



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 918 of 2002

SMALL WONDER LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

R U L I N G

The Plaintiff has brought this application to have the Defendant's Defence struck out and for judgment to be entered in its favour as against the Defendant on account of the Defendant's admission. The application is expressed to be brought under Order VI Rule 13, Order XII of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is based on the grounds that the statement of defence consists of mere denial only intended to embarrass, prejudice and delay the fair trial of the action and that the defendant has admitted the Plaintiff's claim. The application is also on the face of it said to be based on the grounds contained in the affidavit of **RENATO PIEIA**, the nature of the case and any other reasons to be adduced at the hearing.

The application is opposed. No Replying Affidavit was filed and no grounds of opposition were filed either. Instead the Defendant/Respondent relied on the Preliminary Objection dated 4th July 2007 and filed in Court on 5th July 2007. Such Preliminary Objection is based on the grounds that the Affidavit filed in support of the application offends the trite principle of privileged communication of Advocate-client as encapsulated under the Evidence Act Cap.80 Laws of Kenya. That that Supporting Affidavit also offends the provisions of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya and Order XVIII Rule 3(1) of the Civil Procedure Rules, that it offends the statutory bar imposed by the provisions of the Official Secrets Act and finally that the notice of Motion is untenable on the pleadings as no judgment can avail under the provisions of Order XII and order VI for the relief sought in the suit.

The application was canvassed before me on the scheduled date and it was submitted for the Plaintiff that when it went into the land allotted to it for purposes of developing the same it found some persons in occupation. When it went to the Commissioner for lands office to find out what had happened the Plaintiff was told that there was double allocation. This is deponed in paragraphs 6 and 7 of the Affidavit in support of the application. It was further submitted that even at the time of filing the Defence there was nothing to defend as already there was an admission of double allocation which led to the Plaintiff losing its land and hence these proceedings. Its advocate further submitted that the defence was a mere denial of facts which are documented and therefore it is an abuse of the court process. Counsel submitted that this is a proper case for judgment to be determined at the interlocutory stage without the necessity of a hearing and only leave the matter of the assessment of damages for later determination. He added that there was not even one triable issue raised in the defence and hence the Defence should be struck out.

The authorities submitted for the Defendant were said to be distinguishable in the present case. The present application was said to be purely interlocutory both in form and nature since if the plaintiff is successful, it would have to set the case down for formal proof so as to prove damages.

The submissions for the Defendant were limited to technical legal grounds as on the Preliminary objection. They merely restated and re-emphasised what is outlined in the Preliminary Objection.

It was submitted that the Replying Affidavit offends the provisions of the Oaths and Statutory Declarations Act Cap. 15 of the Laws of Kenya Rule 9 thereof as to the commissioning of the annexures to the said Affidavit. That the several documents annexed to the Affidavit in support are not properly marked and securely sealed contrary to the provisions of the above quoted Act. They are different documents and should not be annexed as they were and therefore the court was asked to expunge them from the application as the court cannot look at them since the wrongful annexing of those documents goes to the root of the application. For this point the court was referred to the case of **WEETABIX LIMITED -VS- HEALTHY U TWO THOUSAND LIMITED HCCC NO. 283/2006.**

It was further submitted for the Defendant that as the orders sought are final then the Defendant's Affidavit offends order 18 Rule 3(1) of the Civil Procedure Rules in that it depones to matters not in the personal knowledge of the deponent and no leave of the court was sought and for this the case of **GENERAL (RTD) J. K. MULINGE -VS- LAKESTAR INSURANCE CO. LTD HCCC NO. 1275/2001** was quoted. The said Affidavit was also said to offend S.3(5) of the Official Secrets Act Cap 187 of the Laws of Kenya and therefore the documents relied on by the Defendant cannot aid the Plaintiff the same having been obtained illegally. And finally the defendant's defence was said to be not a sham and that it raises triable issues. The court was told that the power to strike out should be exercised not lightly but on merit and as according to the defendant there is no admission in the defence the plaintiff application should be dismissed with costs.

I have considered the application and submissions by counsel appearing. To my mind I am being asked by the Defendant to dismiss the application on account of the incompetence of the Plaintiff's Affidavit and further that the defence as filed raises triable issues and therefore it is one that should not be struck out at this interlocutory stage. I shall deal with the former issue first.

Rule 9 of the Oaths and Statutory Declarations Rules made under Cap 15 of the Laws of Kenya reads as follows:-

“All exhibits to affidavit shall be securely sealed thereto under the Seal of the Commissioner and shall be marked with serial letters of identification.”

This rule is mandatory in nature. It therefore follows that the letters dated 4th June 1999 and 28th March 1999 annexed to the Plaintiff's Affidavit are not securely sealed in accordance with the Rule above and must be expunged from the said Affidavit. The same position does not however relate to the letter dated 24th June 1999. That letter is properly securely sealed. Does the plaintiff's Affidavit offend order 18(3) (1) of the Civil procedure Rules? The complained of paragraphs of the Plaintiff's Affidavit are 9 and 10. These paragraphs clearly indicate the source of the information, and to that extent I find them not defective. It may be that the Plaintiff has not disclosed how he obtained the annexures marked **“RP2” AND “RP4”** and that they may breach advocate-client relationship but it was not shown that the same were illegally obtained and so I fail to see the operation of the Official Secrets Act.

The defence denies that the plaintiff was the registered owner and proprietor of the suit land yet the Defendant did not at all challenge the Grant annexed to the Plaintiff's Affidavit and marked **“RP1”**. The facts deponed in the Plaintiff's affidavit were not contradicted by the Defendant. The exhibit marked **“RP3”** is headed **“ALTERNATIVE LAND FOR SMALL WONDER LTD – WATAMU IN MALINDI.”** If the defence as filed was not frivolous and vexatious why would the Defendant be writing such a letter headed as above? In light of all the matters discussed above I find that the defence is frivolous and vexatious and do so hold. This is a proper case for striking out the defence and the same is accordingly struck out with costs. The Plaintiff shall proceed to set down its suit and proof its claims.

Orders accordingly.

DATED **and** DELIVERED IN NAIROBI in open court this **17th** day of **April 2008**

in the presence of

Mwangi for the Applicant

Onyiso for the Attorney General

P. M. MWILU

JUDGE

17.04.2008