



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**CIVIL CASE NO. 307 OF 2003**

**NOVA INDUSTRIES**

LTD .....PLAINTIFF

**VERSUS**

ZE YUN YANG.....1<sup>ST</sup>

**DEFENDANT**

ALEX GATUNDU.....2<sup>ND</sup>

**DEFENDANT**

KIHARA MUTTU.....3<sup>RD</sup>

**DEFENDANT**

STANDARD CHARTERED B ANK LTD.....4<sup>TH</sup>

**DEFENDANT**

**RULING**

The application before the court is brought by way of a Chamber Summons dated 20<sup>th</sup> June, 2003, and taken out under **Order VIA Rule 13(b), (c) and (d)** of the **Civil Procedure Rules**. The applicants’ seek from the court orders that this Honourable Court do strike out the Plaint and verifying affidavit herein with costs to the 1<sup>st</sup> Defendant; and that the cost of this application be borne by the Plaintiff in any event.

The application is supported by the affidavit of Ze Yun Yang, the 1<sup>st</sup> Defendant herein, and is made on the grounds that –

- a) The suit herein is vexatious and an abuse of the court process.***
- b) The pleadings filed by the plaintiff are bad in law and fatally defective.***
- c) The Plaintiff’s pleadings do not disclose any maintainable cause of action against the 1<sup>st</sup> Defendant.***
- d) The suit offends the provisions of Section 69 of the I.T.P.A. of India as amended and interpreted by Kenyan Courts.***

The application is opposed by the replying affidavit of John Kilolo Mangeli, the Plaintiff's Managing Director, sworn on 12<sup>th</sup> September, 2003, and also by grounds of appeal filed on the same date. At the oral hearing of the application, Mr Wambugu for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the suit offends the provisions of Section 69 of the Indian Transfer of Property Act as amended and interpreted in Kenya, and that no cause of action can arise unless the Plaintiff can prove fraud, which the Plaintiff Company had not done.

Mr Muthee for the 4<sup>th</sup> Defendant associated himself with Mr Wambugu's arguments. He submitted that the Plaintiff filed **HCCC No 2622 of 1997** by which it sought injunctive orders against the 4<sup>th</sup> Defendant, and further that whatever the Plaintiff is seeking in this suit ought to have been raised in the former suit. He further contended that this suit contravenes Sections 6, 7 and 8 of the Civil Procedure Act and also that the verifying affidavit herein commits perjury by stating that there is no other suit, yet there is another suit. He therefore urged the court to strike out the verifying affidavit with costs.

In response, Mr King'ara for the Plaintiff/Respondent argued that **HCCC No. 2622 of 1997** was withdrawn and that it was not pending when the present suit was filed. He relied on the replying affidavit and grounds of opposition and submitted that it has been alleged by the Applicants that the plaint should be struck out as it does not disclose a cause of action against the 1<sup>st</sup> Applicant and that it would lie only where there is fraud against the Applicant and also where there is a claim in the nature of damages. He then submitted that Paragraph 16 of the plaint pleads fraud, while in the prayer there is a claim for general and special damages which pleads raised causes of action.

Mr King'ara then referred to the consolidation of this suit with **HCCC No. 9 of 2003**. He submitted that the two are intertwined and cannot be separated and therefore there was no basis for striking out this suit and that if there was no cause of action in **HCCC 307 of 2003**, then there was no cause in **HCCC 9 of 2003**. Finally, he submitted that the application was an abuse of court process as the parties had agreed on issues which should go to trial. He also submitted that once parties have framed issues for trial, one of them cannot turn around and argue that there was no cause of action. He referred to **MPAKA ROAD DEVELOPMENT LTD vs. KANA [2004] 1 EA 163** and urged the court to dismiss the application.

In his reply, Mr Wambugu submitted that the particulars of fraud against the 1<sup>st</sup> Defendant were not set out. Secondly, he contended that just because the two suits were consolidated did not mean that they were the same, and that the authority cited was distinguishable. He prayed that the plaint herein be struck out against the 1<sup>st</sup> Defendant as it was scandalous and vexatious.

After considering the pleadings and submissions by the respective parties, I note that although the application is stated to be brought under the provisions of **Order VI A**, it is actually brought under **Order VI Rule 13 (1), (b), (c) and (d)** of the **Civil Procedure Rules**. In the circumstances, the issues to be determined are whether the pleadings are scandalous, frivolous, or vexatious; or whether they may prejudice, embarrass or delay the fair trial of the action; or whether they are otherwise an abuse of the process of the court.

The first issue deals with the allegation in the application that the Plaintiff's Managing Director committed perjury by averring in the verifying affidavit that there was no other suit which was untrue. At the time of swearing of the verifying affidavit on 1<sup>st</sup> April, 2003, there was **HCCC No. 2622 of 1997** pending between the Plaintiff and the 4<sup>th</sup> Defendant only. Although Mr King'ara submitted that the said suit had been withdrawn at the time of the swearing of the verifying affidavit herein, that was not correct. **HCCC No 2622 of 1997** was withdrawn by a notice dated 3<sup>rd</sup> July, 2003 and filed in court on 7<sup>th</sup> July, 2003. But since the verifying affidavit in respect of this suit was sworn on 1<sup>st</sup> April, 2003, it stands to reason that at the date of swearing the said affidavit, **HCCC No 2622 of 1997** was still alive. However, I also note that the first three Defendants in this suit were not parties to that other suit. Technically, it was therefore correct for the Plaintiff to attest in the manner he did since the first three Defendants were not parties in the earlier suit. I would, therefore, give the deponent the benefit of doubt.

The second issue touches on the stage at which the suit has reached. The record shows that the Plaintiff and the first three Defendants signed a statement of agreed issues on 12<sup>th</sup> August, 2003 and filed the same

in court on 13<sup>th</sup> August, 2003. I understood Mr Wambugu for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to argue that the Plaintiff has no cause of action unless it can prove fraud which has not been done. The Amended Plaintiff which Mr Kingara told the court was dated 16<sup>th</sup> May, 2003, is not on record. Even without it, Paragraph 17 of the original plaintiff dated 1<sup>st</sup> April, 2003 gives the Plaintiff's perceived particulars of fraud. And in paragraph 19 thereof, the 1<sup>st</sup> Defendant herein is alleged to be the beneficiary of that fraud. To crown it all, the question as to whether there are particulars of fraud is one of the agreed issues filed in court on 13<sup>th</sup> August, 2003. By reason thereof, it was premature for Mr Wambugu for the Applicants to submit that there is no cause of action unless the Plaintiff can prove fraud and that the Plaintiff had not done so. With the parties having agreed that fraud was an issue, the moment for proof is yet to come and the parties should hold on to their horses and wait for that moment.

Finally, I note from the record that this suit has been severally fixed for hearing. It was first fixed for hearing on 25<sup>th</sup> October, 2005, when it was taken out for a fresh date as "the Judges hands were full". It was listed for hearing again on 22<sup>nd</sup> November, 2006, when it was taken out as only two Judges were sitting; and then again on 8<sup>th</sup> October, 2007, when it was taken out due to shortage of Judges. It was then fixed for hearing on 29<sup>th</sup> January 2008, when it was again taken out of the hearing list due to shortage of Judges and only two Judges were sitting. It then came for hearing on 24<sup>th</sup> November, 2009, when it could not proceed as the bank's key witness was indisposed and the matter was adjourned to 30<sup>th</sup> November, 2009 for mention with a view to fixing a fresh hearing date. On that date, counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not attend court and the matter was stood over generally. All this while, the application now before the court was still pending for hearing.

If the pleadings in this case had been truly scandalous, frivolous, or vexatious; or an abuse of the court process, that point ought to have been taken long before the suit was fixed for hearing on five different occasions. In my humble view, once a suit has come up for hearing, all pending interlocutory applications fall by the wayside. The fixing of the hearing of this application was an afterthought which was probably provoked by the failure of the suit to proceed to hearing for the reasons narrated above. In the context of what has happened, to grant the orders sought at this stage would be tantamount to putting the clock back while time is still ticking away.

For the above reasons, I find that the application by Chamber Summons dated 20<sup>th</sup> June, 2003, has no merit at this stage and it is hereby dismissed with costs.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of November 2010**

**L. NJAGI**

**JUDGE**