



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 273 of 1997

SAMSON KAMAU HAMA ..... APPELLANT

VERSUS

JOSEPH KIHARA MAINA ..... RESPONDENT

(An appeal from the Ruling of Mr. P.N. Morigori Resident Magistrate dated 23<sup>rd</sup>

January 1996 in Murang'a SRMCC No. 349 of 1994)

JUDGMENT

By a Plaintiff dated 21<sup>st</sup> September, 1994, the Respondent (Plaintiff in the Lower Court) claimed damages from the Appellant for injuries sustained arising from alleged physical assault and battery. The Appellant filed his defence denying the assault and subsequent injuries, and claiming, among other things, that he acted out of self-defence.

Thereafter, on 21<sup>st</sup> September, 1995 the Respondent filed an application under O.6 R. 13 of the Civil Procedure Rules to strike out the defence on the grounds, among others, that it disclosed no reasonable defence.

In a brief (9 lines) and unreasoned Ruling delivered on 23<sup>rd</sup> January, 1996, the Lower Court agreed with the Respondent and struck out the Defence. It is against that Ruling that the Appellant has preferred this Appeal. There are four grounds of Appeal, as follows:

- 1. The learned Resident Magistrate erred in law and in fact in striking out the Defence when he knew or ought to have known that the application before him was incompetent and bad in law.***
- 2. The learned Resident Magistrate erred in law and in fact in allowing evidence to be adduced in an application to strike out defence brought under Order VI Rule 13 and in total disregard to the clear and mandatory provisions of the said order and failed to order that no evidence should be adduced.***
- 3. The learned Resident Magistrate erred in law and in fact in striking out the defence when it raised triable issues as to the nature of injuries sustained by the Respondent and the Defendant's defence of self-defence and in not holding that Section 47A of the Evidence Act was not conclusive enough as to determine the nature of injuries sustained and the damages suffered by the Respondent.***
- 4. The learned Resident Magistrate erred in law and in fact in relying on the submissions by Counsel***

***for the then Applicant while he disregarded that of the Counsel for the Respondent.***

Although the heading to the application before the Lower Court did not indicate the sub-rules of R.13 under which the application was brought, it is reasonable to assume that it was brought under R.13(a) as the only ground relied upon was that the defence did not disclose a reasonable defence. If that is so, the Court should not have relied upon any affidavit evidence in accordance with the provisions of R.13(2) which prohibits the use of affidavit evidence in applications filed under R.13(a). The Court should have simply looked at the pleadings to determine if there were triable issues raised. In my view, the defence clearly raised triable issues, such as self-defence and denial of injuries. That was sufficient to allow the Appellant proceed to trial to defend himself.

Striking out pleadings summarily is a draconian measure, and should be done in clear circumstances where the pleading simply discloses no cause of action or defence. Here is what Madan, J.A. (as he then was) said in ***D.T. Dobie v. Joseph Mbaria Macharia*** (Nbi C.A. 37 of 1978):

***“I would sum up. It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the Court, for under subrule 13(2) as hereafter set out, while evidence by affidavit is not permitted in the case of the first application, it is permitted in the case of the second application. Subrule (2) provides: -***

***“(2) No evidence shall be admissible on an application on subrule (1)(a) but the application shall state concisely the grounds upon which it is made.”***

***The court ought to act every cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way”. (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

This is clearly not a case in which the Defence should have been struck out, and the Lower Court was plainly wrong in doing so.

**Accordingly, I allow this Appeal, set aside the Lower Court Judgment and decree, and direct that the case proceed to full trial. The Appellant shall have the costs of Appeal, and of the application in the Lower Court.**

Dated and delivered at Nairobi this 5<sup>th</sup> day of March, 2007.

**ALNASHIR VISRAM**

**JUDGE**