



**OTIENO MAK'ONYANGO.....PLAINTIFF/RESPONDENT**

**Versus**

**ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**DANIEL TOROITICH ARAP MOI.....2<sup>ND</sup> DEFENDANT/THE APPLICANT**

**RULING**

Under provisions of the law empowering the Court to strike out or amend pleadings, the Applicant, who is the 2<sup>nd</sup> Defendant in this suit, is in his Chamber Summons dated 16<sup>th</sup> February 2009 praying:

**“THAT this Honourable Court be pleased to order that the suit against the 2<sup>nd</sup> Defendant/Applicant be dismissed.”**

Although the said Chamber summons is filed as a joint application by the two Defendants in this suit, when the application was brought before me on 25<sup>th</sup> May 2009, the Plaintiff appearing in person and each of the two Defendants being represented by a Counsel, it was unanimously made clear to me that the Applicant in the Chamber Summons was the 2<sup>nd</sup> Defendant only.

At a subsequent appearance before me on 8<sup>th</sup> July 2009 when Mr. Onyiso, Counsel for the 1<sup>st</sup> Defendant who had filed no papers was just watching, it was made clear to me that the 1<sup>st</sup> Defendant was not interested in the Chamber Summons dated 16<sup>th</sup> February 2009 and that the contest in the Chamber Summons was between the Plaintiff and the 2<sup>nd</sup> Defendant only.

Subsequent to 8<sup>th</sup> July 2009, Mr. Onyiso though aware of dates, stopped appearing in the application as the Plaintiff continued to appear and the 2<sup>nd</sup> Defendant who was being represented by M/s Kethi Kilonzo.

The Chamber Summons dated 16<sup>th</sup> February 2009 is stated brought under Order VI Rule 13 (1) (a) and (2) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act (Cap 21 Laws of Kenya).

Section 3 A is about the inherent powers of the Court while Order VI Rule 13 (1) (a) of the Civil Procedure Rules is specifically stating that

**“(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 discloses no reasonable cause of action or defence;”**

Rule 13 (1) lists other grounds (b) to (d) which we are not concerned with in this Chamber Summons. But we are concerned with what is stated in subrule (2) of Rule 13 which states that

**“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”**

On the basis of those provisions therefore, the 2<sup>nd</sup> Defendants Chamber Summons dated 16<sup>th</sup> February 2009 is seeking Court orders as stated earlier. The 2<sup>nd</sup> Defendant/Applicant also seeks costs of the Chamber Summons and goes on to state that he is basing his Chamber Summons on ground (a) which is

**“THAT this suit discloses no reasonable cause of action against the 2<sup>nd</sup> Defendant/Applicant.”**

That is concisely enough and I have had the opportunity to read filed written submissions and listened to oral submissions highlighting the filed written submissions in accordance with the prior consent recorded by the disputing parties before me. It is not my intention to write a long ruling.

In my humble view looking at what has been brought before me, I have no doubt in my mind that the parties have ignored sub rule (2) of Rule 13 of Order VI aforesaid. That subrule clearly states that

**“No evidence shall be admissible”**

Yet what the parties are saying in their respective written submissions and oral submission is evidence. It is evidence which should not be before me for I have nothing to do with it at the moment as I am only required to look at the filed Plaintiff and the defence which I have done leading to the conclusion that, I do not agree that the Plaintiff’s suit herein against the 2<sup>nd</sup> Defendant discloses no reasonable cause of action against that defendant.

Accordingly Chamber Summons dated 16<sup>th</sup> February 2009 be and is hereby dismissed. The 2<sup>nd</sup> Defendant to pay costs of the Chamber summons to the Plaintiff.

Dated this 30<sup>th</sup> day of October 2009.

**J.M. KHAMONI**

**JUDGE**

**Present:**

Kilonzo & Company Advocates for the 2<sup>nd</sup> Defendant/Applicant

Otieno Mak’Onyango – Plaintiff/Respondent in person

Court Clerk: Florence Bojwony