**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 359 of 2004**

**SHEPHERD CATERING LTD ……PLAINTIFF**

**V E R S U S**

**NAIROBI HOLDINGS LTD ……..……1ST DEFENDANT**
**CHIEF LANDS REGISTRAR OF TITLES ……...2ND DEFENDANT**
**STEEL SON LTD ……..……..3RD DEFENDANT**

**R U L I N G**

On 11th March 2009 the 3rd Defendant filed a motion under **section 3A of the Civil Procedure Act, Order 6 rule 13 (b), (c) and (d) and Order 35 rules 1 (1) (b) and 2 of the Civil Procedure Rules** seeking summary judgment to be entered against the Plaintiff for vacant possession of the properties known as L.R. NO. 309/361/3 and L.R. NO. 309/361/4 Nairobi (jointly known as the "suit properties"), and that, further, and in addition thereto, and/or in the alternative to the above, the Plaintiff's plaint and suit be struck out and/or any defence to the counterclaim filed herein be struck out/dismissed with costs. The affidavit in support of the application was sworn by Eric Gate Kirubi who deponed that he was an accountant employed by the 3rd Defendant, a limited liability company, and duly authorized to swear the affidavit.

The 3rd Defendant issued a notice of preliminary objection to the application whose grounds were that:-

a) the application is *ex facie* incompetent, fatally defective and inadmissible as the supporting affidavit was sworn by a person who was not an officer of the applicant as envisaged by **section 2 of the Companies Act (Cap. 486) and Order 3 rule 2 (c)** of the **Civil Procedure Rules**; and

b) the application is incompetent and fatally defective for being an all – cure omnibus application, a mongrel of **Orders 6** and **35** thereby incapable of proper adjudication by the court because each of the reliefs sought apart from being governed by different rules, was also subject to long established and different judicial principles which needed to be raised and considered by the court and is thus not permitted in law.

Mr. Gachoka for the Plaintiff and Mr. Ojiambo for the 1st and 3rd Defendants addressed the court on the preliminary objection. Mr. Ojiambo's concern was that he had not been given sufficient notice of the objection. This was because it had been filed on 26th July, 2010, served the following day and heard on 28th July, 2010. Mr.Gachoka's response was that the notice he issued was only a matter of practice, otherwise we did not have to issue or serve such notice as a point of law could be raised at any time. All that the court wishes to say on this issue is that it is now the accepted courtesy and practice that a party wishing to raise a preliminary objection that may have the effect of disposing of a suit or application should provide notice. The notice is intended to warn the other side and should also provide sufficient opportunity for him to prepare to meet it. It is needless to point out that the notice should indicate the point or points of law that will be relied on to object to the suit or application. This is the only way that parties can alternately save on time and costs.

In seeking to show that the application is fatally defective and incompetent for being an all - cure omnibus and mongrel **of Orders 6 and 35**, Mr. Gachoka relied on the decision in **Rajput –Vs- Barclays Bank of Kenya Ltd & 3 Others [2004] 2 KLR 393** and submitted that the omnibus application was incapable of proper adjudication. This is because, he argued, the relief sought in either **Order** was governed by different rules and subject to long established and different judicial principles

which need to be raised and considered by the court. In the above case, the Plaintiff had sought a mandatory injunction, leave to institute contempt proceedings and leave to amend, all in one application. The court expressed itself as follows:-

**"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught it, there will be one or two edible crabs, or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, it is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court need to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."**

The court, however, decided the application on merits and dismissed it with costs. It did not decide the application on the technical point raised.

Mr. Ojiambo's response was that the application was not an all – cure omnibus, or a mongrel, as the prayer to strike out the plaint and defence to counterclaim and the one for summary judgment were not inconsistent, and that, in any case, the prayers were in the alternative.

The other concern by Mr. Gachoka was that the application had gone further to invoke **section 3A of the Civil Procedure Act**. He submitted that **section 3A** can only be invoked where the **Civil Procedure Act and Rules** have not provided the procedure of approaching the court. In the instant case, there were specific provisions, **Order 6 rule 13 and Order 35 rules 1 and 2**, and therefore the application was defective for invoking inherent powers of the court. Mr. Ojiambo responded by submitting that the court will invoke its inherent powers all the time, even where the application does not make reference to **section 3A**. The mere reliance on **section 3A** could not therefore make the application defective, he argued.

It has become practice for litigants to invoke **section 3A** in all applications. They will invoke the specific provisions covering the application in question but still add **section 3A**. Some will invoke only **section 3A** even where there are specific provisions relating to the application. It is now settled that **section 3A** which provides for the exercise of the court's inherent powers to do justice should only be invoked where the **Act** and **Rules** do not provide for the procedure of approaching it **(Miruka –Vs- Abok & Another [1990] KLR 541).** In the instant case both striking out of a pleading and summary judgment have been provided for under the **Act** and **Rules**. It was therefore superfluous for the 3rd Defendant to invoke **section 3A**. This did not however, make the application defective.

Was there anything wrong with the 3rd Defendant coming under both **Orders 6 rule 13 and 35 rule** 1? It is certainly true that two reliefs are each governed by different rules and judicial principles. The power to strike out is directed at pleadings. It is designed to prevent a pleading from being evasive or from concealing or obscuring the real questions in controversy between the parties and to ensure, as far as the pleadings are concerned, fair terms between the parties in order to obtain a decision which is the legitimate object of the action **(Lynette B. Oyier and Another –Vs- Savings and Loan Kenya Ltd Nbi HCCC No. 891 of 1996).** The function of the court in its jurisdiction of striking out pleadings is not to determine whether the action or defence as framed will or will not succeed, which is the duty of the trial court, but to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose sanctions if they have not been so formulated. It is the soundness of the pleading itself, which is the concern of the court at that stage in the litigation process.

In an application for summary judgment, the Applicant has to show that the Defendant who has appeared has no defence or may have is merely a sham defence **(Lion of Kenya Insurance Company Ltd –Vs- Trinity Prime Investments Ltd, Civil Appeal No. 120 of 1999)**. He has to show that the defence on record does not disclose any issue that should go to trial.

In **Nuru Chemist Limited and Another –Vs- National Bank of Kenya Civil Appeal No. 219 of 2002 at Nairobi,** the Court of Appeal was dealing with an appeal in which the Respondent had at close of pleadings filed a motion under **Order 6 rule 13 (1) (b), (c) and Order 35 rule 1 of the Civil Procedure Rules** and **section 3A** of the **Civil Procedure Rules** seeking that the defence be struck out; and in the alternative or without prejudice, summary judgment as prayed in the plaint be entered against the Defendants. The court noted as follows:-

**"We note that the application that was before the superior court was brought pursuant to Order 6 rule 13 (1) (b) and (c) and under Order 35 rule 1 of the Civil Procedure Rules. These are two different provisions of the Civil Procedure Rules and each sets out its own requirements that must be demonstrated before an applicant succeeds."**

The court went on to outline the requirement and found that they had not been met in the superior court. The court did not say, for instance, that because of the two sets of principles then the application was omnibus, or defective.

In **Mitsubishi Corporation –Vs- Antony Massawa Civil Appeal No. 40 of 1992,** the Court of Appeal held that when the Applicant in an application for striking out the defence does not ask for judgment to be entered, the Judge should not enter judgment. That clearly shows that an application for striking and that for summary judgment are allowed to be brought together.

In short, I do find that the application is not an all – cure omnibus application, and neither is it a mongrel.

The other reason for Mr. Gachoka's submission that the application was defective and incompetent was that the supporting affidavit had been sworn by a person who was not an officer of the 3rd Defendant. The application, it is noted, was supported by the affidavit of Eric Gate Kirubi who deponded that he was an accountant in the employment of the 3rd Defendant who had provided him with authority to swear the same. Counsel relied on **section 2 of the Companies Act (Cap. 486), Order 3 rule 2(c) of the Civil Procedure Rules** and the decision in **Microsoft Corporation –Vs- Mitsumi Computer Garage Ltd [2001] 2 EA 460** to say that the deponent was not an officer of the 3rd Defendant.

**Order 3 rule 2 (c)** talks of recognized agents of a corporation by whom appearances, applications and acts may be made or done. **Section 2 of the Companies Act** defines "officer" in relation to an association or a body corporate to include a director, manager, secretary. It was appreciated by the decision in **Microsoft** that the definition is inclusive rather than an exhaustive. This is the point that Mr. Ojiambo sought to emphasise. That is the same sort of definition in **Halsbury's Laws of England (4ed.), Volume 10 paragraph 64,** which reads as follows:-

**"Any persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be officers" of the company. The term is defined in Companies Act 1985 as including any director, manager or secretary. "Manager" means, in everyday language, a person who has the management of the whole affairs of the company. It connotes a person holding, whether *de jure* or *de facto,* a position in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit. It does not include a local manager.**

In **Microsoft case** the question was whether a country manager of a foreign unregistered company was an officer. The court answered that in the affirmative. What worries me about **Halsbury's Laws of England** (above) is the statement that a local manager cannot be an officer of a company. Take a bank in Kenya that has branches upcountry. Each branch has a manager. Each branch gives loans. The servicing of such loans may be the function of a loans officer at the branch. Not the branch manager, or the Managing Director in Nairobi. In case of default or suit in relation to the facility it would be the officer to swear an affidavit. This officer would in my view be an "officer" of the bank.

It is material that Eric swore that he had authority of the 3rd Defendant to swear the affidavit. I find he is an "officer" of the 3rd Defendant who was duly authorized to swear the affidavit. The application is therefore properly supported.

In conclusion, the preliminary objection by the Plaintiff is not sustained. The same is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI**
**THIS 5TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE**
**J U D G E**