REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 699 of 2005

JULIE MIGARE……..……RESPONDENT /PLAINTIFF

V E R S U S

CO-OPERATIVE BANK OF KENYA…….. APPLICANT/DEFENDANT

R U L I N G

Before me is a Chamber Summons dated 12th April, 2010 filed by M/s Miller & Company advocates for the applicant/defendant. The application was filed under section 3A of the Civil Procedure Act and Order VI Rule 13 (b) and (d) of the Civil Procedure Rules ***(Cap.21 of the Laws of Kenya).***

The prayers in the application are as follows-

1. THAT this Honourable Court be pleased to strike out

the plaintiff's plaint and consequently order that the suit be dismissed.

2. THAT alternatively, this honourable court be pleased to strike out paragraphs 3A, 7, 9A and 11 of the Plaintiff's amended plaint dated 16th April, 2009.

3. THAT cost of this application be provided for.

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by **JAMES SIJENY** advocate on 12th April, 2010.

The grounds of the application are as follows-

(a) THAT the plaintiff filed this suit against the defendant on the 8th day of June, 2005.

(b) THAT the plaintiff's suit is scandalous, frivolous and vexatious.

(c) THAT the Employment Act No. 11 of 2007 came into force in 2007 and does not apply retrospectively.

(d) THAT Labour Relations Act No. 14 came into force on 26th October, 2007 and does not apply retrospectively.

(e) THAT the prayers sought in the plaint are therefore not capable of being complied with by the defendant.

(f) THAT the plaintiff's suit is otherwise an abuse of the process of court.

(g) THAT the plaintiff's amended plaint further offends the mandatory provisions of the Civil Procedure Rules.

In the supporting affidavit, it was deponed inter alia, that the plaintiff's purported use of the Employment Act No. 11 of 2007 and the Labour Relations Act No. 14 of 2007 respectively in the amended plaint was intended as an abuse of the process of the court; and that the amended plaint was embarrassing as the plaintiff had failed to regularize his pleadings and was therefore not deserving any discretion from the court whatsoever.

The application was opposed and grounds of opposition were filed

on 28th April, 2010 by M/s **KULOBA & WANGILA** advocates on behalf of the respondent/plaintiff. The grounds of opposition were as follows-

1. ***The application is an abuse of the court process, frivolous and vexatious.***

2. ***The plaintiff's suit has raised merited and triable issues.***

3. ***The Employment Act No. 11 of 2007 is applicable to this suit by virtue of Section 3.***

4. ***The Labour Relations Act No. 14 is applicable to this suit by virtue of section 3.***

5. ***Without prejudice to the above the suit is open to further amendments under Order VIA rule 7(3) Civil Procedure Rules.***

On the hearing date, Mr. Sijeny for the applicant and Mr. Kuloba for the respondent addressed the court.

Mr. Sijeny submitted that the applicant/defendant wanted the striking out of the amended plaint, or that paragraph 3A of the amended plaint be struck out. Counsel submitted that the suit was filed in 2005. However, the respondent obtained leave of the court and filed an amended plaint on 4th June, 2009 which introduced averments that the new Employment Act No. 11 of 2007 which came into effect on 20th December, 2007 and the Labour Relations Act No. 14 of 2007 which came into effect on 26th October, 2007 applied to the case. Counsel contended that none of the two Acts contained any provisions for retrospective application of any of their provisions. Counsel also argued that, in the alternative, paragraph 3A, 7, 9A and 11 of the amended plaint be struck out.

Counsel lastly argued that though the respondent filed grounds of opposition citing section 3 of each of the two Acts,

none of the said section 3 provided retrospective effects for the provisions of the Acts.

Mr. Kuloba for the respondent submitted inter alia, that the application was frivolous and vexatious. Counsel contended that the respondent filed an application to amend the plaint and the court allowed the same and an amended plaint was filed on 16th June, 2009. Counsel contended that the applicants did not raise any legal issues and merely filed the present application on 12th April, 2010 when the matter was coming up for hearing before Mwera J. This application was therefore an attempt to thwart the progress of the case and was an abuse of court process. The applicants were also guilty of delay and indolence in filing the application.

Counsel contended that, the second major objection raised in the grounds of opposition, was that there were triable issues raised in the plaint and that in view of the provisions of the Civil Procedure Rules, this was a matter that needed to go for trial. In any case amendments to pleadings were allowed under Order 6A rule 7(3) of the Civil Procedure Rules.

I have considered the application, documents filed and submission of both counsel for the parties.

The application was filed under section 3A of the Civil Procedure Act ***(Cap. 21)*** which is a restatement of the inherent powers of the court to make orders that are necessary for the ends of justice and to prevent abuse of the process of the court. It was also brought under Order VI Rules 13(b) (d) of the Civil Procedure Rules, which states-

> **13(1)** ***At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-***
>
> ***(a)*** .....
>
> ***(b) It is scandalous, frivolous or vexatious, or***
>
> ***(c)*** .....
>
> ***(d) It is otherwise an abuse of the process of court.***

It is not in dispute that the amendment to the plaint was allowed by the court, before the amended plaint was filed.

In my view, where an applicant claims that a pleading is scandalous, vexatious, frivolous or an abuse of the process of the court, the burden is on the applicant to demonstrate the allegations to the satisfaction of the court. In our present case, the respondent has sought in the amended plaint to rely on the new Employment Act and the Labour Relations Act, both of 2007. The applicant thinks that those two legislations are not applicable to the present case. Because of that contention, they think that the court should strike out the amended plaint. In my view, the issue of the applicability of the two Acts of Parliament will depend on interpretation of the facts and the law. That will be an issue for the determination by the court, and cannot amount to vexatious or scandalous proceedings nor can it be an abuse of the process of court.

Secondly, it is not disputed that the amended plaint was filed pursuant to a court order issued on 16th April, 2009. The applicants have not filed an appeal nor an application for review of that order of the court. In my view, the orders sought could only be granted in an appeal or review application to the orders of the court allowing the amendments, not through the application herein, the way it was filed.

The third reason why I will not allow this application is based on the Overriding Objective provisions of the Civil Procedure Act **(Cap. 21),** Section 1A which provides-

> **1A (1)** ***The overriding objective of this Act and the rules made hereunder is to facilitate the just,***
> ***proportionate and affordable resolution of civil disputes governed by this Act.***
>
> ***(2) The court shall in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***

In my view, the overriding objective enjoins the court to ensure that substantive justice is done, rather than entertaining applications such as the present one which tend to delay proceedings, cloud the issues, and make litigation very expensive because of numerous applications and appeals from decisions in those applications, which makes proceeding go to and forth in circles. It is not in dispute that this matter was almost ready for hearing of the main suit before this application was filed. That in itself, shows that the applicant either consciously or unconsciously want to delay the hearing of the case, where the issue of the applicability of the Acts complained of would be determined at the end of the substantive hearing. On that reason also this application will not succeed. The application has no merits.

Consequently, and for the above reasons, I dismiss this application with costs to the respondents.

Dated and delivered at Nairobi this 24th day of September, 2010.

George Dulu
Judge.

In the presence of-

Mr. Ouindo holding brief for Mr. Kuloba for the respondent/plaintiff

Mr. Mbichire holding brief for Mr. Shilenje for the applicant/defendant

Catherine Muendo – Court clerk.