS. DORCAS ..... 6<sup>TH</sup> DEFENDANT  
MR. MUTIGANY ..... 7<sup>TH</sup> DEFENDANT  
STEPHEN NDUNDA ..... 8<sup>TH</sup> DEFENDANT  
MR. MOGORI ..... 9<sup>TH</sup> DEFENDANT  
EUNICE RUTO ..... 10<sup>TH</sup> DEFENDANT

**RULING**

The facts emerging from the application dated 6<sup>th</sup> April, 2010 made by EMERG INVESTMENTS LIMITED (the Plaintiff) and from the amended Plaint and the amended Defence show that (1) the suit property situated in Kericho town known as L.R. Number 631/IV/60 is registered under the **REGISTRATION OF TITLES ACT, CHAPTER 28** of the laws of Kenya and (2) that the suit property was on 27<sup>th</sup> April, 2006 transferred to the Plaintiff (Emerg Investments Ltd) freed and discharged from encumbrances by **COOPERATIVE MERCHANT BANK LIMITED** following sale by the latter in the exercise of its power of Sale as chargee pursuant to the **Indian Transfer of Property Act** (as amended) and in consideration of Shs. 10 million paid by the Plaintiff to the said Cooperative Merchant Bank Ltd. It is discernible from the application that the suit property was registered in the name of one **Bernard Gesora Makori** prior to its sale on 27<sup>th</sup> April, 2006 to the Plaintiff. It is not in dispute that the Defendants are in possession of the suit property and have continued in such possession even after the purchase of the suit property by the Plaintiff on 27<sup>th</sup> April, 2006.

In the amended defence dated 8<sup>th</sup> April, 2009, the Defendants deny that the Plaintiff is the registered proprietor of the

suit property. They admit that they are in possession of the suit premises and aver that they are legally the tenants of the said **Benard Gesora Makori** who, they aver, is still the legal proprietor of the suit property. This is their defence. It is also averred in the amended Plaintiff that **Benard Gesora Makori** aforementioned and another had filed suit No. 46 of 2008 in this Court challenging the sale of the suit property by the chargee (Cooperative Merchant Bank Ltd) to the Plaintiff. The Plaintiff averred in paragraph 7 of the amended Plaintiff that the said suit was struck out and that suit no longer exists. This is the same averment that is repeated in the affidavit of the Plaintiff sworn on 6<sup>th</sup> April, 2010 in support of the application by one **Nalinkusmar Shah**, a director of the Plaintiff. The averment in paragraph 7 of the amended Plaintiff is denied in paragraph 5 of the amended Defence wherein the Defendants state

***“5. The Defendants deny the allegation of fact contained in paragraph 7 of the plaintiff and further state that Kericho HCCC. NO. 46 of 2008 (formerly Nairobi HCCC.NO. 1534 of 2005) is still subsisting and the Plaintiff shall be put to strict proof of the allegations thereof.”***

The Defendants did not file grounds of opposition or a replying affidavit to the application. So as to oppose the application, they were enjoined **under Order L Rule 16** to file one or the other, or even both if they so desired bearing in mind that only through a replying affidavit would they be able to controvert and refute allegation of fact made by the Plaintiff in his application. Has the Plaintiff made out a case for summary judgment and striking out of the defence under the invoked **order VI Rule 13(1) (b) and (d)** and **Order XXXV Rule 1(1) (b)** of the Civil Procedure Rules?

**Order XXXV Rule 1(1) (b)** of the Civil Procedure Rules provides.

1(1) In all suits where the Plaintiff seeks judgment for-

***(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,***

***Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***

Where he has appeared, a defendant is required under **Rule 2(1)** of **Order XXXV** to show cause either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. If, as here, the defendant has also filed defence and it appears to the court that the defence is superficial, or does not disclose any reasonable defence, or it is an abuse of the Court process, or it is scandalous, frivolous or vexatious, the court can strike it out under **Order VI Rule 13**. The Plaintiff alleges that the defence is scandalous, frivolous or vexatious and/or is otherwise an abuse of the process of the Court and counsel for the Plaintiff urged the Court to strike it out under **Order VI Rule 13(1) (b) and (d)**.

Has the Plaintiff showed to the satisfaction of the Court that he is entitled to have the defence struck out and summary judgment entered? The application was not opposed. Neither a Statement of grounds of opposition nor a replying affidavit was filed in opposition to the application. The averment that the Plaintiff is the legal owner or proprietor of the suit property was not challenged. The mere denial in the defence by the defendants that the Plaintiff is not the legal owner of the suit property and the defendants' silence when faced with the application which exhibited evidence of legal ownership clearly shows to my satisfaction that their denial is frivolous and is not serious. Nor do the Defendants appear serious when they claim to be the legal tenants of one **Bernard Gesora Makori** and yet they do not respond to the

Plaintiff's claim. Nor do they state or amplify the nature and legal basis of their tenancy. They were content in their amended defence to merely state that they only recognize the said **Bernard Gesora Makori** as their landlord on the basis that he is, as far as they are concerned, the owner of the suit property.

In the face of cogent evidence that the Plaintiff is the legal owner, the claim by the defendants that their landlord is **Benard Gesora Makori** and that they are his legal tenants cannot hold good. They have not showed that they have a reasonable defence and are entitled to defend.

The power to strike out a pleading under **Order VI Rule 13 (1)** (supra) is discretionary and it is exercised with considerable circumspection because it is drastic and implies summary procedure. This power is invoked only in plain and obvious cases where, in the case of striking out of a suit, it is one which cannot succeed or is unarguable or, in striking out of a defence as it is sought here, or pleadings generally, a pleading is found to be clearly an abuse of the Court. The power conferred by **Rule 13 (1)** of **Order VI** is exercised where the court is satisfied that the defences raised are not arguable. In **NAGLE V FELDER [1966] 2 B633**, Danckwerts and Solomon LJJ held that the summary remedy under the English equivalent of our **Rule 13(1)** of **Order VI** is only to be implied in plain and obvious cases where the defence (or the action) cannot succeed or is in some way an abuse of the process of the court or the case is unarguable. That is the stance correctly taken in our courts in Kenya.

In the instant case, the Defendants do not show the basis in law in which they claim to be lawfully on the suit land. They state they are unaware of the allegations made by the Plaintiff. They challenge the Plaintiff to prove the allegations made against them. In short they want the plaintiff to prove the allegations made. While the burden of proof reposes on the Plaintiff to prove that the Defendants have no reasonable defence, the defendants cannot be permitted to make unclear statement of defence or a defence that is evasive and vague. The fact that the burden of proof reposes on the plaintiff does not mean that the defendants have no obligation to show what their defence is. In the case of **GEORGE P.B. OGENDO v. JAMES NANDASA & 4 OTHERS** (KAKAMEGA H.C.C.C. NO. 91 OF 2002) (unreported) the High Court at Kakamega stated

*“... Gone are the days when liberty existed to engage in too many expedients in pleadings to an extent that the pleadings do not show what line of defence is being pursued by a defendant. R.E. Megary in “Miscellany-at-law, a Diversion for Lawyers and others” at page 46 demonstrates a typical example of what today would be a model defence lacking in seriousness and incapable of showing what defence is relied on. It is an example that takes too far the expedients of pleadings. The example concerns an action brought against a neighbour for damaging a borrowed pony-cart. The local sea lawyer advised the defendant to plead thus: “that he had never borrowed the cart; and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged; and that he had borrowed the cart from some person other than the plaintiff, and that the plaintiff had never owned any cart, whether pony or otherwise, and so on and so forth”. This is a defence that would today be struck out without the slightest hesitation”.*

In **DR. MARRY WATSON versus RENTA PLAN LTD. & 2 OTHERS** (NBI H.C.C.C. NO. 2180 OF 1990) Ringera J. as he then was, pointed out in his ruling that “a frivolous claim is ex post facto vexatious for nobody can fail to be vexed by a frivolous allegation against him or her”.

The process of the court must be carried out properly, honestly and in good faith. This is what **rule 13(1)** connotes. The court will not allow its function as a court of law to be abused. Where a pleading is found to be groundless, the court will not hesitate to strike it out as being an abuse of the process of the court.

The defence by the Defendants in this case lacks seriousness. The defendants do not show the legal basis on which they are on the land. Their defence is vague and evasive. It is embarrassing. For the defendants to state that it is up to the Plaintiff to prove the allegation of trespass while they remain vague is to trivialize the process of the court. What the defendants are saying in their defence is that they do not recognize the new proprietor of the suit premises. They do not state why? Title Deeds are sacrosanct documents that prove title to land. The denials contained in the amended defence cannot be said to be serious. The defence is clearly not bona fide. I so find. I have no hesitation in striking it out which I hereby do.

In the result, I allow the application and enter judgment for the Plaintiff as prayed in prayer (a) of the amended Plaint. The suit shall be set down for hearing on the issue of mesne profits and any other or further relief.

**DATED** at **KERICHO** this 19<sup>th</sup> day of July, 2010

**G.B.M. KARIUKI, SC**

**RESIDENT JUDGE**

**COUNSEL APPEARING**

Advocates for the Plaintiff/Applicant in the suit were  
Messrs Bundotich & Co. advocates represented by Mr Bundotich, Advocate,

Advocates for the Defendants/Respondents in the suit were  
Messrs Orina & Co. advocates represented by Mr Orina, Advocate,