



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

**Civil Suit 237 of 2006**

**PETER KIRUKI MWAMBA.....PLAINTIFF**

**VERSUS**

**BAMBURI CEMENT LIMITED.....DEFENDANT**

**R U L I N G**

The application is dated 5<sup>th</sup> September, 2008 and has been brought by the Plaintiff under order VI rule 13 (b) of Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks one substantive prayer which is an order striking out the Defendant's statement of defence dated 26<sup>th</sup> May, 2006 and entering judgment for the Plaintiff as prayed in the plaint.

Four grounds are cited as the basis for the application which are:

- 1. The defendant's defence is a sham and consists of mere denials and raises no triable issues as between it and the plaintiff.**
- 2. The defendant's defence is too scandalous, frivolous and vexatious to be entertained.**
- 3. The defendant's defence will only serve to delay the expeditious disposal of this matter.**
- 4. Interests of justice will be best served if the orders sought herein are granted.**

The application is further supported by the affidavit of the Plaintiff of even date.

The application is opposed. The Defendant has filed a Replying Affidavit dated 8<sup>th</sup> October, 2008 in which it opposes the application.

The brief facts of this case are that the Plaintiff bought certain shares from the Defendant Company in 1974. In June 2003, the Plaintiff approached the Defendant to inquire concerning the trading value of his shares and the payment of dividends, if any. It was then that he Plaintiff was informed that his shares had been transferred to another upon presentation of documents confirming the Plaintiff's death in 1998 and confirming Grant of Letters of Administration to the presenter. When the matter was investigated, it was

discovered that the culprit was the Plaintiff's son.

The Plaintiff has annexed proceedings of a criminal court in which the son was convicted and sentenced to a fine for three offences of making false documents to wit, a death certificate of the Plaintiff, the confirmation of grant and the Grant of Letters of Administration, contrary to section 359(a) of the Penal Code, two counts of forgery of certificate of confirmation of Grant and of a Grant of letters of Administration contrary to section 349 of the Penal Code. He was also convicted of three counts of uttering the same (false) documents in contravention of section 353 of the Penal Code and of stealing Kshs.354,220/- the property of the Defendant Company.

The Plaintiff's case is that after it was confirmed that the transfer of his shares was based on forged documents, the Defendant has declined to reinstate the shares to him. The Defendant however paid the accrued dividends on those shares to the Plaintiff.

The Plaintiff's claim against the Defendant is as follows:

- (i) A declaration that the purported transfer by the Defendant of the Plaintiff's 14,4000 shares in the Defendant's company is illegal, null and void.**
- (ii) A full reinstatement to the Plaintiff of the 14,400 shares, in addition to such bonuses as may have accrued.**
- (iii) In the alternative to prayer (ii) hereinabove, payment by the Defendant to the Plaintiff of the value of the shares as at the date of judgment.**
- (iv) Payment of all dividends that may have been declared or accrued on the shares.**

The Defendant in paragraph 4 of the defence, denies that the transfer of the Plaintiff's shares was unlawful or wrongful and avers that the transfer was lawful. In paragraph 3 of the defence, the Defendant denies that the Plaintiff was the registered, legal and beneficial owner of an original 600 shares and of built up shares of a total of 14,4000. In paragraph 5, the Defendant admits paying accrued dividends to the Plaintiff but denies failing, ignoring or refusing to reinstate the Plaintiff's shares or to compensate him for their value.

In paragraphs 6 and 7 the Defendant denies the contents of paragraph 6, 7 and 8 of the plaint. In paragraphs 6 and 7 of the Defence the Defendant avers:

**6. The Defendant denies the contents of paragraph 6 and 7 of the Plaint and puts the plaintiff to strict proof of the same. The Defendant denies that it breached any terms of any contract at all, and further denies the existence of any custodianship between itself and the Plaintiff as pleaded in paragraph 7 of the same. The Defendant shall request further and better particulars of the same.**

**7. The Defendant denies the contents of paragraph 8 of the Plaint and puts the Plaintiff strict proof of the same.**

In paragraph 6, 7 and 8 of the plaint, the Plaintiff avers;

**6. It is averred that the Plaintiff has a privity of contract between him and the Defendant and that the Defendant could not alienate and/or dispose of the shares without the consent and participation of the Plaintiff as transferee thereof.**

**7. The Defendant became the custodian of the shares by virtue of the Plaintiff's share investment in the company, and as such custodian, the Defendant is answerable to the Plaintiff in all matters respecting all transactions over the shares.**

**8. The Plaintiff did not sell or authorize the sale of the shares and the purposed alienation of the**

**Plaintiff's shares is therefore illegal, null and void.**

In Miss Mbui for the Plaintiff in her submissions urged the court to find that the Defendants defence that the transfer of the Plaintiff's shares was lawful, was a sham as the Plaintiff was still alive at time it was done. Counsel also urged the court to find that the Defendants contention that the Plaintiff failed to advice the Defendant of his change of address could not be a defence for the action taken by the Defendant.

Miss Mbui urged the court to find that the Defendant's defence was a mixture of admissions and denials and that the same had no foundation.

Ms. Ndumia for the Defendant in her submission blames the Plaintiff for the suit on the basis that had the Plaintiff been vigilant and had he informed the Defendant of the change of address the fraudulent claim by third parties could not occurred. That submission that there was a fraudulent claim is not pleaded in the Defendant's defence and is therefore untenable being a statement from the bar. Miss Ndumia also submitted that the Plaintiff was negligent for laying no claim over his shares for 30 years, and that the Defendant effected transfer after proper investigation. Again, that the issue of diligence on the Defendant's part is not pleaded in the defence and is therefore a statement from the bar and unacceptable.

I have carefully considered this application together with the pleadings, including the affidavits by both parties and the submissions by counsels.

Having considered the application I formed the following view of this application.

The Defendant admitted paying the entire accrued dividends over the shares, the subject matter of this suit, to the Plaintiff. The Defendant however declined to reinstate the Plaintiffs shares to him and in paragraph 4 of the Defence, avers that the transfer of the shares from the Plaintiff to a third party was done lawfully. It has been shown that the transfer of the shares was affected through fraud. It is not open to the Defendant to aver in defence that the transfer was lawful. There is a criminal conviction touching on the entire transaction of the transfer of shares by the Defendant from the Plaintiff to the third party. Such defence is untenable particularly because the transfer was made on the basis the Plaintiff was dead. The mere fact he filed this suit renders the Defendant's defence that the transfer was lawful, void as the Plaintiff is alive. It is no defence that the Defendant carried out investigations before transferring the shares. The basis upon which the transfer was effected was fraudulent. It matters not that the Defendant did not discover it to be so despite exercise of diligence on their part.

I do find that by paying the accrued dividends on the shares to the Plaintiff, and yet refusing to reinstate the shares to the Plaintiff, the Defendant was approbating and reprobating at the same time. This is a frivolous pleading which lacks in seriousness. It is difficult for the Plaintiff to know what position the Defendant was taking in its defence. It is an evasive and vague defence from which the Plaintiff cannot know what defence is being pleaded and what case he is likely to face at the trial. The defence is a frivolous and or vexatious pleading tending to annoy rather than assist the Plaintiff to know what line of defence the Defendant is pursuing. As Ringera, J. as he then was stated in **Dr. Marry Watson vs. Renta Plan Limited & 2 others, Nairobi HCCC No. 2180 of 1994:**

***"A frivolous claim is ex post facto vexatious for nobody can fail to be vexed by a frivolous allegation against him or her."***

In **DAY WILLIAMS HILL (PARK LANE) limited [1949] 1 ALL ER 219 CA**, the Court held that pleading is frivolous when:

***"(a) A party is trifling with the court (Chaffners vs. Goldmid [1894] 1 QB. 186 (action against M.P. at ...for refusing to attend a Harambee.***

***(b) When to put it to forward would be wasting the time of the court (Dawkins vs. Prince Edward of Saxe-Weimar [1876] Q.B.D. 499 per Mellor J.***

- (c) *When it is not capable of reasoned argument or is unarguable, or,*
- (d) *It is without foundation or*
- (e) *Where it cannot possibly succeed or*
- (f) *Where the action is brought or the defence is raised only for annoyance; or*
- (g) *To gain some fanciful advantage, or*
- (h) *When it can really lead to no possible good; -*

*(Willis vs. Earl of Beauchamp [1886] 11 P.D. 59 per Bowen L. J. at 65 described the action as “hopeless ... and would lead to no good result.”*

In construing Order 18, rule 19 of the Supreme Court Practice 1991 Vol. 1, which is identical in every word to Order VI rule 13(1) of our Civil Procedure Rules, **Sir Jack Jacobs** in his publication, **PLEADINGS, PRINCIPLES AND PRACTICE (London, Sweet and Maxwell, 1990 Edn)** comments as follows at page 211:

*“The court is clothed with wide and ample powers which are both useful and necessary to: -*

- (a) *enforce the rules of pleadings by striking out or amending pleadings and concurrently*
- (b) *stay or dismiss proceedings which are: -*
  - (i) *an abuse of its process such as frivolous, vexatious or embarrassing proceedings, or*
  - (ii) *manifestly groundless or in which there is clearly no cause of action or ground of defence in law or equity.”*

Having carefully considered the Defendant’s defence herein, and having regard to the parameters within which the power of the court to strike out pleadings is exercised, I find that the Defendant’s defence lacks in seriousness and that it will unnecessarily delay the finalization of this suit and that no good will come out of it. It is my considered view that the exercise of the courts power under Order VI rule 13(1) (b) of Civil Procedure Rules is clearly merited in this case. The Defendant’s pleading is one which in my view should be struck out without any hesitation whatsoever.

In conclusion I will allow the Plaintiff’s application dated 5<sup>th</sup> September, 2008 as follows:

1. **The Defendant’s statement of defence dated 26<sup>th</sup> May 2006 be and is hereby struck out.**
2. **Judgment be and is hereby entered for the Plaintiff against the Defendant in terms of prayer (i), (ii) and (iv).**
3. **The Plaintiff will also have the costs of the suit.**

**Dated at Nairobi, this 31<sup>st</sup> day of October, 2008.**

**LESIT, J.**

JUDGE

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

Miss Mburu holding brief for Miss Mbui for the Plaintiff

Ms. Kagogo holding brief for Miss Ndumia for the Defendant

**LESIT, J.**

**JUDGE**

**Order:**

Stay of execution for 30 days granted.

**LESIT, J.**

**JUDGE**