REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 3 of 2004

J. B. MAINA & CO. LTD …..…………………………………..PLAINTIFF

- Versus -

1. FARID M. AL-MAARY

2. WYCLIFFE MAK'ASEMBO …………………………...DEFENDANTS

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RULING

This application is brought by a Chamber Summons dated 11th May, 2004, and taken out under O. VI rules 13(1) (a), (d), 14 and 16, and O. XXXIX rule 8 of the Civil procedure Rules. Prayer 1 which sought an order that the application be certified urgent is long since spent. The remaining prayers are for orders:-

2. THAT pending the determination of prayers (3) and (4) hereunder the plaintiff be ordered to deposit all the disputed rent in court forthwith.

3. THAT this suit be struck out for failure to disclose a reasonable cause of action against the 1st defendant and for otherwise being an abuse of the process.

4. THAT the costs of this application be provided for.

The application is supported by the annexed affidavit of FARID AL-MAARY, the first defendant in this matter, and is based on the following grounds:-

(a) THAT the plaintiff expressly admits that his advocate, Mr. Wycliffe Mak'asembo, the 2nd defendant, did not have a practicing certificate since 12th January, 2002.

(b) THAT the suit is based on a pending BPRT Case No. 94 of 2002.

(c) THAT the BPRT case NO. 94 of 2002 emanates from a reference by tenant to tribunal through Form B (R5) of Section 6 of the Landlord/Tenant (shops, Hotels and Catering Establishments) Act Cap 301 which was issued by Mak'asembo, Advocate for the tenant.

(d) THAT if by September, 2002 the aforesaid Wycliffe Mak'asembo did not have a practicing certificate it thus means that there was no valid reference filed by the plaintiff to the tribunal.

(e) THAT in the absence of a valid reference filed by the plaintiff as the tenant, the notice filed by the 1st defendant as the landlord took effect after the end of 30 days of service.

(f) THAT the landlord/1st defendant was thus justified in levying distress.

(g) THAT there is no allegation whatsoever that the 1st defendant was privy to any malpractice and the plaintiff has only himself to blame.

By a notice dated and filed on 7th June, 2005, the plaintiff's advocates intimated that on the hearing of the application, the plaintiff would raise a preliminary objection that the said application was incurably defective and incompetent as it was supported by affidavit evidence. This notice was filed in addition to the grounds of opposition filed by the plaintiff's former lawyers, M/s Deche, Nandwa & Bryant on 22nd July, 2004. They are:-

(i) THAT the plaintiff opposes prayer 3 of the 1st defendant's chamber summons application dated 11th May, 2004, on the ground that the suit filed herein is valid.

(ii) THAT the plaintiff opposes the aforesaid chamber summons application on the ground that it is incurably defective in substance.

When the application came for hearing, Mr. Omolo appeared for the plaintiff/respondent while Mr. Mwakireti held brief for Mr. Wameyo. Mr. Mwakireti told the court that Mr. Wameyo wished to rely exclusively on the submissions filed by his firm for the applicant and had nothing to add. On his part, Mr. Omolo submitted that the entire application was incurably incompetent as it was brought under O. VI rule 13(1) (a) and (d). It was also supported by an affidavit, contrary to O.VI rule 13(2). He referred the court to MOHAMED MOHAMED AL-AMIN & ANOR. v. MOHAMED ABDALLA MOHAMED, Mombasa H.C.C.C. No. 757 of 1995 and invited the court to dismiss the application with costs.

Having considered the submissions by both sides, I find that the main prayers to be determined are whether the disputed rent should be paid in court and whether the suit herein should be struck out. The prayer for order 2 seeks that all the disputed rent be deposited in court pending the determination of prayers 3 and 4. That order would have been granted when the applicant first appeared before the judge under the Certificate of Urgency. However, the court declined to certify that matter urgent, and thee is nothing on record to suggest that order 2 was granted pending the hearing of prayers 3 and 4. Since the hearing of the application for orders 3 and 4 has already taken place, it follows that prayer 2 is already spent as having been overtaken by events and all that remains now is for the court to consider and determine prayers 3 and 4. These prayers seek the striking out of the plaint, and the provision of costs of this application, respectively.

The regulation governing the striking out of proceedings is set out in O.VI rule 13 of the Civil Procedure Rules. It is in the following words:-

"*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

(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."

The application herein is made under subrule (1) (a) and (d), and is supported by the annexed affidavit of FARID M. AL-MAARY, the applicant himself. Subrule (2) of rule 13 states as follows:-

"*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.*"

By annexing an affidavit in support of the application, the applicant has purported to adduce evidence, and such a move is contrary to the express provisions of rule 13 subrule (2). The interpretation given by the courts to subrule (2) is that any attempt to introduce evidence in support of an application under subrule (1) (a) renders such an application incompetent. Suffice it to quote Justice Onyango Otieno, as he then was, in MOHAMED MOHAMED AL-AMIN and ABDULPAZAK OMAR AL-AMIN v. MOHAMED ABDALLA MOHAMED Mombasa HCCC No. 757 of 1995 in which he expressed the point thus:-

"*… Order 6 Rule 13(1) (a) is clear that no evidence should be adduced when a party is proceeding under that rule. That means in effect that a party has to choose whether he wants to come to court under the other sub-rules and proceed to file affidavits in support of the application. One cannot mix the sub-rules to avoid being specific …*"

Since the application is brought under, inter alia, subrule (1) paragraph (a), it should not have been supported by any affidavit. It would have been sufficient to state concisely the grounds upon which the application was made. This is because in determining whether there is a cause of action or not, all the court need refer to is the plaint, without having recourse to any evidence.

The introduction of the affidavit in support of the application herein therefore renders the application fatally incompetent. The application is, accordingly, hereby dismissed with costs. It is so ordered.

Dated and delivered at Mombasa this 9th day of May, 2008.

L. NJAGI

JUDGE