



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 346 of 2008**

**ARUA MERCANTILE LIMITED.....PLAINTIFF**

**VERSUS**

- 1. HUMPHREY BABUKIIKA**
- 2. SEMLIKI MINERAL RESOURCES LIMITED**
- 3. MUMIAS SUGAR COMPANY LIMITED.....DEFENDANTS**

**RULING**

This is an application by way of Chamber Summons dated 26<sup>th</sup> February 2009 brought under the provisions of Order VI Rules 1, 3 (1), (b), (c) and (d) and 16 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and All enabling Provisions of the Law. The applicant is the plaintiff and seeks one main order that the 3<sup>rd</sup> defendant's statements of defence dated 20<sup>th</sup> January 2009 be struck out and judgment be entered against the 3<sup>rd</sup> defendant. The grounds for the application are as follows:-

- a) **That the statements of defence filed by the 3<sup>rd</sup> defendant are otherwise an abuse of the court process; or scandalous; frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action.**
- b) **That the 3<sup>rd</sup> defendant filed, through the firm of M/S M. Ananda & Company Advocates, a statement of defence dated 20<sup>th</sup> January 2009.**
- c) **That the 3<sup>rd</sup> defendant also filed, through M/S Otieno, Ragot and Company Advocates another statement of defence dated 20<sup>th</sup> January 2009.**
- d) **That filing of two statements of defence by the 3<sup>rd</sup> defendant is scandalous and a clear and blatant abuse of the court process.**
- e) **That the trial of this action will be prejudiced, embarrassed and/or delayed by reason of the proceedings filed by the 3<sup>rd</sup> defendant.**

The application is further supported by an affidavit sworn by one Kahinda Otafiire a director of the plaintiff which affidavit is an elaboration of the above grounds. The application is opposed on the basis

of Grounds of Opposition filed by M/S M. Ananda & Company Advocates. The said advocates contend in the said grounds that the written statement of defence filed by them on behalf of the 3<sup>rd</sup> defendant is properly on record and that it is upon the 3<sup>rd</sup> defendant to sort out the issue of its representation otherwise their defence delivered on its behalf by them raises triable issues and justice will not be achieved by striking out the said defence purely on technicalities. Mr. Calleb Manase Ananda of the said firm of advocates has also filed a replying affidavit in which he depones, among other things, that he was indeed instructed by the 3<sup>rd</sup> defendant and entered appearance and delivered the defence impugned by the plaintiff. Mr. Ananda further depones that at the time of entering appearance and filing defence, he was not aware that M/S Otieno & Ragot Advocates had also been instructed by the 3<sup>rd</sup> defendant.

The application was canvassed before me on 5<sup>th</sup> May 2009. At the hearing, counsel for the plaintiff took me through the affidavits and urged that both sets of pleadings lodged for the 3<sup>rd</sup> defendant be struck out. Mr. Ogembo, who was instructed by the firm of M/S Otieno, Ragot and Company Advocates acknowledged that only one set of pleadings should have been filed on behalf of the 3<sup>rd</sup> defendant. In his view the pleadings filed later in time should be struck out. Those were infact the documents filed by the firm of M/S Otieno Ragot and Company Advocates. In counsel's view, to strike out both sets of pleadings would be draconian and would amount to punishing the 3<sup>rd</sup> defendant for the mistake of its Advocates.

Mr. Ananda associated himself with the submissions of Mr. Ogembo and saw nothing scandalous, frivolous, vexatious or embarrassing in the pleadings filed on behalf of the 3<sup>rd</sup> defendant. Counsel urged the same view that the ends of justice would be served by striking out the pleading filed later in time in which event no issue of delay would arise.

I have considered the application and the affidavits as well as the Grounds of Opposition. I have also given due consideration to the submissions made to me by counsel appearing. Having done so, I take the following view of the matter. Striking out a pleading is a drastic remedy and it has been held time and again that striking out procedure can only be invoked in plain and obvious cases and that such jurisdiction must be exercised with extreme caution. (See **Nitin Properties Limited – v – Jagjit Singh Kaisi & Another [CA No. 132 of 1989] (UR)**). The plaintiff in this case seeks the striking out of pleadings filed on behalf of the 3<sup>rd</sup> defendant on the single ground that two sets of statements of defence were delivered on its behalf. There is no allegation that the statements do not raise bona fide triable issues. The offence committed on behalf of the 3<sup>rd</sup> defendant is delivering two sets of statements of defence. I accept the contention by counsel for the plaintiff that only one statement of defence should have been filed. However, does the filing of two sets of defences attract the sanction of striking out? If the Deputy Registrar had declined to accept the statement filed later in time on the basis that the same was incompetent by virtue of the earlier defence on record, would precious judicial time be expended on this application? Counsel for the 3<sup>rd</sup> defendant have freely acknowledged the error and urged that the statement of defence delivered later in time be struck out. With that on record the issue of representation of the 3<sup>rd</sup> defendant has been resolved. The apprehension of the plaintiff that it cannot know which statement of defence it should respond to no longer has basis. In my view a defendant who has clearly elected which pleading he wishes to retain should not be debarred from defending the plaintiff's suit merely because two sets of pleadings were originally filed unless of course the pleading is patently frivolous, scandalous and vexatious and may prejudice, embarrass or delay the fair trial of the action. The statement of defence elected by the 3<sup>rd</sup> defendant does not suffer from those defects or defaults. Courts are reluctant to strike out pleadings because where possible disputes should be heard on their own merit (See **Essanji and Another – v – Solonki [1968] EA 224**). In **Trust Bank Limited – v – Amalo Company Limited [2003] 350**, the Court of Appeal stated that “**errors should not necessarily deter a litigant from the pursuit of his rights.**”

In the matter at hand, the 3<sup>rd</sup> defendant has clearly erred in delivering two sets of defence. It has now elected which set it wishes to rely upon. The error in the circumstance can be excused. I will therefore strike out the Memorandum of Appearance and Written Statement of defence filed by M/S Otieno Ragot and Company Advocates in this suit. This application is otherwise dismissed.

With regard to costs, I note that the 3<sup>rd</sup> defendant did not make its election until the plaintiff's application came up for hearing. In the premises, I will depart from the normal rule that costs follow the event and order that the 3<sup>rd</sup> defendant pays the costs of this application to the plaintiff.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF MAY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Mwakireti for the plaintiff and Mr. Ananda for the 3<sup>rd</sup> defendant and holding brief for Mr. Otieno for the same defendant.

**F. AZANGALALA**

**JUDGE**

**28<sup>TH</sup> MAY 2009**