



REPUBLIC OF KENYA

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

Civil Suit 798 of 2006

KINOTI MUKINDIA PLAINTIFF/RESPONDENT

VERSUS

DAVID PIUS MUGAMBI 1ST DEFENDANT/APPLICANT

CO-OPERATIVE BANK KENYA LIMITED 2ND DEFENDANT

RULING

There are two defendants in those suit, David Pius Mugambi being the First Defendant and Co-Operative Bank of Kenya

ed being the Second Defendant. The First Defendant alone filed Chamber Summons dated 9th November, 2006 seeking main orders as set out in prayers number 1 to the effect.

THAT the plaint amended on 18th August, 2006 and filed herein be struck out with costs to the 1st Defendant.

Of course the application also seeks such other and/or further reliefs as the Court may deem fit and just to grant in the circumstances of the case.

On the face of the body of the said Chamber Summons are listed a number of grounds running from (a) to (n).

Although the Chamber Summons was served to the other parties, neither of them filed its reaction to the Chamber Summons, counsel for the Plaintiff/Respondents, Mr. Mburu waiting to come to the Court on the hearing dated 12th March, 2007 two months after the service, to apply for adjournments to enable him file his clients replying affidavit. I declined to grant the application for adjournment and Mr. Kimanthi who had come to hold brief for Mr. Mburu withdrew from further proceedings. Mr. Odongo, counsel for the Second Defendant was present and saying his client supported the First Defendant's Chamber summons.

I therefore heard Mr. Kinyanjui who was holding brief for Mr. Macharia for the First Defendant/Applicant and as Mr. Kinyanjui continued to make his submissions to strengthen the grounds on the Chamber Summons as well as the Applicant's supporting affidavit dated 9th November, 2006, I could not understand why the Plaintiff/Respondent, apparently, found it difficult to oppose this Chamber summons.

The relevant law is clearly set out in the authorities the learned counsel for the Applicant himself cited. In MURRI – v- MURRI AND ANOTHER (1999) 1 E.A. 212 the Court of Appeal stated as follows at page 216:

“ --- the object of the summary procedure of striking out is to ensure that Defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff- permitted to waste large sums of his

own or somebody else's money in an attempt to pursue a cause of action which must fail. It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank v. Pooley (1885) 10 AC 210 at 221, are applicable. He said that 'a stay or even dismissal of proceedings may often be required by the very essence of justice to be done'. The object is to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigations. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear."

Is that the case here? Where are the uncontested facts?

In another authority MPAKA ROAD DEVELOPMENT LTD v. KANA (2001) 2 E A 468 Justice Ringera, as he then was held as follows:

"A matter would only be scandalous, frivolous and vexatious if it would be inadmissible in evidence to show the truth of any allegation in the pleading which was sought to be impugned, for example, imputation of character where character was not in issue. A pleading was frivolous if it lacked seriousness. It would be vexatious if it annoyed or tended to annoy. It would annoy or tend to annoy if it were not serious or contained scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading was ipso factor vexatious"

Is that the position in this case?

In brief:

"Summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable."

The very grounds in support of the Chamber Summons as listed in the body of that Chamber summons alert my mind that the striking out being prayed for may not be available. Reading of the affidavit of the Applicant supporting the listed grounds and the Chamber summons, persuades me that striking out the plaint may not be proper. Listening to submissions by the Applicant's counsel in light of the plant filed by the plaintiff, convinces me that granting the orders prayed for by the First Defendant in this Chamber Summons dated 9th November, 2006 would not be the requirement of the very essence of justice to be done when so many contested triable issues are raised or revealed as early as at this interlocutory stage. I am convinced no justice will be done if the orders prayed for are granted.

That being the position therefore, even though the plaintiff/Respondent did not come up to react to this Chamber Summons, the said Chamber summons is hereby dismissed and there will be not orders as to the costs of the Chamber Summons.

Dated and delivered at Nairobi this day of 21st day of March, 2007

J.M. KHAMONI

JUDGE