



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

**Civil Case 826 of 2005**

**GWENDOLINE ATIENO MIRUKA..... PLAINTIFF**

**VERSUS**

**VINTAGE AFRICA LIMITED ..... DEFENDANT**

**RULING**

This Ruling is delivered in the Chamber Summons dated 26<sup>th</sup> August, 2005 in which the Plaintiff/Applicant seeks, inter alia, orders for the striking out of paragraphs 3,4,5 and 8 of the Defence herein and for Judgment in terms of prayers (a) of the Plaint dated 4<sup>th</sup> July, 2005. The application is supported by an affidavit sworn by the Plaintiff to prove the grounds that:

- (i) The Defence or portions thereof are scandalous, frivolous or vexatious.**
- (ii) The defence is an abuse of the process of court in that it is a mere traverse, a sham and contains statements that are oppressive, offensive and untrue.**
- (iii) That the Defence is merely intended to delay the fair and speedy trial of the claim.**

The application is brought under Order VI Rule 13(1) (c) and (d) and is opposed on the strength of a Replying Affidavit sworn by one Mathew M. Muthusi on 23<sup>rd</sup> June, 2006 on behalf of the Respondents.

When the application was argued before me on 26<sup>th</sup> June, 2006 the court's attention was drawn to a consent recorded on 7<sup>th</sup> February, 2006 when the same was listed for inter partes hearing before the Honourable Mr. Justice Osiemo. The said order, which has neither been varied or set aside reads as follows:

**“By consent the Defendant do pay the Plaintiff Shs.38,666/= as part settlement of the Plaintiffs’ claim to be paid within 7 days from the date hereof. The balance of the Plaintiff’s claim being Shs.96,733/=, costs and damages for ... breach to proceed to full hearing.”**

Order VI Rule 13 1 (b) (c) and (d) vests in this court the discretionary power to strike out any pleadings on grounds that it is either scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or it is otherwise an abuse of the process of the court.

It has been severally held that an applicant should elect to apply for a striking order on either of the grounds and not all of them together. I agree with such holding, given that the grounds under (a) (b) (c) and (d) are provided in the alternative without the use of the term and/or. The application as filed is not

only obscure as to which ground the applicant considers to be the main ground but goes further to ask for the striking of the entire defence in addition to asking that certain paragraphs, specifically 3,4,5, and 8 be struck out.

It appears to me that the essence of the application is an attempt to obtain summary judgment which would ordinarily be applied for under Order XXXV of the Civil Procedure Rules had the Plaintiff herein not sought damages in addition to his liquidated claim of **Shs.135,399/=**. I do not consider the present application competent in the presence of the consent order recorded herein since by simply reading the same, one is led to conclude that there are issues yet to be determined at a full trial, a matter which is not disputed by the applicants herein. Unless the consent order is reviewed and varied or set aside the application for striking out stands no chance of success.

Indeed counsel for the applicant, when replying to the submissions by the Respondents at the inter partes hearing stated, inter alia, that:

“The Defendant is seeking to vary the consent which was clear that the balance was to be argued at a full trial.”

The consent order clearly shows that there is a dispute as to whether more sums are payable over and above the sum agreed to be paid, and whether the Plaintiff is entitled to damages and costs. These are claims that the Plaintiff would need to prove at the full trial and which the Defendant is ready and willing to disprove at that stage. The Plaintiff/Applicant cannot go round the consent order to obtain judgment before proving her case since the burden to prove her claim was not discharged by the consent order.

The legal requirement for striking out being that the discretionary power of the court to do so is to be exercised with caution and only in clear and plain cases, I am not inclined to allow this application since the circumstances of the case militate against the exercise of that discretion in light of the record and submissions made before me.

The application is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 26<sup>th</sup> day of January 2007

M.G. MUGO

JUDGE

Ruling delivered in the presence of:

Mr. Opande for the Plaintiff

Mr. Okelo holding brief for Mutisya for the Defendant