



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Commercial 25 of 2005

CHARLES LUTTA

KASAMANIPLAINTIFF

-VERSUS-

UNITED INSURANCE CO. LTD & 10 OTHERSDEFENDANT

R U L I N G

Coram J. W. Mwera, Judge,

Kasamani for plaintiff,

Ngunjiri for defendant,

Raymond CC.

When the court was minded to hear the plaintiff/applicant's chamber summons dated 30/3/2006, Mr. A. N. Ngunjiri informed it and all were agreed that his preliminary objection filed here on 26.4.2006 be heard first. The chamber summons is filed under order 6A rules 3(1), (4), (5), (6), 5, Civil Procedure Rules and Section 3A, Civil Procedure Act. The main prayer is that leave be granted to the plaintiff to amend his plaint dated 2.6.2006 and that the draft filed along with this application be deemed duly filed.

Only one ground appeared in the body of the application which was supported by an affidavit sworn by the plaintiff on 31.3.2006. Since this is a ruling about the preliminary objection, the substance and detail of the said application must be held in abeyance.

Mr. Ngunjiri told the court that while the 2nd, 3rd and 4th defendants are sued as shareholders of the 1st defendant company, the 5th to the 9th defendants are sued as directors of the same 1st defendant. That in the defence filed herein on 16.6.2005, it was contended that the plaintiff had no cause of action against both sets of defendants mentioned above (share-holders and directors of the 1st defendant). That the plaintiff's cause of action is a claim based on fraudulent trading. That this features in both the original and intended amended plaint. It was further argued that the plaintiff had put forth prayers 1 and 2 in the original plaint and the amendments, to the effect that he desired this court to declare that the 1st defendant was insolvent and also to have its corporate veil lifted. That to pursue both prayers, the plaintiff was

bound to proceed by way of a petition under the Companies Act and Companies Winding - Up Rules, which require that - and not by plaint. The defendants saw this mode of proceeding as procedurally fatally defective and asked the court to declare so now but not later.

It was added that under Order 21 Civil Procedure Rules, a corporate veil can only be lifted after judgment has been delivered against a limited company, whereupon the directors are heard on oath as to why their company's veil should not be lifted and they face the consequences of execution of the judgment passed.

Mr. Ombwayo for the 10th defendant did not participate in the arguments here on the ground that the preliminary objection was not served on him.

Mr. Kasamani (the plaintiff) did not agree with Mr. Ngunjiri. He **posited that** the stand and course taken by the defendants cannot determine the cause of action pleaded against them (the 2nd - 9th defendants). To him, if the 2nd - 9th defendants ought not have been sued, they ought to have filed an appropriate application, after filing their defence, seeking the court to strike them out from the suit or to have the whole suit stricken out. The counsel went on to state that whether sued as share-holders or directors, the defendants conducted the business of the 1st defendant with a view to collect premiums and make profits. That the plaintiff did not desire to wind - up the 1st defendant in any way and so the defendants should either apply to strike out the plaint (amended or otherwise) or just defend themselves.

In this court's opinion, the preliminary point fails. Whether the cause action exists or not as against the defendants, is actually the cornerstone of litigation. The plaintiff proves his claim in court and gets a remedy or fails and the claim is dismissed with costs to the defendants. So, however the claim is set out here, may a trial conclude if it was properly based or not.

As for the suitability or otherwise of suing the defendants, if they feel that they ought not have been sued, then may they consider to apply so that if successful, the court will strike them out of the suit. Or if the suit itself need be struck out for one reason or another, again the defendants know the path to take - definitely not by a preliminary objection where it is being argued that from the nature of the prayers, the plaintiff should have filed a petition under the Companies Act, rather than a plaint.

In sum, the preliminary point is rejected and the chamber summons to amend ought to be set down for hearing.

Orders delivered on 17.5.2006.

J. W. MWERA

JUDGE

JM/hao