



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT 561 OF 2004

DRUM PUBLICATIONS (E.A.) LIMITED1ST PLAINTIFF

JARED BENSON KAGWANA2ND PLAINTIFF

VERSUS

MEDIA 24 LIMITED1ST DEFENDANT

NATION MEDIA GROUP LTD2ND DEFENDANT

EAST AFRICAN MAGAZINES LIMITED3RD DEFENDANT

THE REGISTRAR OF TRADE MARKS4TH DEFENDANT

THE REGISTRAR OF BOOKS & NEWSPAPERS.....5TH DEFENDANT

RULING

This ruling relates to a Preliminary point of Law raised by Mr. Karori learned Counsel for the 3rd Respondent, and supported by Mr. Majanja, learned counsel for the 2nd Defendant that the Replying Affidavits to the 2nd and 3rd Defendants Chamber Summons Applications dated 22.10.2004, and 27.10.2004 respectively and sworn by the 2nd Plaintiff on his own behalf and on behalf of the 1st Plaintiff be struck out as being contrary to the provisions of Order VI rule 13 (2) which reads -

"No evidence shall be admissible on an application under subrule(s) 13 (e) (a) but the application shall state concisely the grounds on which it is made."

The application in issue herein and referred to above by the 2nd and 3rd Defendants seeks to have the Plaintiff's suit struck out in accordance with the provisions of the said order VI rule 13 (1) (a) which empowers the Court to strike out the suit on the ground that it discloses no reasonable cause of action or defence. In such an application, the Court may also order the suit to be stayed or dismissed or judgement to be entered accordingly.

The 2nd Defendant has not expressly pleaded in its defence dated and filed on 17.11.2004 that the Plaintiff does not disclose a reasonable course of action against this Defendant. It merely avers in paragraph 12 of the Defence that the Plaintiffs are not entitled to any of the reliefs sought in the Plaintiff or at all and puts

the Plaintiffs to strict proof of their claims.

The 3rd Defendant does however specifically in paragraph 15 thereof plead that the Plaintiffs suit as drawn does not disclose any or any reasonable cause of action against the third Defendant; and reserved the right to apply to have the Plaintiff's suit against it to be dismissed. It put this threat to effect by the application of 27.10.2004 although it was beaten to it by the 2nd Defendant's application dated 22.10.2004.

In their more or less identical submissions to the Court, learned Counsel for the 2nd and 3rd Defendants told the Court that the Replying Affidavits by the 2nd Plaintiff do not lie because rule 13 (2) cited above expressly forbids or precludes any evidence by way of affidavit or otherwise. Mr. Majanja Counsel for the 2nd Defendant put it this way. "An application under Order VI rule 13 (1) is in the nature of a Preliminary Objection. In determining such an objection, the court looks solely at the Plaint to see whether it discloses any reasonable cause of action."

In her opposition to the objection to the Reply by way of Affidavit, Miss Kilonzo, learned Counsel for the Plaintiffs cited the provisions of Order L rule 16 (1) of the Civil procedure Rules which expressly empowers any respondent who wishes to oppose any motion or other application to file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.

Counsel submitted that rule 16 (1) of Order L was introduced by Legal Notice No. 128 of 2001, when rule 13 (2) of Order VI was already well entrenched into the legislation. If there was any intention by the Rules Committee to exclude its application to applications brought under VI rule 13, the Committee would have said so. In the absence of any such express exclusion, the interpretation that Rule 13 (2) of Order VI excludes the application of rule 16 (1) of Order L, cannot be correct. Counsel submitted that the said rule 13 (2) is limited to the applicant and not the Respondent. The rule does not set any limits to the rights of the Respondent to reply to an application for striking out pleadings under Order VI rule 13.

Both Counsel raising the objection and Miss Kilonzo relied upon the case of **D. T. DOBIE & COMPANY LTD -VS- MUCHINA** [1982] K.L.R.I in support of their respective submissions, and both sides relied upon the same passage at page 8 - 9 in the judgement of Madan J. A (as he then was), where he said -

"..... I would sum up. It is relevant to consider all averments and prayers when assessing under VI rule 13 whether a pleading discloses a reasonable cause of action and also the contents of any affidavit that may be filed in support of a pleading that a pleading under sub rule 13 (2) as hereafter set out, while evidence by affidavit is not submitted in case of first application, it is permitted in the case of the second application"

As I am not being asked to consider the application herein for dismissal of the Plaintiff's suit, I will confine myself to the determination of the 2nd and 3rd Defendants Preliminary Objection that the Plaintiffs' Affidavits do not lie and are precluded by the provisions of sub rule (2) of Rule 13 of Order VI. Is evidence by Affidavit actually precluded by way of a reply to the charge that the plaint or pleadings do not disclose a cause of action?

In answering this question, I have had the benefit of looking at similar provisions in the Supreme Law Practice, 1999 Edition Volume 1 page 348, paragraph 18.19.5

Evidence Where the only ground on which the application is made that the pleading discloses no reasonable cause of action or defence, no evidence is admitted (paragraph 2) A. G. of **DUCHY OF LANCASTER -VS- L & N. W. RLY [1892] 3 CH 278: REPUBLIC OF PERU -VS- PERUVIAN GUANCO CO.** [1887] 36, CH D 489 at 498 and where the only ground on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (**WENLUCK -VS- MOLONEY [1965] W. L. R 1238 [1965] 2 ALL ER**

871, C.A. But in an application on any other ground mentioned in the rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and is ordinarily used."

It is clear from this extract in the Supreme Court Practice that an application under rule 13 (1) (a) that the suit discloses no reasonable cause of action does not admit of any evidence by affidavit or otherwise. Only concise grounds upon which the application is grounded is permitted. Unfortunately it does not provide on how the Respondent is to reply to such an application. I am not even sure of what the learned judge of Appeal and later Chief Justice of Kenya (the Hon. Mr. Justice Madan) meant in the **D. T. DOBIE -VS- MUCHINA** (supra) case in his dicta - at page 8 paragraph 40 that "**while evidence is not permitted in the case of the first application, it is permitted in the case of the second application.**"

Miss Kilonzo hazarded a submission that the phrase meant that it is the applicant who is precluded from adducing any evidence in an application to strike out, (that is the first application), but that the Respondent is not precluded from doing so (the second application). On the first leg of her interpretation, I concur with her, and I do so only on the basis that the rule requires the applicant to give or set out concise grounds upon which it is made. I cannot say what the basis of adducing evidence by affidavit would be except perhaps by reference to the Respondent's Replying Affidavit and in which event one would conclude by saying that whereas the applicant may only set out concise grounds of his application, the Respondent may respond thereto by way of a Replying Affidavit. There are several reasons for making this conclusion.

Firstly, the Plaintiff the basis of the suit is itself verified on oath by a Verifying Affidavit so technically all the averments in a Plaintiff are affirmed by the Verifying Affidavit, and a Plaintiff without a Verifying Affidavit is incompetent and is liable to be struck out. So a response by way of an Affidavit to an application for striking out a plaintiff is in my view permissible.

Secondly, if I be wrong on the first proposition, indeed Order L rules 1 and 16 (1) puts the matter beyond doubt. Order L is entitled - **MOTIONS AND APPLICATIONS**, and rule 1 provides -

1. All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court and Rule 16 (1) says.

(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a Replying Affidavit if any, not less than three clear days before the hearing date.

The 2nd and 3rd Defendants applications are both commenced by Chamber summons because it is so provided under order VI rule 16, and comply both with that rule and Order L, rule 1. Rule 16 of Order L prescribes the manner in which a respondent may reply to an application whether such an application is by way of Motion other applications - these include Chamber Summons, Originating Motions or other originating process. The respondent who wishes to oppose any motion or other application is enjoined to file and serve a replying affidavit or grounds of opposition if any.

In summary therefore, under Order VI Rule 13 (2) an application to strike out pleadings under Rule 13 (1) (a) (for disclosing no reasonable cause of action) must be supported by concise grounds and affidavit evidence is expressly precluded on the part of the applicant not the respondent. Secondly, the Respondent is, under the **dicta** of Madan J. A. (as he then was) in the case of **D T DOBIE & CO. KENYA LTD. - VS- MUCHINA** (supra), permitted to respond by way of an Affidavit. Thirdly, if there was any doubt on this question Order L rule 16 (1) expressly permits **any respondent who wishes to oppose any motion or other application** do so by way of a replying affidavit or grounds of opposition.

In the result therefore, the Plaintiffs' Affidavits by **Jared Benson Kagwana** sworn and filed on 24.11.2004 and filed on 25.11.2004 and sworn on 3.02.2005 in response to the 2nd and 3rd Defendants' Chamber Summons dated 22.10.2004 and 27.10.2004 are admissible and competent for purposes of proceedings under Order VI rule 13 (1) (a) and 13 (2) of the Civil Procedure Rules.

Dated and Delivered at Nairobi this 17th day of February 2005.

ANYARA EMUKULE

JUDGE