



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

**Civil Suit 560 of 2001**

**BTB INSURANCE AGENCIES LTD. ....PLAINTIFF**

**VERSUS**

**NITIN SHAH and ANUJ DESAI.....1ST DEFENDANT**

**AJAY SHAH .....2ND DEFENDANT**

**KUSINI INVESTMENTS LTD.....3RD DEFENDANT**

**RULING**

The defendant has filed an application to strike out the Plaint. The said application is pursuant to Order 6 rule 13 (1) (a), (b) and (d); Rule 16; Sections 6(1) and 22 the Land Control Act.

The plaintiff raised a preliminary objection to the application, asking the court to strike it out. This ruling is in relation to the said preliminary objection.

It was the plaintiff's contention that pursuant to the provisions of Order 6 rule 13(2) of the Civil Procedure Rules, no evidence was admissible on an application made pursuant to sub-rule (1) (a). Therefore, the plaintiff believes that the defendants had insidiously invoked Order 6 rules 13 (1) (b) and (d), to enable it introduce evidence which would otherwise be inadmissible, in view of the mandatory provisions. Having cited the said rules, the defendants then filed the affidavit of Mr. Alibhai advocate, through which it introduced evidence, by way of exhibits.

As far as the plaintiff was concerned, the defendant was obliged to make an election of which of the sub-rules it wished to invoke. If the defendant then chose subrule (1) (a) of Order 6 rule 13, it was imperative that the affidavit be expunged from the record.

In the event that the affidavit was left on record for purposes of prosecuting the application under Order 6 rule 13 (1) (a), the plaintiff contends that it would be prejudicial to the respondent.

In the meantime, as the application was brought, inter alia, pursuant to rule 13 (1) (a), yet there was an affidavit, the plaintiff submits that it was defective, and should thus be dismissed.

In the face of the preliminary objection, the defendants drew the court's attention to the fact that this application was not only made pursuant to O. 6 rule 13 (1) (a). They said that an applicant who was moving the court for orders to strike out pleadings did not need to make an election. It was the defendants view that an applicant could cite all the four parts of Order 6 rule 13 (1) jointly or severally.

At the same time, the defendants conceded that if the application was only pursuant to O. 6 rule 13 (1) (a), the applicant could not cite any evidence, by affidavit or otherwise. However, as this application was made pursuant to more than just Order 6 rule 13 (1) (a), the defendant undertook not to refer to the affidavit or any evidence, when making submissions founded on O. 6 rule 13 (1) (a). The said affidavit would only be invoked when prosecuting the application under O. 6 rule 13 (1) (b) and (d), submitted the applicant.

Order 6 rule 13 (1) provides as follows;

**"(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that –**

**(a) it discloses no reasonable cause of action or defence; 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 stayed or dismissed or judgement to be entered accordingly, as the case may be."**

After the foregoing, sub-rule (2) makes it clear that no evidence would be admissible on an application under sub-rule (1) (a). Apart from that express limitation as appertains to sub-rule (1) (a), the rules do not have any other. In other words, there is no limitation as to whether or not an applicant could rely on any two or more of the grounds, in an application to strike out pleadings.

In **BERNARD SAMUEL MOSI –VS- NATIONAL BANK OF KENYA LIMITED HCCC NO. 1863 OF 2000** Ringera J. (as he then was) expressed himself as follows;

**"It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13 (1). All that is required is that the grounds relied on be specified in the application and that if they be other than the first one, the affidavit evidence is expected."**

I share exactly the same understanding of the rules, as spelt out above. In effect, if an applicant decided to found his application to strike out a pleading on more than one of the prescribed grounds, he would be expected to file an affidavit, but only in relation to grounds other than that prescribed by Or. 6 rule 13 (1) (a).

In **MELIKA –VS- MBUVI [2001] 1 E.A 124 at 126**, the Court of Appeal held as follows;

**"We accept that the particular sub-rule of rule 13 of Order VI of the Civil Procedure Rules, under which the application to strike out is made, should be specified, and that when the application has been brought to strike out a pleading on the only ground of it disclosing no cause of action, no affidavit evidence may be relied upon. We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all of the grounds mentioned in the rule, provided that such grounds have been specified.**

**However, we do not see any breach of sub-rule 1 (a) of rule 13 because the affidavit evidence can be confined to the other grounds of the application, without it being used to show the plaintiff discloses no cause of action."**

I believe that the foregoing words speak for themselves, and by so doing provide an answer to the preliminary objection. In other words, there was absolutely nothing wrong with the applicants herein filing an affidavit, to support this application, provided only that the affidavit be limited to supporting the

application insofar as it is grounded on O. 6 rule 13 (1) (b) and (d).

Before concluding this ruling, I wish to touch on the issue of the supporting affidavit. The plaintiff submitted that it was wrong for Mr. Z. H. Alibhai advocate to have sworn the said supporting affidavit, whilst at the same time representing the applicant in this application. However, the plaintiff's counsel then indicated that he was not raising the issue as part of the preliminary objection.

Although that be the plaintiff's stated position, I think that it is nonetheless important to point out the following words of the Hon. Onyango-Otieno J. (as he then was) in **JOSEPH MUEMA NGALA -VS- UNITED INSURANCE COMPANY LIMITED, HCCC NO. 1409/ 2000;**

**"First, I want to state that it cannot be a legal principle of general application that advocates cannot swear affidavits in matters in which they are acting for their clients.**

**All the courts have said is that it may be embarrassing for advocates to step into the arena and swear Affidavits on matters that are contested and are adversarial in nature. I think that the test for such matters would be for an Advocate to ask himself/herself one question and that is that "should the opposing party seek to cross-examine the deponent of the Affidavit, will the Advocate (if he/she is the deponent) be in a position to re-examine himself/herself after such cross-examination if he is the deponent and so go onto the witness box?" If, as is clear, the answer is that it would be impossible for the advocate (being the deponent) to re-examine himself, then he should leave such swearing to his client and maintain his dignified position at the bar."**

I believe that the foregoing words spell out the legal position. However, as the plaintiff finally opted not to make the issue of the affidavit part of the preliminary objection, my decision here is not founded on the issue. But, as already stated earlier herein, the defendants cannot be faulted for filing an affidavit to support this application, as the application is grounded on more than Order 6 rule 13 (1) (a).

Accordingly, the preliminary objection is overruled, with costs to the defendants. But, the defendants are directed to restrict the supporting affidavit to such parts of the application as are grounded on Order 6 rule 13 (1) (b) and (d).

Dated and Delivered at Nairobi this 25th day of January 2006.

**FRED A. OCHIENG**

**JUDGE**