



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 2 of 2007 (OS)**

ESTHER NJERI GICHURUAPPLICANT

VERSUS

SAMUEL KIMUCHU GICHURU RESPONDENT

RULING

The application before this court presently is a Chamber Summons filed by the respondent and dated 7.2.2007. It seeks the following orders -

- (a) That the Originating Summons filed by the applicant on 12.1.2007 and dated 12.1.2007, be struck out.**
- (b) That the suit of the respondent aforementioned be dismissed.**
- (c) That costs in both (a) and (b) be borne by the applicant.**

The grounds upon which the application to strike out is based are -

- (i) That the Originating Summons is an abuse of the process of court.**
- (ii) That the Originating Summons discloses no reasonable cause of action against the respondent**
- (iii) That there is no relationship of wife and husband between the parties.**
- (iv) That the respondent had no capacity to enter into a second marriage when he purported to do so.**
- (v) That the relationship if any, upon which the Originating Summons is predicated, was illegal**
- (vi) That (in summary) the applicant's claim is based on an illegality, is null and void and is against public policy.**

I have carefully perused Order VI rule 13 under which the application to strike out is brought by the respondent. The rule states -

"13(1) At any stage of the proceedings the court may order to be struck out any pleadings 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, and may order the suit to be dismissed as the case may be.
- (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.
- (3) this rule shall apply to an originating summons”

The court observes that the grounds upon which the defendant seeks the striking out of the Plaintiff’s Originating Summons, include two which clearly fall under Order VI, Rule 13 (1) (a) and (d). These are that –

- (a) the Originating Summons discloses no reasonable cause of action, and that
- (d) The Originating Summons amounts to an abuse of the process of the court.

The other grounds in the Chamber Summons which are –

- (i) there was no relationship of wife and husband between the parties
- (ii) the respondent(defendant) had no capacity to enter into a second marriage with applicant(Plaintiff)
- (iii) the cohabitation between the parties was illegal
- (iv) the applicant’s (Plaintiffs’) claim is null and void for being illegal and against public policy -,

are not expressly provided as grounds for striking out under the said Order VI Rule 13(1) (a-d). They were however fully argued by Mr. Ohaga for the defendant basing his submissions upon the pleadings of the Plaintiff as contained in the Originating Summons. Indeed this allowed Mr. Mwangi also basing his submissions upon the Originating Summons with its supporting affidavit, to respond in full and in kind. The latter introduced the doctrine of “**Putative Spouse**” and tried to persuade this court to introduce it in our jurisdiction.

The conclusion I come to is that the defendant’s other grounds for striking out and which specifically raise the claim that there was no wife-husband relationship and that the cohabitation between the parties was null and void or illegal or against public policy, were not specifically placed under the four grounds of Order VI Rule 13(1). Careful consideration of the grounds, however, does easily place them under Rule 13(1) (b) and (c). For example if the cohabitation between the parties herein is shown to have been illegal or void or against public policy, a pleading which purports to use the cohabitation to prove the required marriage in order to seek division of property would become scandalous or would be frivolous or would be vexatious or all three of them within Rule 13(1) (b). Again if the said relationship was illegal or against the public policy then any pleadings based on such, has no chance of success and would only be used to embarrass or prejudice the other party and would not allow a fair trial of the action within Rule 13(1) (c) aforementioned.

As stated by the Court of Appeal in **Desai v Patel t/a Sandpiper constructions & Civil Engineering Service & 13 Others** [2001] KLR, 120, an applicant who wishes to strike out a pleading under Order VI, Rule 13(1) (a) has to specify the said rule under which he approaches the court. The court noted however, that there is no bar to such an application being based on any or more of the grounds specified in the rule. It would also appear that failure to making specific reference to the subrule at the head of the application need not alone prejudice the applicant. At page 123 of the Judgment in the abovementioned case it states

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“Therefore there was no prejudice resulting from lack of specific reference to the subrules as the respondent to the application in the superior court obviously was aware of the objections taken on the plaint, namely, that a wrong party was sued and that therefore that party, wanted the suit as against him struck out.”

In this case the applicant/respondent has only indicated that he seeks that this court strikes out the original applicant’s pleading under Order VI, Rule 13(1) (a). Yet thereafter he clearly names five grounds upon which he seeks the relief. The grounds include two grounds provided under Order VI, Rule 13(1) as (d) and (a). This is more than the one ground that is shown at top of the Chamber Summons. Furthermore the other three grounds upon which the Chamber Summons is based are clearly those that would conform with Order VI Rule 13(1) (b) and (c).

Since the grounds are specifically mentioned and tabulated, this court will consider the application under them as well, notwithstanding that the applicant failed to show them at the heading of the Chamber Summons as he did subrule (1) (a) thereof. This is because they were specifically tabulated although without specific reference to the subrules as stated in the Desai case aforequoted. That is to say, the plaintiff cannot claim prejudice as the actual grounds are enumerated in the list of grounds in the Chamber Summons and she must have been aware of them as she came to court.

What thereafter flowed from both parties approach in this matter however, is that they did not confine themselves within Order VI Rule 13 (1) (a) under which a decision to strike out pleadings, forbids the court from examining any affidavit of evidence on the record. In that respect this court is enjoined not to trespass on the jurisdiction of the trial court which will come during the full hearing if the case goes to a hearing. Yet in this application both counsel clearly fully examined in their submissions, the content and possible full meaning of the supporting affidavit to the applicant’s (plaintiff’s) Originating Summons.

The predicament the above approach brings can, in my opinion, only be resolved out of the fact that in an Originating Summons, as stated in Order VI Rule 13(3) and Order XXXVI, Rule 10, both the summons and the supporting affidavit are considered as the pleadings. It is my view therefore, that both would be available for consideration in making a decision to strike out under Rule 13(1) (a). Such approach would obviously appear to be different from the normal approach to simple pleadings consisting of a plaint or defence. For the above purpose only a consideration of the plaint or defence on its face is required for the purpose of striking out for failure to disclose a cause of action under subrule 1(a). By implication of Order VI Rule 13(2) also, I find no impediment to this court, taking into account any evidence admitted on record if the purpose is to consider striking out a pleading under Order VI, Rule 13(1) (b-d). My logic in making such conclusion is that the limitation not to take into account any such evidence is specifically limited to Rule 13(1) (a) only.

Having so stated, my view is that in this matter I will limit myself to the Originating Summons and its supporting affidavit as the pleadings in considering whether or not the pleading herein disclose a reasonable cause of action. On the other hand, I will take into account all the material placed before me in deciding whether the pleadings are an abuse of the court process or are scandalous, frivolous or vexatious; or finally whether they will otherwise prejudice, embarrass or will delay the fair trial of this suit. Having in the above manner decided the course I will take, I now move to the other aspect of this case.

In the remaining part of this ruling the original applicant, will be referred to as **“the Plaintiff”** while the original respondent who herein is the applicant will be referred to as **“the defendant.”**

The Plaintiff’s Originating Summons shows that she seeks, in summary, the following one relief - that the court do issue a declaration that all the assets shown in –

- (a) the schedule for properties numbered 1 to 70 in prayer (1), and,

(b) the shares of the companies listed in the schedule of companies listed as number (a) to (v) in prayer 2, and

(c) the bank accounts held in the banks listed in the schedule in prayer 3 and numbered from (a) to (f).

be all valued, sold and the net total proceeds, be divided equally between the plaintiff and the defendant. The ground she gives for seeking division of the said properties and assets is that she is entitled to such division because the properties were acquired by both parties jointly when the two were husband and wife during the period from 1975 to 2003.

The Plaintiff's Originating Summons is supported by a supporting affidavit. The summary of the content of the affidavit is as follows: - That the plaintiff and the defendant started cohabitation after moving in together in 1975. The defendant was at the time married to another wife and had children and a home. The Plaintiff accordingly regarded herself as a second wife.

The Plaintiff further deposed that in 1984 the defendant abandoned her and her home, a situation that persisted until 1988 when considering herself free from the cohabitation with defendant, she entered a monogamous church marriage with a third party. She remained in the new marriage with her new husband for a year or so during which apparently, she continued to have an adulterous relationship with the defendant. This continued until 1993 when she divorced her husband of the monogamous marriage.

In her supporting affidavit, however, the Plaintiff introduced another angle to her marital status. She averred that in 1989 when her marriage with a third party subsisted, the defendant agreed to and swore in her favour, an affidavit declaring his acceptance of her as a common law wife. The affidavit was marked as "ENG 1". The most striking part of the said affidavit is its declaration of the year 1989 as the date when the Plaintiff became the defendant's common law wife and not any other time earlier. The supporting affidavit concludes by stating that the defendant for the second time abandoned her for another woman in 2003 which brought their cohabitation or alleged marriage to a final end.

This court, on a prima facie basis borne by the Plaintiffs pleading, does conclude as follows:-

(a) That there was a cohabitational relationship between the plaintiff and defendant between 1975 to 1984 when the defendant broke away and abandoned the same

(b) That the plaintiff contracted a monogamous church marriage with a third party in 1988 and that the marriage lasted until 1993 when she obtained a divorce

(c) That in 1989 when for the first time the plaintiff was declared a common law wife, she was in a monogamous statutory marriage abovementioned and that the said marriage was not dissolved until 1993.

(d) That in her pleadings the plaintiff neither disclosed the nature of the defendant's marriage to his first wife nor pleaded that she divorced the defendant in 1988 in order to enter a monogamous marriage with a third party.

For the purpose of Order VI, Rule 13(1) (b) to (d) the defendant raised certain facts which must now be highlighted and to which the Plaintiff as well submitted in writing and orally.

Firstly the defendant in his written submissions drew this court's attention to the following – That the defendant's marriage with the first wife was monogamous and statutory. He submitted that the plaintiff in her paragraph 70 of the supporting affidavit to the Originating Summons referred to Nairobi HCCC No. 58 of 2006 in which the nature of the marriage as statutory, was declared. Mr. Ohaga for the defendant pointed out that in the abovementioned suit, the first wife who was married to the defendant in church under the marriage certificate No. 412 of 9.12.1967, was seeking divisions of property acquired during their marriage. The plaintiff, on the other hand, did not deny the fact that the plaintiff had referred

to the above suit in her abovementioned paragraph 70. On the contrary, he instead embarked on submissions seeking to establish a new principle of law called “**Putative Spouse**” principle. This seeks to establish that where two parties have entered into a marital union and it is later discovered that the union is illegal due to deception of one of the spouses, then equity will come in aid to protect the innocent spouse and secure for the victimized spouse such benefits as would have been available to them but for the invalidity of the marriage. The Plaintiff in the said submission was admitting the possible invalidity of her marriage to the defendant.

The conclusion that the court reached on the point accordingly is that it was a common view and position that the marriage between the defendant and his first wife when the Plaintiff decided to join the family as a “**second wife**”, was monogamous and statutory. Indeed it was on that basis that the plaintiff submitted the “**Putative Spouse**” Principle. It is on the same basis that this court arrived at the conclusion found on page **12-13** of this ruling.

I now turn to the plaintiff’s claim as borne in the pleadings. The claim sought a declaration to the effect that the listed assets in the Originating Summons, be divided between the plaintiff and the defendant on the ground that the assets were acquired by both when the two were husband and wife. The jurisdiction to this court to do so is donated by Section 17 of the Married Women’s Property Act 1882 of England which has always been applied in Kenya by virtue of the famous reception clause. The gist of the said section is as follows:-

“... In any question between husband and wife as to the title to or possession of property, either party ... may apply by Summons or otherwise in a summary way to any Judge of the High Court ... and the Judge of the High Court ... may make such order with respect to the property in dispute...”

It is clear to me accordingly, that the basis of any division of property under the said legal provision is the subsistence of a recognized marriage between the parties. This made one husband, and the other, the wife, during the relevant period when the property is acquired. It is my view therefore, that where the relationship of a recognized marriage lacks as a matter of proven fact, then a party or spouse cannot approach the court for division of such property. Put differently, it is the subsistence of valid or recognized marriage between the parties at the material period or time that donates the jurisdiction to the High Court.

The Plaintiff’s pleadings as clearly borne in her Originating Summons seek division of assets as listed in her seven prayers on the face of the summons. None of those prayers seeks that this court first and foremost establishes that the cohabitation between the Plaintiff and the defendant, whether such cohabitation covered the year 1975 to 1984 or 1989 to 1993 or 1994 to 2003 or even whether it covered the period 1975 to 2003, amounted to a recognized marriage that would invoke the jurisdiction donated by section 17 of the Married Womens Property Act, 1882 aforementioned.

The basis for my statement above is that marriage due to long cohabitation otherwise referred to as presumption of marriage, is an issue that entirely depends on proof by evidence. It is not an issue that a party can magically mention or utter or plead and it automatically comes into being. In Kenya the concept was recognized and accepted by the former Court of Appeal for East Africa in the case of **Hortensiah Wanjiku Yawe v Public Trustee** in Civil Appeal No. 13 of 1976. Our present Court of Appeal did the same in the case of **Mbithi Mulu and Another V. Mitwa Mutungu** in Civil Application No. Nairobi 17 of 1983.

In **Yawe** case Wambuzi JA and President of the court said that the presumption of marriage out of long uninterrupted cohabitation was

“nothing more than an assumption that the parties must be married irrespective of the nature of marriage actually contracted.”

Madan , JA **in Njoki v. Mutheru** [1985], 882 stated that,

“...the law, subject to the requisite proof, bestows the status of “wife” upon the woman...”

While Nyarangi , JA called the presumption -

“...simply ...an assumption based on very long cohabitation and repute that the parties are husband and wife...”

He further stated that before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. That there has to be evidence that the long cohabitation was not merely a close friendship between a woman and a man or that the woman was not merely a concubine but that it crystallized into a marriage and that a court would find it safe to presume existence of a marriage.

I now turn to consider the principles that govern the exercise of the discretion of the court in matters where striking out of a pleading is sought.

In my understanding of this principles, whenever as in this case, an application has been brought to have a pleading struck out on the ground that it discloses no reasonable cause of action, the courts have always emphasized that the very strong power in the courts to do so, should only be exercised in cases which are clear and where the court has seen that the party whose pleadings are so attacked, has got no case at all. It is understood that this is a power to be resorted to, only in plain and obvious cases so that the jurisdiction is exercised with extreme care and caution. It is a power which is not mandatory but permissive and is therefore an exercise of the discretionary jurisdiction of this court donated both by the Constitution and by statute. It can be exercised to strike out a pleading not only that it discloses no reasonable cause of action but also on the grounds that the pleadings are an abuse of the process of court or are scandalous, frivolous or vexatious or that the pleading may prejudice, embarrass or delay the justice of the case. However the underlying rule is normally that a lawsuit or defence is for pursuing, and a court should aim at sustaining it rather than terminating it in a summary fashion. The court is enjoined to be very cautious and to carefully consider all facts and circumstances of the case as portrayed in the pleadings without appearing to embark upon a trial of an application founded on a failure to disclose a reasonable cause of action or defence or an abuse of the process of the court.

All the above propositions can be found in several cases decided by the Court of Appeal as well as this court. They include **D.T. Dobie & Co. (K) Ltd v Muchina [1982]** KLR, 1; **Wamutu v Kiarie [1982]** KLR 480 **Kassam v Bank of Baroda [2002]**, 294 and many others.

Having said what I have said above, the court has nevertheless a power to strike out a pleading and will do so in suitable cases upon any or several of the reasons provided under Order VI Rule 13 (1) (a-d).

In the instant application, it is clear to me that the plaintiff has failed to plead the fundamental basis upon which this court’s jurisdiction for division of matrimonial properties and assets can be invoked i.e. the fact that during the relevant period or period, a recognized marriage existed. This could have been done by either pleading the existence of the marriage if already declared by a court decree or alternatively, by making the issue a prior issue to be resolved by this court before moving to the issue of division of the listed properties under the relevant legal provision. Since the court cannot grant a fundamental prayer such as that one abovementioned without the issue or prayer being pleaded the court cannot on its own deal with an issue not sought or placed before it. This means that the Plaintiff’s pleadings are premature. They have sought a relief which is clearly based on existence of another relief not in existence and not made a precondition of proof by the plaintiff’s pleadings. Since division of property is based on a recognized valid marriage the failure to make existence of such marriage an issue to be decided by the court robs the court the jurisdiction donated by section 17 of the Married Womens Property Act, 1882. The pleadings therefore are liable for striking out.

The second aspect of this ruling is that the plaintiff’s pleadings are unclear. They aver that her marriage with the defendant from 1975, was a second marriage to the defendant. This made the plaintiff a second wife as she clearly pleaded. Although the plaintiff did not specifically plead that the defendant’s

marriage with his first wife was monogamous Christian marriage such a fact was established by both the parties as they submitted on the plaintiff's doctrine of "**Putative Spouse**". I understood the plaintiff to be saying that in the circumstances of the defendant's marriage to his first wife being a statutory monogamous marriage, which she did not deny in her submissions before the court, she presented the putative spouse principle to save her claim for division of property.

The defendant in relation to that fact, that his marriage with his first wife was monogamous and statutory, referred this court to several local cases. His purpose as I understood it was to assert that no other or further marriage was legally possible or could legally be countenanced by the defendant's first marriage. The defendant accordingly further submitted that the plaintiff's alleged marriage to the defendant in 1975 to 1988 or 1989 to 1993 or 1994 to 2003, or even from 1975 through to 2003, was not legally viable or possible. He averred that any cohabitation between the two during any such period or periods was illegal for being bigamous and was null and void and/or against public policy.

One of the cases the defendant cited is **Machani v. Vernoor**, [1985] KLR, 859. In the case one of the main issues was whether an already married man under the Marriage Act (Cap 150) and whose such marriage has not been absolutely dissolved, could lawfully enter into a customary marriage with another woman while the first monogamous marriage subsisted. In the said case the husband and the second woman had even begot children out of their long cohabitation. It was held by the Court of Appeal that an already married party has no capacity to enter into a marriage or even promise to marry before a decree absolute of divorce has been granted; neither could they do so during the continuance of a previous monogamous marriage. The court stated at page 863 –

"If the adulterous association arose and ended during the continuance of a previous marriage, it would always be an illegitimate association. The presumption covers two aspects, that the parties had the capacity to enter into a marriage, and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into a new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce, such as a decree absolute ---"

The same principle was stated in the case of **Irene Njeri Macharia vs Margaret Wairimu Njomo & Patrick Muriithi Harrison**, in Civil Appeal No 139 of 1994 at page 8 where the court said –

"In the appeal before us, we have said we do not know whether the first respondent and the deceased even went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances ... It must not be forgotten that in Mutua case, Josephine went very great lengths to prove that Mutua had married her under Kamba Customary Law. The learned judge in the Mutua case apparently was of the very clear view that even if that evidence were to be treated as true, it did not matter because under section 37 of the Marriage Act, Mutua lacked capacity to contract another marriage during the subsistence of the statutory marriage."

Confronted with the principle of law in above cases, the plaintiff in this case before me through Mr. Mwangi, as earlier pointed out, did not contradict the fact that the defendant was in 1975, when the two met, a married man whose marriage had been solemnized under the African Christian Marriage and Divorce Act (Cap 151). She did not also contradict the fact that it was not until 2006 when the defendant's statutory marriage with his first wife was dissolved in a judgment, copy of which was served on her for the purpose of argument in this application to strike out. She however submitted that she should, nevertheless, be allowed to go to a full hearing because the pleadings filed by her did not disclose the nature of the defendant's first marriage. She also argued that for the purpose of Order VI Rule 13(1) (a), no material evidence is supposed to be examined by the court in order to reach a conclusion to strike out or not to strike out.

The plaintiff further argued that any reference by the court to any evidence, such as the reference to Nairobi High Court Divorce No.156 of 2005 in which the defendant obtained a divorce against his first wife of a statutory monogamous marriage, or Nairobi HCCC No. 58 of 2006(OS) in which the same

parties seek division of property, should be a no-go-zone to the court at this stage, for the purpose of Rule 13(1) (a) of the Civil Procedure Rules.

On the other hand the defendant argued that this court should look at both cases since the plaintiff made a reference to HCCC No.58 of 2006 in para 70 of her pleadings and in any case, for the purpose of ascertaining the nature of the defendant's marriage to his first wife. He also argued that failure to plead the nature of the said marriage was deliberate and intended to hide a basic fact that ought to have been pleaded at the earliest in any pleadings, to disclose the real cause of action.

I have carefully considered the above submissions. In my view failure by the plaintiff to disclose the statutory nature of the defendant's marriage to his first wife, was deliberate since she went ahead to call herself the "**second wife**". Mr. Mwangi for her, stated that the absence of that basic detail is a good reason to allow the plaintiff to go to trial where the information would properly be disclosed. The conclusion I reach however after appraisal of the pleadings, is that the absence of the detail was deliberate with the result that it made the pleadings evasive and ambiguous. In my opinion it behoved her from the beginning to state that she was a second wife through long cohabitation against the background of a first statutory marriage. But because she must have realized that that disclosure would undermine her cause of action from the beginning, she deliberately withheld such information with a view to seek leave to amend later or let the other party to whom it would be an advantage, plead it. As stated by Kuloba J in **Kassam v Bank of Baroda** (Kenya) Ltd. [2002] 1 KLR, 294 at 307, line 10 and 35, this court has power and discretion to control the form and substance of pleadings so as to secure compliance with the rules and to give each side a definite and unambiguous picture of the other side's case. In this case the plaintiff failed to give the other side a definite picture of facts by being evasive.

I have already indicated that the plaintiff's supporting affidavit to the Originating Summons contains basic pleadings which are both conflicting and contradictory. For example, the plaintiff claims that close cohabitation between her and defendant started in 1975 and continued through to 2003. Then at the same time she deliberately discredits that deponement by stating that she herself opted out of the marriage and entered a statutory one with a third party in 1988. She also concedes that the defendant swore an affidavit of marriage marked ENG 1 which categorically declared her a common law wife not from 1975 but from 1989. The court notices of course that plaintiff wishes the court to rely on the affidavit and indeed asks the court to do so. If the court were to do so, then this would definitely erase any cohabitation before 1989.

Furthermore, even if the court were to rely on the above affidavit, the declaration therein would come to naught because in 1989, as the plaintiff's same pleading prove, she had no legal capacity to enter into any marriage whether with the defendant or any other party because she herself was in a statutory marriage with a third party. This does not exclude the common ground that the defendant throughout the relevant period ie 1975 to 2003 had no legal capacity to take a "**second wife**" since he was still tied in the statutory marriage with his first wife until 2006 when the marriage was dissolved in High Court Divorce Cause No. 156 of 2005.

A pleading may amount to an abuse of process of court on many reasons. It may be evasive or may deliberately avoid to plead basic or fundamental facts that would form the claim or defence. Or it may contain open admissions or confessions which conflict with others that also form the basis of the cause of action or defence or which make such cause of action or defence untenable or palpably absurd. Furthermore, a pleading may appear to be so ambiguous or so noncompliant with prescribed form or rules that the court may necessarily find it to amount to an abuse of the process of court. In my view, for one or more of the above reasons, a court may find it necessary to strike out a pleading.

I am of the clear view that under Order VI, Rule 13(1) (a) aforementioned this court is precluded from analytical consideration of any evidence admitted on record for the purpose of wishing to strike out any such pleadings of failure to disclose a reasonable cause of action. Not only is the subrule expressly clear but the courts have constantly followed it in practice. My view however, is that under the said subrule (1) (a) this court is not barred from examining properly admitted evidence that is on the record as part of a lawful and substantive pleading. On the other hand for the purpose of striking out a pleading for

any other ground other than under subrule (1)(a), I see no bar to examining all lawfully admitted material on record by the court.

In the case before me the plaintiff fails to invoke the grounds for exercise of the jurisdiction donated under section 17 of the Married Women's Property Act, 1882, as already demonstrated earlier in this ruling. Her pleadings however, are not only evasive, ambiguous and unclear but are also clearly contradictory and conflicting against themselves. If left to go to trial the pleadings would not only lead to a waste of both the plaintiff's and the defendant's time but are otherwise frivolous, scandalous and/or vexatious. If allowed to go to trial the pleadings as they stand, will as well, prejudice and embarrass the defendant who will not be sure of what are the correct set of facts which the plaintiff really relies on in the contradicting and conflicting versions in the supporting affidavit. The result is that left as they are, they do not bear a reasonable cause of action that is triable.

It is possible nay, probable to hear the plaintiff argue that she has a right to later seek amendments to align her pleadings. I am indeed conscious of the courts' liberal practice to allow amendment of pleadings for the purpose of giving a party a chance to better or bring out more clearly the basis of one's case. However such amendments must not likely change the nature of basic facts that are supposed to form the cause of action, thus introducing a new basis or cause of action. On the contrary, the expected amendments would be only expected to remove minor obscurities or grammatical misconstructions to improve the cause of action. In this case however, plaintiff's basic story and facts upon which her claim for division of matrimonial properties is based, has been revealed in her pleadings. That is that in 1975 or as per exhibit ENG 1, in 1989, or whether it was during the whole period of 1975 to 2003, she cohabited with the defendant who had no legal capacity to marry her. The Plaintiff herself had as well, no such capacity from 1988 to 1993. Those facts cannot possibly be alterable or amendable. Her present or future pleadings on these basic facts are unlikely to change if the cause of action is to remain the same. Amendment will therefore be unable to help her.

The pleadings therefore in my view, in their present or reasonably foreseeable amended form, amount or will amount to no pleadings that can secure her what she wants in this suit. They are or will accordingly be merely an abuse of the court process within Order VI Rule 13(1) d. They also are, or will be, in so far as they cannot secure her what she claims, scandalous, frivolous and/or vexatious within Rule 13(1) (b). They further, as well are in their present form, able to prejudice, and embarrass the defendant within Rule 13(1) (c).

Since I have for various reasons above, concluded that the said pleadings do not disclose a reasonable cause of action, the court will and hereby does, in the circumstances exercise its discretion and strikes out the pleadings. The end result is to dismiss the whole suit borne in the plaintiff's Originating Summons dated 12th January, 2007 which I hereby do. Costs will be to the defendant in this application and in the Originating Summons. Orders accordingly.

Dated and delivered at Nairobi this 22nd date of October 2008.

D.A. ONYANCHA

JUDGE