REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 70 of 2008

KENNEDY ODHIAMBO OWITI.....APPLICANT

VERSUS

GEROGE ARUNGA SINO.....1ST DEFENDANT

JOHN BROOKS CONSULTANTS LTD..2ND DEFENDANT

R U L I N G

This ruling is on the preliminary objection raised by the plaintiff respecting the defendants' application dated 23rd January 2009.

The notice of the objection was filed on the 18th March 2009.

The plaintiff contends that the defendant's said application violates the mandatory provisions of Order VI Rule 13 (2) of the Civil Procedure Code and is therefore suitable for striking out.

Order VI Rule 13 of the Civil Procedure Rules provides for striking out pleadings and states as follows:-

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) It loses no reasonable cause of action or defence or

(b) It is scandalous, frivolous or vexatious or

(c) It may prejudice, embarrass or delay the fair trial of the action, or

(d) It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

13 (2)- "No evidence shall be admissible on an application under sub-rule 1 (a) but the application shall state concisely the grounds on which it is made".

Learned counsel for the plaintiff, Mr. Okero, argued that the defendant's application is made under

sub-rule 1(a) of Order VI Rule 13 and is supported by an affidavit containing averments in support of sub-rule 1 (a) and more so paragraph 4 of the supporting affidavit.

Mr. Okero contended that the merging of the entire sub-rule 1 (a) (b) (c) and (d) is an incurable defect. He relied in that regard on the decisions in the case of **Ali Onamu Apindi –VS- Shakeel Ahmed Shabir & Another High Court Civil Case No. 353 of 2001 at Kisumu** and **Yaya Towers Limited –VS- Trade Bank Limited (IN LIQUIDATION) Civil Appeal No. 35 of 2000 Court of Appeal Nairobi** and urged this court to strike out the defendant's application.

Mr. Motubwa, learned counsel for the defendant argued that the objection is misconceived as Rule 13 (1) of Order VI of the Civil Procedure Rules is very clear and gives options under which a party may proceed.

He also argued that the only instance where affidavit evidence is not required is under Rule 13 (1) (a) otherwise the rule provides for filing of an affidavit. He further argued that the application is proper on record and referred to Order 50 (1) and (3) of the Civil Procedure Rules.

Mr. Motubwa, contended that Order 50 of the Civil Procedure Rules is the substraum that gives the supporting affidavit its validity unless the same is excluded and that each ground is separately set out in the application. He further contended that a preliminary objection should be decided on the merits and not merely on technicalities. He therefore urged this court to dismiss the preliminary objection.

The foregoing arguments and contentions have been considered by this court which must first acknowledge what was stated by the Court of Appeal regarding preliminary objections in that well know case of **Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd (1969) EA 696** in that:-

"**The first matter relates to the increasing practice of raising points, which should be argued in the normal manner quite improperly by way of preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing, but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop".**

The question herein is whether this preliminary objection is merited.

Undoubtedly, Order VI Rule 13 (1) provides several options under which a party may proceed to apply for striking out of pleading.

Sub-rule (2) of Rule 13 (1) restricts the introduction of evidence when the application is made under Rule 13 (1) (a). The catch phrase is "evidence" and not affidavit. It is common knowledge that evidence may be introduced through an affidavit. However, under Rule 13 (1) (a) no such evidence should be introduced and doing so would be in contravention of Order 13 rule (2) of the Civil Procedure Rules. Otherwise under Order 50 rule (3) of the Civil Procedure Rules an application must state in general terms the grounds upon which it is made and if it is grounded on evidence by affidavit a copy of which must be served.

The defendant's disputed application is made under Order VI Rules 13 (1) (a) (b) (c) and (d). It combines all the four options provided therein.

It is the plaintiff's contention that paragraph four (4) of the supporting affidavit dated 28th January 2009 constitutes evidence in support of sub-rule 1 (a) of Rule 13 and is therefore incurably defective.

The said paragraph (4) reads as follows:-

"**That I am further advised by my Advocate on record, which advise I trust to be true, that the plaintiff's pleadings and entire suit does not disclose any or any reasonable cause of action against either of the two Defendants and this ought to be struck out".**

It is the opinion of this court that the foregoing paragraph is merely a re-statement of ground (b) of the application and does not contain any evidential material so as to contravene the provisions of Order VI Rule 13 (2) Civil Procedure Rules.

Ground (b) of the application reads:-

"**That the plaintiff's pleadings do not disclose any or any reasonable cause of action".**

In the case of **Shiloah Investments Ltd –VS- John Michael Ohas & Others Civil Appeal No. 262 of 2006 at Nairobi**, the Court of Appeal stated that:-

"**Where the assertion is that a suit does not disclose a reasonable cause of action it means there is no cause of action with some chance of success when only the allegation in the plaint are considered. No further evidence is requires".**

Paragraph (4) of the supporting affidavit does not contain evidential proof to show that the plaintiff's suit does not disclose any or a reasonable cause of action. It is a bare statement and in the event that it is defective it may be corrected by amendment and would thus not be regarded as being fatal or incurably defective. Again, any attack on the validity of the paragraph vis-à-vis Rule 13 (2) of Order VI ought to be made at the hearing of the substantive application rather than by way of a preliminary objection. It has previously been stated that matters of procedure are not normally of fundamental nature unless they go to the jurisdiction of the court **(See Gatuba Kiarie –VS- Pius Kimani Mutua Civil Appeal No. NAI 235 of 2008.**

As to the merger of all the options availed under Rule 13 (1), the rule does not preclude a party from applying one or two options if not all. However, a particular option should be applied on the basis of underlying factors peculiar to the matter in issue.

In any event, in the case of Gatuba Kiarie (Supra), it was stated that the fact that the wrong provisions of the law which the application is brought are cited is a mere irregularity which does not go to the jurisdiction of the court and which does not render the application incurably defective.

In applying all the available options, the defendant ensured that each ground is separately set out.

In a sum, this preliminary objection is not merited and is dismissed with costs.

[Read and Signed at Kisumu this 17th day of July 2009].

J.R. Karanja

JUDGE

J.R.K/va