**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 405 of 2007**

**BAHARINI OIL SUPPLY SERVICES LTD…..…....……PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY……..……..1ST DEFENDANT**

**THE HON. ATTORNEY GENERAL……..…....…2ND DEFENDANT**

## R U L I N G

By a plaint dated 8th August, 2007 the Plaintiff herein, Baharini Oil Supply Services Limited, hereinafter referred to as the Respondent, sued Kenya Ports Authority the 1st Defendant, hereinafter referred to as the Applicant, and The Hon. Attorney General, the 2nd Defendant, for breach of contract. The 2nd Defendant, it is averred was sued on behalf of the Minister of Transport and Communications pursuant to provisions of the **Government Proceedings Act, Cap 40**. It is averred that the Respondent entered into a Concession Agreement with the Applicant to construct and manage Berthing facilities at Mbaraki Wharf. Part of the complaint made by the Respondent in it's plaint is that the Minister of Transport is interfering with the performance of the contract and frustrating it from executing the approved works.

The Applicant has by this Chamber summons application dated 7th March, 2008 applied under **Order VI rule 13(1)(b)(c)** and **(d)** of **Civil Procedure Rules** and **Section 3A** of **Civil Procedure Act,** to have the plaint struck out on the grounds:

a) It is frivolous and vexatious

b) It may embarrass the fair trial of the action

c) It is an abuse of the process of the Court

The grounds forming the basis of this application are cited on the face of the Chamber Summons as being:

**a) The plaint does not disclose any triable issue as against the 1st Defendant.**

**b) The plaint does not disclose any particulars or any sufficient particulars of such unlawful conduct on the part of the 1st Defendant as would be capable in law of giving rise to a cause of action.**

**c) Unless the plaint is struck out, the 1st Defendant would be gravely prejudiced and embarrassed in its defence as no proper case against it has not been disclosed.**

**d) The plaint is in the circumstances vexatious and oppressive.**

**e) It is therefore in the interest of fairness and justice that the plaint herein be struck out as against the 1st Defendant.**

The application is supported by **Muthoni Gatere**, the Corporation Secretary and Legal Officer of the Applicant with annexure thereto.

**Mr. Munyiso** for the Attorney General informed the court that the 2nd Defendant did not oppose the application.

The Respondent has however opposed the application by filing grounds of opposition dated 3rd April, 2008 and a replying affidavit, dated 4th April, 2008 sworn by the Plaintiff's General Manager, **Moses Changwony**. In the grounds of opposition, five grounds are cited as follows:

**1. The application is an attempt to subvert the provisions and procedure in Order VI Rule 8 of the Civil Procedure Rules.**

**2. The application is an attempt to subvert the provisions of Order 13(2) of the Civil Procedure Rules.**

**3. The application fails to meet the standards required by the Court of Appeal ruling in D.T. Dobie & Company (Kenya) Limited vs. Muchina (1982) KLR 1.**

**4. The application fails to disclose concisely or at all how the plaint**

**i) Is frivolous and vexatious.**

**ii) May embarrass the fair trial of the action**

**iii) Is an abuse of the process of the court**

And fails to meet the legal standards set for an application under Order 13 rules (1)(b) and (d).

**5. The application is an abuse of court process.**

**Prof. Muigai** for the Applicant submitted that none of the 19 paragraphs of the Plaint contained any claim known in law as against the Applicant. Counsel complained that there was no allegation of any breach of contract, any misconduct or any unlawful conduct on the part of the 1st Defendant, neither were any particulars given linking the Applicant to any unlawful or illegal conduct.

**Mr. Mwangi** in regard to the submission that the Plaintiff's case did not disclose a cause of action, has urged the court to find that even though the Applicant failed to indicate this on the face of the Application, the Applicant was actually arguing the application under the provisions of **Order VI Rule 13(1) (a)** of the **Civil Procedure Rules**.

**Order VI Rule 13(1) (a)** provides

"***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 discloses no reasonable cause of action or defence."*

Under **sub rule (2)** of **Rule 13**, it is stipulated

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

**Mr. Mwangi** is correct to say that **Prof. Muigai** raised the issue of the Plaintiff's case not raising a reasonable cause of action as provided under **Order VI Rule 13(1) (a)** of the **Civil Procedure Rules** the moment he urged the court to find that there was not actionable wrong in law. The Applicant should have made an election whether it was challenging the suit under **Order VI rule 13(1) (a)** of **Civil Procedure Rules** in which case no evidence was required to support it. If it elected to pursue the application under **Order VI Rule 13(1) (b) (c)** and **(d)** as pleaded, then evidence would be required to support it. It was therefore wrong for the Applicant to raise the ground that the plaint did not disclose any reasonable cause of action simultaneously with the other grounds pleaded on the face of the Chamber Summons.

I did not think however that the mistake would necessitate the striking out of the application for the simple reason that the provisions of **Order VI Rule 13(1) (a)** were not invoked on the face of the application. I will disregard submissions by counsel made pursuant to the ground disputed and determine the application on the basis of the other grounds raised

The Applicant through Counsel has contended that the suit was frivolous, vexatious and intended to embarrass the Applicant and was otherwise an abuse of the court process. Attention has been drawn to particular pleadings in the plaint and to the fact that any conduct complained of was of the Minister of Transport and the Permanent Secretary in that Ministry. **Prof. Muigai** submitted that the Applicant had no control or authority over the Minister or his Permanent Secretary or influence over their conduct. That in the circumstances the Plaint did not contain any particular as against the 1st Defendant and that the same should be struck out. **Prof. Muigai** relies on the quotation from **Halsbury's Law of England**, **4th edition Vol. 36** paragraph 73 as quoted by **Kasango J**. In **Iraro Holdings Limited vs. Canadian Foodgrains Bank & Others Milimani HCCC No. 1475/200**0 in the following terms.

"***In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exist, the court will strike it out. A pleading will not however be struck out if it is merely demurable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases."***

**Prof. Muigai** correctly submitted that the test applicable in this case was to look at the plaint and determine whether it is frivolous, vexatious and may embarrass the defendant's case. **Prof. Muigai** contended further that the fact the defendant filed a defence does not preclude it from raising the issue raised in this application. Counsel relied on case of **D.T. Dobie & Co. (K) Limited vs. Muchina 1982 KLR 1** on the issue of what constitute a reasonable cause of action. That not being one of the grounds relied on in this application, it is ignored.

**Mr. Mwangi** challenged the Defendant's application on the grounds that having filed a statement of defence in complete answer to the plaint, it cannot now be heard to say that it did not understand what the claim against it is or the conduct complained of against it.

**Mr. Mwangi's** other argument was that since only the Minister of Transport could give directions to the Applicant regarding the contract which is the subject matter of the suit, the Applicant cannot be

"divorced" from the 2nd defendant as it has sought to do in this application. Mr. Mwangi also challenged the application on grounds that the Applicant had not demonstrated how the Plaintiff's suit was frivolous, or vexatious, or embarrassing or an abuse of the Court process. Counsel relied on the case of **D.T. DOBIE & COMPANY (K) LIMITED**, supra, for the preposition that the power of striking out of pleading is very harsh and should be exercised cautiously.

I have considered the application before me together with submissions by counsel and the cases relied upon. I am well guided by **MADAN JA** in **DT DOBIE & COMPANY LIMITED** case, Supra, where the learned Judge stated that "***on an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."***

The power the Court is being asked to exercise is discretionary and the Court must exercise a judicial discretion in determining whether the proceedings are frivolous, vexatious, embarrassing or otherwise an abuse of court process.

Each party has relied on different portions of the Supreme Court practice. **Prof. Muigai** relied on the portion cited by **Kasango, J**. in the **Iraro Case**, supra. The principle behind it applies to the instant application which is that to judge the sufficiency or otherwise of the pleading, in this case the plaint, the court should look at the pleading itself and if it is found to be merely demurable, it ought not to be struck out. That principle would apply where the party applying is relying *inter alia* on the ground that the action is not maintainable. As already stated, the Applicant cannot rely on that ground having not invoked the court's jurisdiction to hear it and for the reason that if it opted to rely on it., then it would have been required not to adduce any evidence to support it.

The Respondent has relied on the **Supreme Court practice, 1997, Vol. 1 part 1 Order 18 rule 19**. It was **Mr. Mwangi's** submission that the Applicant did not disclose why the plaint was frivolous, vexatious, embarrassing or an abuse of the court process. These phrases are explained at paragraph 18/19/13 to 18/19/15. I have taken into account examples given therein.

**Mr. Mwangi** also relied on **Bullen and Leake and Jacob's Precedents of pleadings 12 edition**, which is persuasive. It has defined the terms frivolous or vexatious pleadings as follows: -

"***A pleading or action is frivolous when It is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense."***

I agree with **Mr. Mwangi** that it was not enough for the Applicant to say that the plaint was frivolous and vexatious. It had to demonstrate why the plaint was claimed to be so. This was not demonstrated by the Applicant. It was not even claimed that anxiety, trouble or expense was being caused unjustifiably to the applicant. Besides, I have considered the plaint herein and I am satisfied that it is not without substance or groundless or fanciful. In regard to whether the plaint was embarrassing, **Bullen and Leake and Jacobs**, supra, defines an embarrassing pleading as "*one which is ambiguous or unintelligible or which states immaterial matter and raises irrelevant issues which may involve expenses, trouble and delay and thus will prejudice the fair trial of the action, and so is a pleading which contains unnecessary or irrelevant allegations*."

The Applicant had the duty to identify to the court which sections of the plaint it found embarrassing. None were identified to the court neither was it claimed that the Plaintiff's claim was not clearly stated.

I did consider the **Prof. Muigai's** contention that the claim being founded on contract, and a breach having been alleged, the particulars of the alleged breach should have been pleaded in the plaint. I fully agree with **Prof. Muigai** on that point. Particulars of the alleged breach of contract should be stated in the plaint. However, that failure renders the plaint merely demurable and is capable of being rectified by an amendment. The power to strike out is only invoked where the pleading is so bad or hopeless that even an amendment could not cure the defect. That is not the case here. Clear triable issues are evident

in the case, and the presence of the applicant in the suit is in my view itself a trial issue since it was the party with which the Respondent entered into the contract that is the subject matter of this suit.

Having considered the application, I am satisfied that the same is without merit and is accordingly dismissed with costs to the Respondent.

**Dated at Nairobi, this 18th day of April, 2008.**

**LESIIT, J.**

JUDGE

***Read, signed and delivered, in the presence of:***

**Mr. Mwangi - Advocate for the Plaintiff/Respondent**

**Prof. Muigai - Advocate for the Applicant /Defendant**

**Mr. Munyiso for 2nd Defendant**

**LESIIT, J.**

**JUDGE**