REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 876 OF 2004

ORBIT CHEMICAL INDUSTRIES LTD…….PLAINTIFF/APPLICANT

-VERSUS-

ATTORNEY-GENERAL ……...……DEFENDANT/RESPONDENT

RULING

A. IS THE STATEMENT OF DEFENCE A SHAM AND IS FOR STRIKING OUT? — THE PRAYERS AND THE RESPONSES

Within the framework of the plaint of *11th August, 2004* the plaintiff filed an application by Chamber Summons, dated *10th June, 2005*. The application was brought under s.3A of the Civil Procedure Act (Cap. 21), and Order *VI*, rules 13(1)(b), c, d and 16 of the Civil Procedure Rules.

The plaintiff's main prayer is that the statement of defence be struck out. On what grounds? Firstly, that the defendant's defence is otherwise an abuse of the process of the Court. Secondly, that the defendant's defence is scandalous, frivolous and vexatious. Thirdly, that the defendant's defence is intended

to prejudice, embarrass or delay the fair trial of the suit. Fourthly, that the defendant's defence is a mere denial, is implausible, and is a sham.

Depositions in Support of and in Opposition to the Application Ashok Chandaria in his affidavit of 10th June, 2005 depones that he is duly authorised by the directors of the plaintiff company and another company, Solvents Kenya Limited, to conduct and take charge of all matters, legal or otherwise relating to L.R. No. 12425.

The deponent avers that the plaintiff is the registered owner of all that piece of land situate in Nairobi, in the Embakasi area, measuring 38.54 hectares (95.2 acres) or thereabouts known as L.R. No. 12425 as comprised in a Grant registered as No. I.R. 32622/1 and issued under the provisions of the Registration of Titles Act (Cap. 281).

On or about *28th September, 1987* the Registrar of Titles, one ***Ms. Jemimah L.W. Munjuga***, in the course of her employment as a servant and agent of the Government of Kenya lodged a caveat on the said suit land, claiming an interest under s.65 of the Registration of Titles Act – the caveat being registered as No. I.R. 32622/3. The deponent believes to be true the information received from his advocates, that at the time the said caveat was registered against the plaintiff's property, only three grounds would in law, under s.65 (1)(f) of the Registration of Titles Act, have justified the registration of such a caveat:

(i) to prevent the transfer or dealing with any land belonging to or supposed to belong to the

Government;

(ii) to prohibit the dealing with any land in a case in which it appears to the Registrar that an error has been made by misdescription of the land or otherwise in any certificate of title or other instrument;

(iii) to prevent fraud or improper dealing.

The deponent also believes to be true the information received from his advocate, that in 1990 a *further reason* for a caveat lodged by the Registrar under the Registration of Titles Act was added, so that now the Registrar could also register a caveat *"for any other sufficient cause"*.

The deponent avers that he believes to be true the information received from his advocate that (para. 8) *"there is and was no question of fraud or improper dealing when the [suit] land was purchased by the plaintiff nor is there any misdescription in any certificate or title or other instrument [relating to the suit land]."*

The deponent avers that the effect of registering the said caveat, No. I.R. 32622/3 was that "*all and any dealing with the [suit] land was absolutely prohibited"*; and that as a consequence of the registration of the said caveat, the plaintiff was rendered unable to protect the suit land from invasion by squatters. It is averred that it was not till *14th January, 2000* that the Commissioner of Lands wrote a letter to the Managing Director of Orbit Chemical Industries Limited saying: *"Please note that I have no objection to the removal of the Government Caveat*". Notwithstanding the said letter of the Commissioner of Lands, however, it is averred, the Lands Office file for L.R. No. 12425 could not be traced in the Lands Office; and to-date *"the plaintiff's efforts to have possession of the suit land have been frustrated*" (para. 18).

It is deponed that the plaintiff had *"complied in every possible way with the explicit requirements of the Land Control Act and legally obtained an exemption from the provisions of the Act signed by the President and gazetted in Legal Notice No. 280 of November 1986 in respect of the sale of [the suit] plot by National Bank of Kenya [to] the plaintiff*". The plaintiff after obtaining exemption from the provisions of the Land Control Act (Cap.302) had proceeded to complete the purchase of the suit land, and the transfer of title, dated *11th March, 1987* was duly registered.

A second affidavit has been sworn by ***Michael Eustace Aronson,*** an Advocate specialising in land and conveyancing law since 1958. He avers that he has "*worked in every field of land law including within the Civil Service where [he had] attained the rank of Principal Registrar of Titles and Chief Land Registrar"* (para. 2). The deponent avers that he is "*fully conversant with both the law and practice relating to the actual registration and the effect of the registration of a Registrar's Caveat against a title registered under the provisions of the Registration of Titles Act"* (para. 3).

The deponent deposes that he was in 1987, while being a partner in the firm of Kaplan & Stratton Advocates, instructed by two directors of Orbit Chemical Industries Limited (***D. Chandaria*** and ***A. Chandaria***) with regard to the purchase by that company of L.R. No. 12425 (the suit land). The deponent had to advise the company on the effect of the registration against the said title, of a Registrar's Caveat under the provisions of s. 65(1)(f) of the Registration of Titles Act; he also had to advise on the reasons for the registration of the Registrar's Caveat; and he was instructed to *"take such steps as [he] thought necessary for the immediate removal of the Registrar's Caveat*" (para. 4). The deponent then approached his task by making inquiries *"at the highest level within the Ministry of Lands", "because it was clearly apparent that none of the very few reasons enabling a Registrar of Titles to register a Registrar's Caveat against a title existed in the present case*" (para. 5). The deponent also took up the matter with one ***Abdi Osman,*** the Deputy Commissioner of Lands, whom he "*had known and worked with in different parts of Kenya over the previous twenty-five years*" (para. 6) – with a view to obtaining a full report on the circumstances surrounding the registration of the said Registrar's Caveat. On the basis of information obtained from ***Mr. Osman,*** the deponent made further attempts to have the Registrar's Caveat withdrawn, but this proved unsuccessful. The deponent thereafter took up the matter, but again unsuccessfully, with the Permanent Secretary in the Ministry of Lands. The reason given to the deponent at the several high-

level consultations, was that "*the matter was political and emanated from a higher source …*" (para. 7). During the consultations, the deponent had drawn the attention of the highly-placed Lands Ministry officials to the fact of a "likelihood of inevitable damage to the [suit] property if the [plaintiff] was prevented by the [Registrar's] Caveat from dealing in any manner with the land" (para. 7). ***Mr. Abdi Osman*** the Deputy Commissioner of Lands went as far as offering a new solution which he must have supposed, could legally divest the plaintiff of the suit land and in its place provide substituted satisfaction: "that an alternative 30 acre plot of land would be made available in exchange for plot No. 12425 [the suit land]" (para. 7). The deponent's position on that proposal was that such an offer "*was not in accordance with the provisions of the Government Lands Act (Cap. 280)*". And the plaintiff company and its directors, besides, "*were not prepared to consider an alternative plot of land until the [Registrar's Caveat was removed from the title*" (para. 7). The deponent then advised the directors of the plaintiff company that "*the matter was quite clearly political and as no administrative pressure would remove the [Registrar's] Caveat, there was no alternative but to take the matter to Court*."

A third affidavit is sworn (dated *10th June, 2005*) by one ***Milton Odhiambo*** who is a Court Clerk and was entrusted with responsibility for conducting title search on the suit property, L.R. No. 12425 registered in the Registry of Titles as I.R. No. 32622. The deponent deposes: "I have made several visits to [the Lands Office] with a view to [conducting] a search and/or [an inspection of] the said file on the plot known as Land Reference No. 12425 … but [to] no avail, since all the time I am being informed that the file cannot be traced."

Rosinah Ndila Mule, a Senior Registrar of Tiles in the (current) Ministry of Lands and Housing swore a replying affidavit on 30th June, 2005. She avers that she is "conversant with the facts relating to the land parcel in issue in this suit by virtue of [her] official duties in the Ministry of Lands and Housing", and that she is duly authorised to swear this affidavit.

The deponent sets out in her depositions by raising procedural quibbles about the authority which the deponents of the supporting affidavits had, to make their depositions. The deponent next depones on the legal question regrading the triability of the defendant's defence – a definite impropriety, since the canvassing of juridical questions is reserved to counsel during submissions in Court. The deponent executes her scheme further still by asserting: "justice would be done and be seen to be done in relation to all the issues mentioned in paragraph 5 of this affidavit [i.e. the deponent's identification of triable issues in the statement of defence] if only evidence was taken in the main suit" (para. 6). Such distortion of the purpose of an affidavit is generalised in all the 25 paragraphs of her affidavit. She states, for instance (para. 13):

> "That by way of perusal of the documents in NBI HCCC No. 3263 of 1992 I have come to learn that the plaintiff's suit herein is frivolous and vexatious in that it is quite obvious that the directors [of the] plaintiff [have] all along been aware of the fact that its claim if any lay against National Bank of Kenya Limited and not the current defendant …"

The excerpted assertion is stated as the basis for an attempt, at this stage, by the defendant to seek an amendment of the statement of defence as originally filed on *23rd May, 2005* — so as to incorporate a limitation-of-actions defence.

Rosinah Ndila Mule denies ***Milton Odhiambo's*** supporting affidavit, on the question of the availability in the Lands Office of the deed file on the suit property. She avers (para. 21): "*That the contents of* ***Milton Odhiambo's*** *affidavit at paragraph 5 are not supported by any credible evidence and in any event I am aware that the deed file has been and is even now available for search or inspection at the Registry"*.

To ***Rosinah Ndila Mule's*** replying affidavit, ***Ashok Chandaria*** on *30th August, 2005* swore a further affidavit, in which he avers that he is a Director of Solvents (Kenya) Limited which has been duly authorised by the plaintiff to take over the conduct of all matters legal or otherwise, relating to L.R. No. 12425 and has the authority of the plaintiff to swear supporting affidavits in relation to the instant application. The deponent avers that the supporting affidavit by ***Michael Eustace Aronson*** was in all

respects proper, as the deponent in that instance *"had had personal contact with this matter on behalf of the plaintiffs when he was a senior partner in the firm of Kaplan & Stratton Advocates";* and it is averred that ***Milton Odhiambo*** is the clerk in the firm of advocates which at first had the conduct of this matter on behalf of the plaintiff.

B. SUBMISSIONS BY COUNSEL

(a) Can Defendant's Last-Minute Application to amend Defence Trump Plaintiff's Listed Application to Strike-out that Defence?

On the 1st occasion of hearing, on 11th October, 2005 learned counsel ***Mr. Oseko*** and ***Mr. Koceyo*** represented the plaintiff/applicant, while learned counsel ***Mr. Njoroge*** represented the defendant/respondent.

Although it is the plaintiff's application that came up for hearing, counsel for the defendant urged that the defendant should be given priority, to have a Chamber Summons of 11th October, 2005, heard and to allow for a belated amendment to the statement of defence. ***Mr. Njoroge*** had not yet served the defendant's application but still urged: *"We would wish to prosecute the application for amendment first; [counsel for the plaintiff] can pursue the striking-out application after our amendment has been considered".*

Learned counsel ***Mr. Oseko*** opposed the defendant's attempt to have the plaintiff's application adjourned. He submitted that the defendant's application was an abuse of Court process, for "once an application has been made, a party cannot attempt to make amendments to the pleadings only for the purpose of defeating the application before the Court". Such an application had already been the subject of a ruling by ***Nyamu, J*** in ***Nicholas Kipyator Kiprono Biwott v. Paul Kibugi Muite & Another,*** HCCC No. 1369 of 2003, where the learned Judge remarked:

> ***"The Court holds the view that introducing amendments in the final stages of … preliminary proceedings apparently in order to save the unmeritorious injunction order without seeking the Court's leave is apart from anything else, sharp practice, lacks good faith and is an abuse of Court process especially taking into account the prejudice suffered by the defendants in having been so far injuncted on the basis of a plaint which has turned out to have been a mere shell in law."***

Mr. Oseko urged that the principle in the ***Nicholas Kipyator Kiprono Biwott*** case be applied here: last minute attempts to amend pleadings will amount to an abuse of the process of the Court. Counsel urged that the plaint had asserted that the respondent had without a basis in law, lodged a Registrar's Caveat on the plaintiff's property, maintaining that *status quo* for some fourteen years, and no amendment to the statement of defence should be made at this stage only for the purpose of defeating the plaintiff's claim.

Learned counsel ***Mr. Njoroge*** attempted to distinguish the ***Biwott*** case – on the basis that its referent was *injunction*, whereas what was now being sought were *interim orders*. He maintained that parties ought to enjoy the right to seek amendments to their pleadings.

I made a ruling as follows:

> ***"What was coming up for hearing today was the plaintiff's Chamber Summons of 10th June, 2005. Before coming to that application a preliminary point has been raised by the defendant who seeks an opportunity to have his own application – a Chamber Summons of 11th October, 2005 – heard before the plaintiff's application is heard.***
>
> ***"I have heard submissions by counsel on both sides, on the oral application by Mr. Njoroge, learned counsel for the defendant.***

"It is clear to me, from the representations of counsel, that the plaintiff feels hard done-by, through the defendant keeping the plaintiff out of some property over a long period of time. Those, however, are issues of merit which are of no concern to the Court at this moment.

"The critical question is this: on 10th June, 2005 the plaintiff filed an application to strike out the defendant's defence. I take it that the defendant was not at all impressed by the seriousness of intent on the part of the applicant; because only on 11th October, 2005 – i.e., at today's Court sitting – is the defendant now seeking to amend his defence.

"***The defendant is asking that the proposed amendment should have priority over the old application which has been on record for more than three months.***

"Just as counsel for the plaintiff submits, the proposed amendment is coming as an afterthought, and its design can only be to disrupt the trial processes which the Court has already put in place.

"Learned counsel has invoked the gravity of the defendant's case by mentioning stupendous sums of money at stake. So I understand learned counsel to be urging that parties who have colossal sums of money at stake can walk into Court any time and re-arrange the way the Court works.

"That would be perverse. Parties have to learn to accept that this Court works under its own case-management designs, and for all persons, rich or poor. Just as the poor must file their documents properly in Court, and comply with the normal play of Court procedures, so must the rich also.

"That is the abiding principle of judicialism, and therefore also of constitutionalism, which all suitors coming to the Kenyan Courts must learn to accept.

"Being guided by those principles, I will not accept that the respondent's new Chamber Summons application dated 11th October, 2005 should take precedence over the plaintiff's application which had been set down for hearing today."

(b) Is the Statement of Defence Scandalous, Frivolous, Vexatious and Meriting Striking Out? – Submissions for Plaintiff/Applicant

Replying on affidavit evidence, learned counsel ***Mr. Oseko*** showed that the plaintiff is the registered owner of the suit land, L.R. No.12425 Nairobi. Soon after the suit land was registered in the name of the plaintiff, the Registrar of Titles registered a caveat, on *28th September, 1987* claiming an interest over the same, and purportedly acting by virtue of s.65 of the Registration of Titles Act (Cap. 281). The plaintiff's case as stated in the amended plaint of *11th October, 2004* is that the registration of the said caveat against the plaintiff's registered property was unlawful; for there were only three grounds upon which a Registrar's Caveat could lawfully be registered against a land-owner's property, and none of these would permit the registration of the impugned caveat. Only in *1990* were the grounds for lodging a Registrar's Caveat enlarged, and this would not apply retroactively to affect property such as the suit land, which had been registered in the name of the plaintiff in *1987*. Learned counsel submitted that since the registration of the plaintiff's property in *1987* was *not* tainted with fraud, nor improper dealing, nor error, it should be inferred that the Registrar's Caveat aforesaid was lodged for improper motive and was tainted with *mala fides*. The relevant claim in the plaint is thus stated (Para. 14): "The plaintiff avers that there was no fraud or improper dealing to its acquiring of title to L.R. No. 12425 or any error or misdescription of its title to the said land"; and learned counsel remarked that this claim had not been denied, and indeed had been admitted by the defendant.

The registration of the said Registrar's Caveat, counsel submitted, had the effect of preventing the owner of the suit land, i.e. the plaintiff, from undertaking any dealings with that land, including restraining the

plaintiff from securing that land against the depredations of squatters; the plaintiff had been left, in the words of counsel, *with "no way of being strong enough to assert its title to the land"*. In the premises, learned counsel submitted: "*Invasion by squatters was a natural and foreseeable consequence of the registration of the [Registrar's] Caveat."* And hence, counsel submitted, the defendant was liable to the plaintiff for loss of user, loss of profits, and for *mesne* profits.

Mr. Oseko demonstrated the reality of the squatter threat as an inhibition on the plaintiff's enjoyment of lawful property rights, by seeking that the Court do take judicial notice of a judicial review application which the squatters once they invaded the suit land, lodged to endow themselves with an appearance of legitimacy to remain in possession of the plaintiff's land. I have taken judicial notice of the squatters' motion in *H.C. Miscellaneous Civil Application No. 784 of 1996* in which ***Mbito J,*** on *23rd August, 1996* made orders against the administrative authorities, sanctioning the continued occupancy by the squatters, of the suit land. The relevant orders read thus:

> ***"1. That leave be and is hereby granted to the applicants to file an application for prohibition and certiorari against the respondents [i.e., the administrative authorities] herein.***
>
> ***"2. That the said leave do operate as a stay of any further eviction actions by the respondents or their agents and officers until the hearing of the application for orders of prohibition against the respondents.***

It is clear, therefore, that between 1987 when the plaintiff became the legal owner of the suit land — and also when the impugned Registrar's Caveat was registered — and 1996, *squatters* had invaded the suit land and they were invoking technicalities of the judicial process to remain ensconced in that land.

In *H.C. Miscellaneous Civil Application No. 784 of 1996* the Attorney-General had represented the administrative authorities against the invading squatters. I think, in these circumstances, the Attorney-General who is the defendant in the instant suit, must have *recognised that the squatters were not legally in possession of the Plaintiff's land;* otherwise, why was he representing Government Officers who were acting to remove these squatters? In whose interest, in the first place, would the Provincial Commissioner for Nairobi and the Chief of Embakasi Location (who were being represented by the Attorney-General) have been acting when they contrived to force out the squatters? Were they protecting the lawful property rights of the Plaintiff herein? Or did they have ulterior motives? Or were they doing no more than keeping the peace and civil order, in the interests of pacific, well-ordered administration, in the public interest?

In an earlier application by the plaintiff herein, by Chamber Summons of *16th September, 2004* I had held, in relation to the squatters in reference herein and with regard to the Court orders of 23rd August, 1996:

> ***"The application [by the squatters] appeared to be defective, as the applicants did not exhibit the orders or instruments which they were seeking to have quashed by way of judicial review. The applicants did not state the nature of their interest, in relation to the land as to which they were seeking orders of Certiorari and Prohibition. At that time the land was the property of [Orbit Chemical Industries Limited] and was duly registered as such and a simple search conducted in the Lands Office would have disclosed the same. Without securing and supplying such elementary but crucial information to the Court, the applicants were able to secure leave to file proceedings for judicial review. Obviously such leave was obtained without observing the principle of uberrima fides which required full and frank disclosure of material facts before the Court. On these grounds, the leave obtained ex parte by the judicial-review applicants was defective and, on the basis of well-established principles of law…, was liable to be vacated. It was an abuse of the judicial process to obtain leave to commence judicial review proceedings in those circumstances."***

Learned counsel ***Mr. Oseko*** submitted that the fact of filing *H.C. Misc. Civil Application No. 784 of 1996* by squatters, was "*proof of the consequences of the defendant's action*" in lodging the Registrar's Caveat against the plaintiff's land title. The squatters, in their claim, represented that they *were in occupation*

with the *consent of the defendant;* and so, counsel submitted, the "*defendant's illegal action resulted in the occupation [of the suit land] by squatters."*

Mr. Oseko remarked that the plaintiff's efforts to take possession of the suit property have been frustrated to-date, and that for this fact the defendant must be held responsible. Such a situation, counsel submitted, amounted to expropriation of the plaintiff's property, namely the suit land (L.R. No. 12425), and was an infringement of the *rights of enjoyment of private property* as provided for in s.75 of the *Constitution of Kenya;* it was also an infringement of the law relating to acquisition of private land by the State, as provided for in the *Land Acquisition Act (Cap. 295).*

Mr. Oseko submitted from the affidavit evidence that, the plaintiff's many attempts to remove the impugned caveat had been unsuccessful, and that there had been not legal, but *extra-legal*, ulterior cause in the maintenance of the offending Registrar's Caveat. Ulterior cause is further evidenced by the fact that a senior Lands officer even broached the possibility of offering the plaintiff a smaller alternative property measuring some *30 acres,* in exchange for the plaintiff forgoing its *legal right* and entitlement to the suit land which measured *95 acres.* Ulterior grounds for maintaining a Registrar's Caveat outside the terms of the law is, furthermore, evidenced by the fact that senior Lands Officers repeatedly attributed the non-removal of the caveat to "political reasons" beyond the play of legal procedure and prescriptions.

Learned counsel submitted that there were still other actions taken within the Government which appeared designed to take away the plaintiff's *rights* to the suit land. The suit land had been purchased from National Bank of Kenya Ltd. and the transfer transaction had been duly authorised by the President, by virtue of *L.N. 280 of 13th November, 1986.* Change of user of the suit land from agricultural land to industrial land had then been duly authorised by the Land Control Board on *3rd December, 1986.* And the suit land was *transferred to the plaintiff* on *10th March 1987*. Thereafter, when the transfer process was *complete* and the suit land was properly *registered* as the property of the plaintiff, a new *Legal Notice, L.N. 119* dated *8th May, 1987* was published purporting to revoke L.N. 280 of *13th November, 1986*. (But later on (*5th June, 1998)* L.N. 65 of 1998 was published revoking L.N. No. 119 of 8th May, 1987). The Lands Registrar then lodged a Registrar's Caveat, the proper reason for which he was not able to give, a caveat which the Registrar also would not withdraw despite many requests from the plaintiff. The Registrar by his action and inaction, counsel submitted, and in my view quite meritorisly, had engaged in violations of natural justice; had been unreasonable; and had acted contrary to law. Such unlawful action on the part of officials of the Government, learned counsel submitted, prevented the plaintiff *"from developing land which it had legally and properly acquired."* In these circumstances the plaintiff had filed an application, *H.C. Misc. Civil Application No. 364 of 1992*, on *20th May 1992* for the purpose of challenging the Registrar's Caveat. The career of that application, which in the end was not heard on the merits, is puzzling; the plaintiff found itself in a contest with the Government, the Registrar of Titles and the National Bank of Kenya Limited (the vendor of the suit land) all on the opposite side. Such a scenario depicts the state of *duplicit*y which sometimes beleaguers the course of the judicial process. Why would a vendor who had already transferred title to the plaintiff, return to the fray, joining hands with officials who will not honour the law by keeping the plaintiff's title unclogged, so the plaintiff may partake of its constitutionally-secured property rights?

Although learned State Counsel ***Mr. Njoroge***, in the instant matter, has urged that the withdrawal of *H.C. Miscellaneous Civil Application* No. 364 of 1992 on 4th November, 1992 is a material question detracting from the *bona fides* of the instant application, I do not, with respect, accept such a proposition. The facts on record show considerable extra-legal pressures, and a pre-occupation with denial of the plaintiff's settled legal rights to the suit land, and I would consider the present application to bear all serious litigious intentions. I would consider meritorious the contention of learned counsel ***Mr. Oseko,*** that the instant application, which is in the first place brought against the Registrar for lodging and maintaining an illegal Registrar's Caveat, is not affected by the doctrine of *res judicata* on account of the earlier application (*H.C. Miscellaneous Civil Application No. 364 of 1992*) which had been withdrawn. Moreover, the indication to the plaintiff by the Lands Office on *14th January, 2000* that the impugned Registrar's Caveat *has now been removed*, demonstrates that this caveat ought neither to have been lodged nor maintained over the whole period, from 1987 to 2000.

Mr. Oseko submitted that ever since the suit premises had been transferred to the plaintiff herein, on *10th March, 1987* it has remained in the name of the plaintiff, and is the property of the *plaintiff*; and this *is* the basis of the plaintiff's suit seeking damages, and of the instant application to strike out the statement of defence.

On the next occasion of hearing, 30th November, 2005 learned counsel ***Mr. Oseko*** made submissions on the basis of case law. To buttress the legal foundation of the plaintiff's claim he called in aid the decision of this Court in ***Park View Shopping Arcade Ltd v. Charles M. Kangethe***, HCCC No. 348 of 2004. I had in that case stated the principle of the sanctity of *private property* under Kenyan law:

> ***"This is a truly seminal case on the relationship between, on the one hand, current constitutional guarantees of ownership and enjoyment by individuals of private property, and on the other, the collective interests and legal rights of communities in public resources or amenities such as environmental resources. In the common law tradition, which is part of our heritage of legal culture, and under commonplace constitutional principles considered an essential element in political civilization, the sanctity of private property is a virtue. In the present case the plaintiff is stating a simple fact, that he is the owner of the suit land, having been duly recognised as such by the duly authorized agency of the State. On the face of it this is an unanswerable claim."***

From the above-stated principles, ***Mr. Oseko*** urged that the effect of the registration of the Registrar's Caveat on *28th September, 1987* was an act of confiscation of the plaintiff's property rights, which act was contrary to the guarantees in *s.75 of the Constitution* of Kenya: because, just as in the ***Park View*** case, "[the] registered owner [of property] under the Registration of Titles Act has been kept out of his land, and his land has been appropriated without compensation."

Learned counsel urged that the plaintiff's case is clear beyond dispute; and this is the basis for the contention that the defence case is for striking out. Counsel urged that the bulk of the defence case consists in *bare denial*. Para.3 in the statement of defence dated 23rd May, 2005 merely denies the focussed assertions in as many as six paragraphs of the plaint. Para.4 of the defence gives perfunctory treatment to the plaintiff's pleadings regarding the squatter-invasion of the suit land; the paragraph reads: "*The defendant denies that he caused squatters to invade and occupy the suit premises in issue and puts the plaintiff to strict proof thereof."* Similar denial is to be found in other paragraphs of the statement of defence: para. 5, para.6, para.7, para.11, para.13, para.14, para.15, para.16.

Learned counsel noted that some of the paragraphs in the statement of defence contain inherent contradictions – and thus do not raise any triable issue. For instance, para.8 of the defence claims it was the duty of the plaintiff herein to take control of the suit premises; yet it is known that a Registrar's Caveat had in 1987 been lodged against the plaintiff's title, disallowing any taking of possession by the plaintiff. ***Mr. Oseko*** submitted that it is precisely the improper registration of the Registrar's Caveat that gave the cause of action in the instant suit for damages.

In para.17 of the statement defence, it is alleged that liability for *mesne* profits in this matter must fall on the *squatters* who invaded the suit land, and not on the defendant; but this fails to address the plaintiff's claim – as regards the *effect* of registering the impugned Registrar's Caveat, a caveat claimed to have been *"illegal and fraudulent."*

Learned counsel submitted that para.18 of the statement of defence missed the essence of the plaintiff's gravamen. That paragraph reads:

> "The defendant avers that it [i.e. the impugned Registrar's Caveat] was necessary and legal in order to safeguard the Government's interests in that the plaintiff had not complied with the provision of the Land Control Act (Cap.302, Laws of Kenya)."

Mr. Oseko urged that the sale and transfer of the suit land had been in compliance with the law in force; and this transaction being between private parties, the Government had no interest in it to be safeguarded

by registering a Registrar's Caveat.

Learned counsel submitted that while the statement of defence consisted in a wide range of general denial, it had not denied certain specific, vital pleadings in the plaint. For instance, there was no denial of para.11 of the amended plaint of 11th October, 2004. That paragraph reads:

> "The plaintiff states that the defendant's wrongful act of registering a caveat continued unabated until a letter dated *14th January, 2000* was received from the Commissioner of Lands."

It is the said *continuation* of what is seen as an improperly lodged caveat, counsel urged, that has caused the injury giving cause of action for this case.

Mr. Oseko submitted that the defendant had not denied the crucial claim in paragraph 14 of the plaint, that –

> "The plaintiff avers that there was no fraud or improper dealing to its acquiring of title to L.R. No. 12425 or any error or misdescription of its title to the said land".

Another important claim by the plaintiff which is not denied, counsel urged, is in paragraph 17 of the plaint:

"The plaintiff contends that the defendant, through the Registrar of Titles … by entering and registering a caveat against the land unlawfully prevented the plaintiff from entering, dealing with, developing or taking any action with respect to the land".

Counsel urged that there was no denial by the defendant of the claim in paragraph 22 of the plaint, which reads:

> "The plaintiff further claims against the defendant a declaration that the Registrar's conduct in entering and registering a caveat over L.R. No. 12425 was null and void and was a taking of private property without following the laid-down procedures and without compensation contrary to section 75 of the Constitution of Kenya and the Land Acquisition Act (Cap. 75, Laws of Kenya)."

From the foregoing instances, ***Mr. Oseko*** submitted that the defendant had assumed liability as claimed, on the basis of the provisions of O.VI, rule 9(3) of the Civil Procedure Rules, which stipulates:

> ***"Subject to subrule (4) [which relates to claims of damage, and to amounts thereof], every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them."***

Learned counsel urged that the Court do proceed, by virtue of O.VI, r.13 to *strike out* the defendant's statement of defence on the grounds that –

> *(a) it discloses no reasonable defence;*
>
> *(b) it is scandalous, frivolous and vexatious;*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action;*
>
> *(d) it is otherwise an abuse of the process of the Court.*

In this Court it has been held (***Ringera, J*** – as he then was) in ***Mpaka Road Development Limited v. Kana*** [2004] I E.A. 124, on the striking out of pleadings (p.165):

"And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in Court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious."

Along those same lines, the position is stated in *The Supreme Court Practice 1995,* Vol. 1 (part 1) (London, 1994) at paragraph 18/19/32 (on p. 343):

"The Court is disposed to give a liberal interpretation to these words [i.e., 'Tend to prejudice, embarrass, or delay the fair trial of the action'] … at the same time parties must not be too ready to find themselves embarrassed. 'The rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right' [Bowen,L.J. in Knowles v. Roberts (1888) 38 Ch. D. 263, p. 270]. If the defendant does not make it clear how much of the statement of claim he admits and how much he denies, his pleading is embarrassing …"

Still on scandalous pleadings, it is thus stated in ***Bullen and Leake and Jacob's Precedents of Pleadings***, 12th ed. by ***I. H. Jacob*** (London: Sweet & Maxwell, 1975) (at p.144):

"Any scandalous matter in any pleading or indorsement of the writ may be ordered to be struck out or amended. For this purpose, allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any 'unnecessary' or 'immaterial' allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else."

On the basis of the foregoing principles ***Mr. Oseko*** submitted that the defendant's pleadings in the instant case are in nature fanciful, groundless, and without substance. He urged that by the said pleadings the defendant was merely trifling with the Court, by making averments so lacking foundation that they cannot possibly succeed. Learned counsel relied on the following passage *in* ***Bullen and Leake and Jacob*** (op.cit, at p.147):

"… a pleading is embarrassing which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expense, trouble and delay and thus will prejudice the fair trial of the action, and so is a pleading which contains unnecessary or irrelevant allegations. Moreover, a claim or defence which a party is not entitled to make use of is embarrassing. …[A] plea of justification is embarrassing if it leaves the plaintiff in doubt what the defendant has justified and what he has not. Indeed, denials in a defence are embarrassing where they are vague or ambiguous or are too general."

Mr. Oseko submitted that, of the 27 paragraphs of the amended plaint the defendant accepts only *six* and denies the rest in general terms – even though all the paragraphs of the plaint are fundamentally linked; and counsel contended that this made the defendant's pleadings unstructured, hollow and, in character, embarrassing.

The case to strike out the statement of defence was, besides, advanced by counsel on the basis of the *admissions,* or *non-traverse* by the defendant. It has been held in this Court (***Ringera, J*** – as he then was) in ***Royal Insurance Company of East Africa & Another v. Superfreighters Limited & 4 Others*** [2003] KLR 722 (at p. 723):

"An allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is denied by that party in his pleading or a joinder of issue operates as a

denial of it."

Mr. Oseko urged that if the Court came to the decision that the statement of defence should be struck out, then the plaintiff would be entitled to *judgment in the terms of the plaint*. Apart from a claim for Kshs3.4 million in special damages, counsel urged, in the event of the defence being struck out, that by virtue of O.IXB, rule 2 the suit be set down for *formal proof.*

(c) Defence carries Triable Issues, and Plaint turns on Facts to be proved by Evidence: Submissions for the Defendant/Respondent

It was learned counsel ***Mr. Njoroge's*** submission that the plaintiff's application is misconceived, and is frivolous and only meant to confound pertinent issues and "delay hearing of the suit *inter partes"*. To support this perception learned counsel noted that the suit had been filed on *11th August, 2004* and amended on *14th October, 2004*; a statement of defence was filed on 23rd May, 2005; there had at this stage been no discovery and inspection of documents. In those circumstances the normal course of events, learned counsel submitted, is to pursue *hearing*, "yet this application seeks striking out". He urged: "Substantial justice should be seen to be done, [in place of] just [a] reliance on technicalities".

In ***Mr. Njoroge's*** submission a quest for substantial justice in this matter requires only addressing the question: *"Are there triable issues in the defence?"* Only on that basis, counsel urged, should the Court determine the instant application. He submitted that only very rarely would the Court strike out a defence. He contended that the Court, when exercising its powers under O. VI rule 13(1)(b),(c),(d) has a discretion even where the pleading in issue is hopelessly poor; even where such a pleading may embarrass, prejudice or delay; and even where the pleading may be regarded as an abuse of Court process. Counsel disputed the contention that the statement of defence in this case fell at all within the category of shortfalls provided for in O.VI, rule 13; and he urged, however, that whatever the true position would be held to be, s.3A of the Civil Procedure Act (Cap.21) upon which the applicant was relying, did repose in the Court unlimited inherent powers which should now be used to allow a hearing of the substantive claim *on the merits.*

No doubt, ***Mr. Njoroge*** had apprehended that the statement of defence might be defective, for he came to Court with a Chamber Summons filed on the same day, praying that *"the defendant be granted leave to amend his defence"*, on the grounds *inter alia*, that "the proposed amendments will make the issues clearer", and that "the amendments are necessary and raise triable issues".

Even as learned counsel indicated his desire to introduce triable issues in his defence he invoked the powers of the Court to allow amendments to pleadings under ss.99 and 100 of the Civil Procedure Act (Cap.21). S.99 of the Act, however, is concerned with amendments to judgments, decrees or orders. And s.100 is concerned with amendments to "any defect or error in any proceeding in a suit***". Mr. Njoroge*** did not expressly state *what error or defect* he had at this stage identified in the statement of defence. But he urged that "The Court is a Court of justice, and no matter how poor or weak a party's case is, the Court is to hear what the party has to say before determining the issues."

Learned counsel contended that the statement of defence did carry *triable issues* – and so the ends of justice demand that the defendant be heard in the main suit. He gave as an example the plaintiff's claim (para. 8 of plaint) that the invasion of the suit land by squatters was as a result of the Registrar's Caveat lodged against the plaintiff's title. Counsel urged that that claim had been traversed by the assertion in paragraph 4 of the statement of defence – that the defendant did not *cause* the squatters to occupy the plaintiff's land. I have doubts as to whether this example shows a true joining of issue; indeed I find the defendant's contention merely evasive, as the plaintiff has made the cogent point that the registration of the said caveat inhibited the plaintiff's taking of possession of the suit land and safeguarding the same appropriately; and so the Registrar's Caveat had the direct effect of opening up the suit land to access and occupation by whoever cared to come along – such as the squatters. I am unable to appreciate ***Mr. Njoroge's*** submission on this point when he contends: "The propensity to squattership should be a subject of evidence. How could registering a caveat cause squatters to enter the land? There is no direct connection!"

Mr. Njoroge also extolled paragraph 9 of the statement of defence as carrying triable issues; and the essential point therein is that "it is not the defendant who is in occupation of the [suit] land; the occupiers are trespassers who are known to the plaintiff". Again I would regard this as an evasive assertion which fails to join issue on the plaintiff's claim: the suit is lodged against those who kept the plaintiff away from the plaintiff's registered property for more than a dozen years, by recording a spurious legal ouster, in the form of a Registrar's Caveat; and the void then resulting in the land's custody and care, drew in wrongful occupiers who further kept the plaintiff out of his duly-registered property.

Mr. Njoroge urged that the issue of squatters in the claim required evidence being called on both sides; and he considered the following to be relevant questions: When did the squatters invade? When did the plaintiff come to know there were squatters on the suit land? Has the plaintiff attempted to evict the squatters? What is the real loss from the plaintiff's non-occupation of the suit land?

Such issues, in my assessment, fall at a *secondary level,* in relation to the plaintiff's claim – which is that a wrongful registration of a Registrar's Caveat had set up an apparent legal condition which obligated the plaintiff to desist from taking possession, custody and control of his land, and that, therefore, a vacuum in occupation rights was imposed over the land for some 13-14 years, and during that period only persons carrying no defined legal obligations *vis-à-vis* the suit land had the *de facto* liberty to access that land; and hence the squatter invasion which ensued, and caused damage to the plaintiff in the enjoyment of its property rights. These, in my view, are *legal* questions; they lie at the threshold and the core of the plaintiff's case; and they are the basis, in my opinion, of the plaintiff's application herein.

Learned counsel raises further issues which he regards as evidentiary matters that ought to proceed to trial, such as: How will the Court know there are squatters on the land? How many squatters are there? How much land is in the hands of the plaintiff? How much land is in the hands of the squatters?

In the light of my earlier holding that the plaintiff's claim rests upon the purported legal act of registering the Registrar's Caveat in 1987, soon after the suit land was transferred to and registered in the name of the plaintiff, it is my opinion that the *factual scenarios* being raised by learned counsel can only be relevant for the purpose of appraising the *extent of damage* caused to the plaintiff; and therefore such matters come at a *later stage*, rather than at the stage of the instant application.

Learned counsel urged that if there is even just a single triable issue in the statement of defence, this would be reason enough to preserve the defence; and he considered that the claim that the defendant was not the one in occupation of the suit premises did truly traverse the plaintiff's claim for *mesne* profits – and therefore this would be the vintage element in the triable matter in the statement of defence. I am not, however, in agreement, as I have already come to the conclusion that the number of squatters who may be occupying or have in the past occupied the plaintiff's land, and the extractions or depredations they cause or have caused thereon, would only come before the Court during *proof of damages.*

Mr. Njoroge submitted that the striking out of any pleading is a draconian act which should not be taken lightly. He called in aid the Court of Appeal decision in ***D. T. Dobie & Co. (Kenya) Limited v. Muchina*** [1982] KLR 1 in which the following passage appears (p.9):

> ***"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."***

Counsel relied too on the Court of Appeal decision in ***Raghbir Singh Chatte v. National Bank of Kenya Limited,*** Civil Appeal No. 50 of 1996 in which the following passage appears:

> ***"It is also trite law … that striking out a pleading is a draconian act which may only be resorted to in plain cases. Whether or not a case is plain is a matter of fact …"***

These same points were reiterated in a fairly long list of authorities which learned counsel introduced. These included: *The* ***Co-operative Merchant Bank Limited v. George Fredrick Wekesa,*** Civil Appeal No. 51 of 1996; ***Barco Hiring & Leasing Limited v. Zahra Spares Ltd.,*** HCCC No. 2062 of 1998**;** ***Lonrho Motors E.A. Ltd.*** *(In Receivership)* **v.** ***Beshmon Limited***, HCCC No. 2024 of 2000; ***Ayaz Hussein Mukhi v. F. K. Motors (K) Limited & Another***, HCCC No. 1541 of 2001; ***Evans Collie Goro v. Joshua Muthika***, HCCC No. 822 of 1997; ***Coast Projects Limited v. M. R. Shah Construction (K) Limited,*** Civil Appeal No. 242 of 2003; ***Sanober Limited v. George Samuel Eshiwani***, HCCC No. 97 of 2003: ***Orbit Chemical Industries Limited v. Mytrade Limited,*** HCCC No. 631 of 1998; ***Intercountries Importers & Exporters Limited v. Nairobi City Council*** HCCC No. 1070 of 2001; and ***Five Continents Limited v. Mpata Investments Limited***, Civil Appeal No. 306 of 2000.

(d) Does Defence join issue with Plaintiff's Claim? Is defence conceived in Good Faith? Or is it Scandalous? –Plaintiff's Rejoinder

(i) Does the statement of defence join issue on the real gravamen stated in the plaint?

Learned counsel **Mr. Oseko** submitted that counsel for the defendant in his submission, had failed to address the main question which is the basis of the instant application: *Why did the Government lodge a Registrar's Caveat against the plaintiff's registered land title*? What interest had the Government in the suit land which *was* the property of the plaintiff? Since these are the triable issues at the core of the plaintiff's case, counsel submitted, the defendant's failure to face up to them necessarily means that the statement of defence has not engaged the crisp issues in the suit, and therefore the defendant's whole pleading consists in allegations not triable.

Learned counsel cited earlier proceedings in *H.C. Miscellaneous Civil Application No. 784 of 1996* as having been concerned with *different issues,* and involving *different parties* from the instant case: in the earlier case "the question was to *dislodge the squatters*; simple eviction; no other remedy was sought"; in the instant suit, by contrast, what the plaintiff seeks is: damages; loss of income, rent and/or *mesne* profits. The question, in these circumstances – counsel submitted – whether or not it was the squatters who did the damage pleaded in this suit, is beside the point; and the real issue in Court now is the improper registration of a Registrar's Caveat against the plaintiff's duly-registered property title.

(ii) Fraudulent concealment of cause of action?

Mr. Oseko contested the defendant's attempt at this belated stage to make an amendment to the statement of defence, for the purpose of pleading issues linked to *limitation period*. Limitation as a plea had, in counsel's contention, been waived; and in this regard there is relevant authority: ***Kidayu Ole Lepet & 9 Others v. Nkuruna Ole Masikonde & 11 Others***, HCCC No. 1669 of 1994. This Court had in that case held:

> ***"[Hudson Laise Walimbwa v. Attorney-General, HCCC No. 2714 of 1987 – Ringera, J] … is succinct and unambiguous, on the different legal effect of a plaintiff failing under the limitation-of-time rule, on the one hand, and under the required statutory-notice rule, on the other. The latter goes to substantive law and is a matter in respect of which an objection does not have to be pleaded; the former interfaces with fact, must be pleaded, and can be waived."***

Counsel further argued that the unexplained circumstances in which the Registrar's Caveat had been lodged and maintained from 1987 to 2000 should be associated with *fraudulent concealment*, and this should be taken to bar any possibility of limitation period being raised today, in amended pleadings. Fraudulent concealment of cause of action has been held to *postpone* the date from which the limitation period begins to run: ***Kitchen v. Royal Air Force Association & Others*** [1958] 1 WLR 563 (esp. pp 567, 568, 569, 572, 573, 574, 578, 579); ***Sheldon & Others v. R.H.M. Outhwaite*** (***Underwriting Agencies***) ***Limited & Others*** [1966] 1 A.C. 102 (esp. pp. 104, 105, 106, 107, 108, 109, 111, 112, 113, 115, 118, 119, 120, 121, 122, 123, 124, 127, 128 ,144, 145). Although in an earlier ruling I had already disallowed the defendant's attempts to have this matter adjourned, so that he could instead have his defence-amendment application accorded priority, I would still cite a passage in the ***Sheldon*** case (*op.cit*.) which indicates

limitations to such a possible defence initiative (especially considering that there is evidence before me that, for some 13 years, the Registrar's Caveat was maintained in silent stubbornness); ***Browne-Wilkinson, L. J.*** thus states the applicable law (p. 144):

> ***"For myself, I do not find it absurd that the effect of section 32(1) [of the English Limitation Act, 1980 (c.58)] is to afford to the plaintiff a full six-year period of limitation from the date of the discovery of the concealment. In such a case, the Plaintiff must have been ignorant of the relevant facts during the period preceding the concealment: if he knew of them, no subsequent act of the defendant can have concealed them from him. If the defendant then deliberately takes a step to conceal the relevant facts (a step which is by ordinary standards morally unconscionable if not necessarily legally fraudulent) it does not seem to me absurd that a plaintiff who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action should be afforded the full six-year period from the date of the discovery of such concealment to bring his action."***

(iii) ***Motions for "Summary judgment", versus motions to strike out pleadings for want of cause of action, or for being abusive of process, scandalous, frivolous and vexatious***

Learned counsel ***Mr. Oseko*** submitted that the defendant's position in the application herein, insofar as it is built around submissions that urge the importance of taking evidence, is misconceived and is an inappropriate response to the plaintiff's prayers. Most of the authorities relied on by the defendant, counsel submitted, had to do with *summary judgment* under O.XXXV of the Civil Procedure Rules, and such judgments are with regard to: (a) liquidated demand with or without interest; and (b) recovery of land by landlord from a tenant whose term has expired. The plaintiff's claim, counsel submitted, does not fall in such a category. The plaintiff's application comes under Order VI and contests the *triability* of the statement of defence as filed, and also addresses the question whether the statement of defence has been filed in *good faith* and merits being heard in full trial. Counsel submitted that the Attorney-General has to-date not explained the impugned registration of the Registrar's Caveat in 1987 and its maintenance upto 2000, and such conduct *ex facie* showed bad faith. Under O. VI, rule 13(1)(a), counsel submitted, an application for striking out of a defence does not deal with evidence, and the relevant issues are disposed of purely on the basis of *legal argument.*

Learned counsel submitted that in the many authorities which the defendant had sought to rely on, no indication had been made whether they were brought under *O.VI, rule 13* or *O.XXXV,* and that this lessened their utility; it should have been indicated, for instance, that ***D.T. Dobie & Co. (Kenya) Ltd. v. Muchina*** [1982] KLR 1 and ***Raghbir Singh Chatte v. National Bank of Kenya Ltd***., Civil Appeal No. 50 of 1996 were concerned with *O.VI, rule 13(1))(a),* while ***Ayaz Hussein Mukhi v. F.K. Motors (K) Ltd*** HCCC No. 1541 of 2001 and ***Evans Collie Goro v. Joshua Mithika,*** HCCC No. 822 of 1997 were based on *O.XXXV, rule 1* and were dealing with liquidated damages. It was submitted that the concern for *bona fides* is common to applications under both O.VI, rule (13)(1)(a) and O.XXXV, rule 1. In the ***Evans Collie Goro*** case a contract document had not been exhibited, but the Court held that the matter should go on to trial. Such, counsel submitted, was not the case in the instant matter where it was apparent there was no bon*a fides* on the part of the defendant.

Mr. Oseko submitted that the affidavits in the instant matter show a continuous attempt to create mystery around decisions of the Commissioner of Lands which are prejudicial to the plaintiff; so it remains unclear whether the Government ever thought the suit land belonged to it – for how could it come to register a caveat against the title to this land? That mystery is created around the impugned Registrar's Caveat, counsel urged, is evidence of *bad faith,* on account of which the statement of defence should be held to fall.

Both ***Sanober Ltd v. George Samuel Eshiwani***, HCCC No. 97 of 2003 and ***Orbit Chemical Industries Ltd. v. Mytrade Ltd,*** HCCC No. 631 of 1998 were *summary-judgement cases* under O.XXXV, rule 1 of the Civil Procedure Rules. In ***Sanober Ltd*** it was held that the amount claimed could not be ascertained, and so it was not a proper case for summary judgment. In the ***Orbit Chemical*** case the plaintiff's application for summary judgement was dismissed, because the statement of defence was found to raise

triable issues. It was counsel's submission that, unlike in the ***Orbit Chemical*** case, the defendant in the instant case had failed to show a legal interest in the suit land, and so the defendant's only remaining hope is that he can amend his defence and raise a *new issue* of limitation – an opening which could only enable the defendant to benefit from his own inequity.

The application in ***Intercountries Importers & Exporters Ltd v. Nairobi City Council,*** HCCC No. 1070 of 2001 had been brought under *both* O.VI, rule 13(1)(b) – (d) and O.XXXV though the Court (***Ringera, J)*** chose to deal with the matter under the summary-judgement provisions of O.XXXV. The learned Judge examined the defence and found *bona fide* triable issues; and he held:

> ***"Having shown those triable issues, the defendant is entitled to have its day in Court and the plaintiff's claim for entry of summary judgement must be and is hereby rejected."***

Such a position, ***Mr. Oseko*** submitted, does not prevail in the instant case, in which the statement of defence is lacking in *bona fides.*

The ***Five Continents*** case [Civil Appeal No. 306 of 2000] similarly was brought under O.XXXV, rule 2 for summary judgment. It was found that there were unsettled matters, such as: quantum of debt; missing vouchers; terms of settlement, etc. – and the Court of Appeal held:

> ***"In our judgement this was not a plain and obvious case on which summary judgement could have been entered. There was a genuine dispute on the defendant's liability to the plaintiff which can only be resolved at the trial."***

(iv) Plaintiff's prayer

Learned counsel urged that the defendant's defence was a sham and should not any longer be preserved, as delay in the disposal of the suit herein is destined to subject the plaintiff to further loss by not being able to exercise its rights over the suit land. Counsel urged that the plaintiff be granted the prayers set out in the Chamber Summons of 10th June, 2005: that the statement of defence be struck out and directions be given for formal proof, in respect of damages.

C. FURTHER ANALYSIS

Much analysis has already been undertaken in the course of reviewing the pleadings, the depositions, the submissions of counsel, the relevant written law and the case authorities. Out of this review certain statements expressing legal and factual status may be made, in point form, as follows:

(a) Points of Fact emerging from the pleadings

(1) L.R. No. 12425 situate in the Embakasi area of Nairobi and measuring 95.2 acres is the property of the plaintiff which had purchased the same in a normal land-sale transaction from National Bank of Kenya Ltd.

(2) To facilitate the transfer of L.R. No. 12425 from the vendor to the purchaser, the required exemptions had been authorised by virtue of L.N. 280 of *13th November, 1986*

(3) The suit land was then transferred to the plaintiff on *11th March, 1987* and the land title was duly registered in the name of the plaintiff.

(4) On *8th May, 1987* L.N. 119 was published purporting to revoke L.N. No. 280 of *13th November, 1986* which had already authorised the now-completed transfer of the suit land to the plaintiff.

(5) On *28th September, 1987* ***Ms. Jemimah L.W. Munjuga*** the Registrar of Titles, entirely without explanation and without any hearing accorded the plaintiff, registered a caveat against the

plaintiff's title over the suit land, L.R. No. 12425 comprised in the Grant registered as No. I.R. 32622/1.

(6) Later, L.N. No. 65 of 1998 was published on 5th June 1998, revoking L.N. 119 of 8th May, 1987.

(7) The Registrar's Caveat of *28th September, 1987* was maintained without any reason given to the plaintiff for some 13 – 14 years, and was only withdrawn on *14th January, 2000* when the Commissioner of Lands wrote a letter to that effect, to the plaintiff. The said letter, in part, thus reads: *"Please note that I have no objection to the removal of the Government Caveat*."

(8) Owing to the constraints to the exercise of property rights on the suit land imposed by the Registrar's Caveat of *28th September, 1987* the plaintiff's dominion over that land was pre-empted; he could not secure and control the suit land; invading squatters entered and occupied the land.

(b) Points of Law canvassed by counsel

(9) The plaintiff's position is that its property rights were denied through a Registrar's Caveat lodged in bad faith on *28th September, 1987* and kept in place for more than a dozen years.

(10) It is contended for the plaintiff that the lodgement and retention of the Registrar's Caveat aforesaid was tainted with unreasonableness and breaches of the principles of natural justice.

(11) It is contended that the registration of the Registrar's Caveat on 28th September, 1987 was illegal because its effect was to expropriate the plaintiff's land contrary to the provisions of the Constitution of Kenya and of the Land Acquisition Act (Cap.295).

(12) By virtue of s.65(1)(f) of the Registration of Titles Act (Cap.281) the Registrar of Titles may register a "Registrar's Caveat" but only on the following specified grounds;

i) to prevent the transfer or dealing with any land "belonging to or supposed to belong to the government";

ii) to prohibit the dealing with any land in a case in which it appears to the Registrar that an error has been made by misdescription of land or otherwise in any certificate of title or other instrument;

iii) to prevent fraud or improper dealing;

iv) for any other sufficient cause.

The plaintiff contends that none of the first three grounds above could possible justify the Registrar's action in registering a caveat against the title to the suit land on 28th September, 1987; and that even the fourth ground above, which was only legislated by *Act No. 21 of 1990* — and even were it to operate retroactively — could not justify the said caveat, as no reasons were ever given for registering the caveat and it was in 1990 withdrawn, again, inexplicably.

(13) The plaintiff contended that the mystery kept over the registration and maintenance of the Registrar's Caveat of 28th September, 1987 amounted to bad faith and a fraud upon the plaintiff as the plaintiff identified and prosecuted its cause of action.

(14) The defendant's essential point is that the Registrar's Caveat of 28th September, 1987 was not the cause of squatter invasion upon the suit land, and so the plaintiff lacks a cause of action.

(15) Secondly, the defendant would have craved leave of the Court to introduce an amendment to the statement of defence, introducing a challenge to the plaintiff's case based on limitation of actions. But the plaintiff has responded that such is a peripheral attempt to delay resolution of the plaintiff's gravamen, which relates to expropriation of property rights by virtue of an improperly registered Registrar's Caveat; and moreover, the silence and mystery surrounding the registration and maintenance of the said caveat is perceived by the plaintiff as fraud, from the standpoint of equity. The plaintiff has already addressed what is perceived as the wrongs of the squatters themselves, under *H.C. Misc. Civil Application No. 784 of 1996;* and in this instance the gravamen centres on wrongs committed by the *Registrar of Titles.*

(16). At paragraph 18 of the statement of defence it is pleaded:

"The defendant avers that [the Registrar's Caveat] was necessary and legal in order to safeguard the Government's interests…"

But there is no pleading on the nature of the "Government interests" alleged, in relation to land duly registered in the name of the plaintiff.

(17) The foregoing factual and legal points are the basis upon which the plaintiff comes before this Court, praying for (i) the striking out of the statement of defence, and (ii) damages.

(c) Assessment

It is necessary to note that the plaintiff's application was brought under s.3A of the Civil Procedure Act (Cap.21), and Order VI, rule 13(1)(b),(c),(d) and also rule 16. It follows that there is something remarkable in the mode in which counsel have presented their papers in these proceedings. From both sides, affidavits have been sworn; and so the question may be raised as to the purpose for which these depositions were intended. It is now well recognised that the Court, in exercise of its striking-out jurisdiction under Order VI, rule 13 of the Civil Procedure Rules, will act on *pure legal material*, and will not require proof of any contention by evidence. For O.VI rule 13(2) stipulates that "no evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made."

Although I would consider that the essential claims of the applicant herein can be resolved on the bare legal material available, learned counsel ***Mr. Oseko*** has submitted that the application goes beyond an Order-VI scenario and addresses *equitable principles* that require *bona fides*, hence the plaintiff's reliance on s.3A of the Civil Procedure Act (Cap.21). Learned counsel perceived the depositions in this application against this *broader background.*

Justification in such an approach to the instant application can be found in some of the authorities relied upon by counsel***: Sanobar Ltd v. George Samuel Eshiwani,*** HCCC No. 97 of 2003; ***Orbit Chemical Industries v. Mytrade Ltd,*** HCCC No. 631 of 1998; ***Intercountries Importers & Exporters Ltd v. Nairobi City Council***, HCCC No. 1070 of 2001. In all these cases applications were made under both Order VI, rule 13 and Order XXXV (which is concerned with *summary procedure*) – notwithstanding that it is an express requirement of the law (O.XXXV, rule 1(2)) that "The application shall be made by motion *supported by an affidavit* either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed."

What are the merits of the plaintiff's application? From the 16 points of fact and of law above-summarised, I have to conclude that the plaintiff has succeeded in presenting his case in the plaint clearly, and in showing the merits of the case as beckoning unanswerably. The defendant has not shown how he could possibly meet the plaintiff's legal argument, but has instead pleaded for an opportunity to effect an amendment for the purpose of querying the plaintiff's compliance with the law of limitation. Since I have already held that any challenge based on limitation must be pleaded, I now hold that the defendant, as he never pleaded limitation, has raised no convincing grounds to weaken the plaintiff's application.

It is not true, with respect, as learned counsel ***Mr. Njoroge*** reiterated, that the Court is always bound to sustain a limping defence up to hearing stage; otherwise Order VI, rule 13 would not have been made.

This Court had, in ***Crispus Karanja Njogu v. The Attorney-General & Another,*** HCCC No. 574 of 2002 struck out a statement of defence by virtue of O.VI, rule 13; and the crucial holding in that matter reads:

> ***"The vital reference-points in this litigation are marked, firstly, by the pleadings, and then by the said two authoritative Court decisions. From these three pillars of the case, no foundation, I believe, exists for any meaningful defence to the plaintiff's claims. From listening to all the counsel representing their clients, I have formed the clear impression that there is no momentum of legal argument to move the defence case forward, in the face of the vitality of the plaintiff's case. I have become convinced, in the circumstances, that sustaining this litigation will be on unduly expensive and unnecessary claim on the time and resources of the Court, as well as an unjustified denial of the just deserts of the plaintiff as demonstrated in the claims in the plaint."***

And this Court had also struck out the statement of defence in ***John Patrick Machira t/a Machira & Co. Advocates v. Grace Wahu Njoroge, HCCC No. 3383 of 1995*** in an application such as the instant one, brought under Order VI, rule 13. The pertinent holding in that case reads as follows:

> ***"However, on reading the defendant's further-amended defence and counterclaim which the Court in its solicitude graciously allowed her to file, I find that she has not squarely engaged the plaintiff in his case. The further-amended defence and counterclaim dated 23rd January, 2004 is a document of bald denials – see paragraphs 3,4,5,6,7,8,9,10,11,12,13,15; yet those very paragraphs, it is apparent, constitute the backbone of the statement of defence. The effect is that the plaintiff's case passes uncontroverted…***
>
> ***"It is clear from the analysis herein that, I do not think the defendant's further-amended defence and counterclaim dated 23rd January, 2004 is a proper defence which merits preservation to the trial stage. Not only does the said defence consist in nothing but bare denials, it wholly fails to engage the plaintiff on the issues raised in the claim***."

I hold the defendant's statement of defence in the instant matter to be in precisely the same position. The defendant has no credible pleading on how, and on what account, the Registrar's Caveat of 28th September, 1987 was lodged and kept in place for more than a dozen years – yet that is the core of the plaintiff's gravamen. By *not engaging the plaintiff's claim at the critical point,* the statement of defence must be held to disclose *no reasonable defence* (O.VI, r.13(1)(a)). Rather than squarely engage the plaintiff on its claim, the statement of defence alleges that it is the *squatters* on the suit land who are to blame and not the Registrar of Titles; and a pleading of this kind is a red herring which I would typify, with respect, as scandalous, frivolous and vexatious (O.VI, rule 13(1)(b)).

The defendant's statement of defence, moreover, consists largely in denials, rather than in a systematic engagement of the plaintiff on the assertions in the plaint. Such a statement of defence, I would hold, amounts to an abuse of the process of the Court (O.VI, rule 13(1)(d)).

The essence of the plaitniff's case may be stated to be that the officers of the Lands Office have acted in breach of the constitutional law relating to the sanctity of private property which can only be expropriated by the Government following the provisions of the Land Acquisition Act (Cap.295). The position, in law, is that a violation of any person's rights of enjoyment of private property entitles the injured person to redress. But in the instant matter the defendant fails to plead to the plaintiff's grievance; and such is, I think a fundamental defect in the statement of defence, such as will justify termination at this stage of the defence case.

(d) Orders

The foregoing analysis leads me to make orders as follows:

1. The defendant's statement of defence dated 23rd May, 2005 is hereby struck out.

2. Judgement is entered for the plaintiff in the terms of the prayers set out on page 4 of the amended plaint of 11th October, 2004.

3. The plaintiff shall have this matter set down for formal proof, and a date shall be given on the basis of priority before a Judge in the Civil Division of the High Court.

4. ***Any such application as may arise from this ruling, and any such motion as may relate to the cause herein, shall be heard and determined before a Judge in the Civil Division of the High Court***.

5. The plaintiff's costs in this application shall be borne by the defendant.

DATED and **DELIVERE*D*** at Nairobi this 22nd day of September, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Oseko, Mr. Koceyo, instructed by M/s. Oseko & Co. Advocates

For the Defendant/Respondent: Mr. Njoroge, instructed by the Attorney-General