



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL CASE 651 OF 2006**

**ABEL ONDIMU SAGINI.....PLAINTIFF**

**VERSUS**

**MERIDIAN AMSCO LIMITED.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**DOLPHIN AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

The Applicant, the Plaintiff in this suit has by a Chamber Summons Application dated 21<sup>st</sup> April 2008 applied to this court under **Order VI rule 9(1), (2), (3), (4) and 13(1) (a) of Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** to have the 2<sup>nd</sup> Defendant's defence dated 30<sup>th</sup> January, 2008 struck out and judgment be entered in favour of the Plaintiff as prayed in the plaint.

The grounds for the application are that the 2<sup>nd</sup> Defendant's statements of defence do not disclose any defence and that the 1<sup>st</sup> Defendant had failed and/or neglected to file any defence.

The application has been opposed. The 2<sup>nd</sup> Defendant has filed a replying affidavit and a further affidavit in opposition to the application. After the 2<sup>nd</sup> Defendant filed its replying affidavit, the Plaintiff filed a supplementary affidavit dated 22<sup>nd</sup> May 2008 in answer thereof.

I have considered the submissions by both counsels to this application and the cases upon which each relied in support of their clients' position in the matter. **Order VI rule 13(1) (a)** of Civil Procedure Rules under which this application is founded stipulates:

***“13. (1) At any state of the proceedings the court may order to be struck out or amended any pleading on the ground that –***

***(a) it disclosed no reasonable cause of action or defence.”***

The Plaintiff's contention is that the 2<sup>nd</sup> Defendant has no defence since the defence pleaded could only be acceptable if the 1<sup>st</sup> Defendant had filed a defence in this matter. The specific averments questioned include paragraph 5 where the 2<sup>nd</sup> Defendant avers to the effect that the 1<sup>st</sup> Defendant owns L.R. No. 2259/6/3.

The 1<sup>st</sup> Defendant itself has filed no defence in this matter. In an application brought under **Order VI rule 13(1) (a)**, no evidence should be adduced to support it. **Order VI rule 13(2)** provides:

***“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.”***

In so far as the Plaintiff has filed a supplementary affidavit, wrongly so named by the Plaintiff, to support his application, the same contravened the provisions of **Order VI rule 13(2)** of **Civil Procedure Rules**. It renders the application incompetent.

When the Plaintiff filed this application he correctly did not file a supporting affidavit as the application invoked **Order VI rule 13(1) (a)** which as provided under **rule 13(2)** requires no evidence to be adduced in its support. As the rule provides an application under **rule 13(1) (a)** should not be supported by any evidence as the pleadings themselves should at a glance be sufficient to determine whether the Defendant has any sustainable defense.

After the application was served on the Defendant, the Defendant filed a replying affidavit in answer to which the Plaintiff filed a supplementary affidavit. It is the evidence in the supplementary affidavit which the Plaintiff's Advocate has now relied on in support of the application. Without the evidence in the supplementary affidavit, all the facts that the Plaintiff Advocate has relied on would not have been adduced. The Plaintiff's contention is that the 2<sup>nd</sup> Defendant has no defense since it is dependent on the ownership of the suit property by the 1<sup>st</sup> Defendant who has failed to file any defence in this matter.

**BULLEN & LEAKE and JACOB'S PRESENTS OF PLEADINGS** 12<sup>th</sup> Ed. page 138 150 especially page 140 which states:

***“The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it “obviously unsustainable” or where the case is clearly beyond doubt or the case is unarguable. A pleading will not be struck out under this Rule “unless it is demurrable and something worse than demurrable” such that no legitimate amendment can save it from being demurrable. The court must be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious or that the defenses raised are not arguable.”***

The rule under which the Plaintiff has moved the court does not permit the Applicant to adduce any evidence of facts to support it. The summary procedure requires the court to look at the defense and determine whether on the face, the defense is sustainable or it is unarguable. What the Plaintiff has done is that, despite invoking **rule 13(1) (a) of Order VI**, it has actually adduced evidence, through the supplementary affidavit which formed the bulk of the Applicants submission in support of the application. Going by the averments in that affidavit, it is clear that what the Plaintiff is contending regarding the 2<sup>nd</sup> Defendant's defence are not purely points of law but are issues of facts.

Mrs. Oduor's entire submissions were based on the supplementary affidavit, which stated facts deposed to by the Plaintiff trying to explain how the suit property in this matter arose. The Defendant on the other hand, has pointed out a very important fact which is, the Plaintiff does not have any title to the suit property written in his name, which raises a pertinent issue whether the Plaintiff has a reasonable cause of action in this case in the first place. The issue of whether the plaint discloses a reasonable cause of action is a matter which will need to be determined.

The other point that the Respondent had contended is that since the order of Ochieng, J. made on 2<sup>nd</sup> February, 2007 on the 1<sup>st</sup> Defendant request and consolidated this case with High Court Civil Case No. 1266 of 2006, the issues in the instant case and those in the consolidated case were fused. This court cannot look at any one of the two cases in isolation as the Plaintiff has attempted to do in this application. The 1<sup>st</sup> Defendant in the instant suit is the Plaintiff in HCCC No. 1266 of 2006. The 1<sup>st</sup> Defendant filed a plaint in which it claimed ownership of the property LR. No. 2259/6/3. The title to that land is annexed in an affidavit in the said suit, and is issued in the name of the 1<sup>st</sup> Defendant. That property, LR. 2259/6/3 is

related to LR. 2259/6. Even though **Mrs. Oduor** submitted that the Applicant in the instant application is not a party in HCCC 1266 of 2006, the two cases were consolidated and it is now not possible to sever them by considering this application in isolation from the pleadings in 1266/2006. Mrs. Oduor's submission that the Respondent's defence in the instant suit is unsustainable on the grounds that the 1<sup>st</sup> Defendant did not file any pleadings in the instant suit is in the circumstances not correct. The 1<sup>st</sup> Defendant's pleadings are in **HCCC NO. 1266/2006**. The 1<sup>st</sup> Defendant is the Plaintiff in the cited case and it has filed a plaint laying a claim over the suit property. The dispute in this matter does not involve the Plaintiff and the 2<sup>nd</sup> Defendant but involves all the parties in both suits, and that matter should be canvassed fully through a hearing before it is determined.

Having considered the application before me very carefully, I find that it has no merit. I do find that the Respondent's defence is sustainable. The Applicant's application was premised on the mistaken preposition that the 1<sup>st</sup> Defendant in this case had not filed any pleadings in this case. The order of Ochieng J., consolidating this case with **HCCC NO. 1266 of 2006**, still stands. The application has no merit and is accordingly dismissed with costs to the Respondent.

**Dated at Nairobi, this 11<sup>th</sup> day of July, 2008.**

LESIIT, J.

JUDGE

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

Mr. Maleche holding brief Mrs. Odour for Plaintiff

Ms. Ndunda holding brief Mr. Murugu for the Defendant

**LESIIT, J.**

JUDGE