



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

**Environmental & Land Case 1965 of 2007**

**JOYCE WANJIKU MADSEN.....1<sup>ST</sup> PLAINTIFF**

**PER KORGH MADSEN.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DR. DANIEL KAIRU KIARAHO.....1<sup>ST</sup> DEFENDANT**

**KIMANI KAIRU T/A KIMANI**

**KAIRU & CO. ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**DAVID KAMAU MAGWA.....3<sup>RD</sup> DEFENDANT**

**STANDARD CHARTERED BANK KENYA LIMITED .....4<sup>TH</sup> DEFENDANT**

**RULING**

This is an application by way of Chamber Summons under order VI Rule 13(1) b, c, d and Rule 16 of the Civil Procedure Rules seeking orders that the amended defence filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants be struck out and judgment be entered against the defendants in favour of the plaintiff in terms of the amended plaint dated 13<sup>th</sup> March, 2009. The other orders sought are that the defences of the 3<sup>rd</sup> and 4<sup>th</sup> defendants should also be struck out with costs to the plaintiff.

The grounds relied upon by the plaintiff are that the defences filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are scandalous, frivolous or vexatious and may prejudice, embarrass or delay the fair trial of this suit. It is also stated that the said defences are an abuse of the court

process. In addition to the said grounds, there is an affidavit sworn by one Per Krogh Madsen who is the 2<sup>nd</sup> plaintiff herein. The application is opposed by all the defendants.

All learned counsel appearing for the parties herein have filed written submissions and cited several authorities. I have read the record before me together with the said submissions and authorities. My first observation is that the pleadings herein are closed. The amended plaint dated 13<sup>th</sup> March, and filed on 30<sup>th</sup> March, 2009 is very detailed. The allegations made against all the defendants herein are also very detailed.

I have looked at the defences filed by the respective defendants herein and related the same to the plaint with a view to addressing the application before me. It is now trite law that the principles of striking out pleading are now settled. The broad principle on which the court act to strike out is that apart from specified cases, it is only where it is perfectly clear that the plea cannot succeed or has little substance.

Where it is the pleading by the defendant, guidance is to be found in several decided cases. In *Kenya Commercial Bank Limited Vs- Baraka Ochungu and another Nairobi HCCC No.3815 of 1994* Onyango J. (as he then was) said as follows;

**“The law is now well settled that a defendant who shows that he has in his defence at least a triable issue, must be allowed to proceed unconditionally and be heard in his defence at a full hearing.”**

In *DT Dobie and Company Limited – vs – Muchina* (1982) KLR 1, Madan JA. said as follows;

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely preserved for the judge at trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action.”**

The submissions by counsel in this particular application, with respect, have addressed issues and matters that belong to the province of a main trial. I say so because they have tended to give evidence rather than observations relating to the pleadings.

My position is that, if I were to delve deeper into this matter before discovery, inspection and exchange of documents prejudice may result to the parties herein. Suffice to say, the defences filed by the respective defendants disclose serious triable issues that must go for full trial.

Having said so, I find that the application lacks merit and the same is hereby dismissed with costs to the defendants. I noted earlier that the pleadings are closed. Counsel shall now embark on pretrial procedures under Order X the Civil Procedure Rules and set the suit down for hearing.

Orders accordingly

*Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September, 2010.*

**A. MBOGHOLI MSAGHA**

**JUDGE**