REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 54 OF 2005

MARY WANJIRU NGURU …… PLAINTIFF

- Versus -

STELLA SEKI …….. DEFENDANT

R U L I N G

This is an application by the defendant seeking to strike out the plaint filed herein. It is expressed to be brought under Order 4 Rules 6, 13 and 16 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of law. Mr. Kibara, counsel for the plaintiff, submitted that these provisions do not exist and the application is therefore incurably defective.

In response to that Mr. Magolo, counsel for the defendant, submitted that it is clear the application is brought under Order 6 Rule 13 of the Civil Procedure Rules and that the citing of Order 4 Rules 6, 13 and 16 is clearly a typographical error curable by Order 50 Rule 12 of the Civil Procedure Rules. He urged me to find that the application is properly before the court and proceed to rule on its merits.

The provision of Order 50 Rule 12 is well known to all legal practitioners but it bears repeating it here. It states:-

"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

Clearly this rule deals with a situation where the provision under which an application is made has not been stated. It does not cover a situation where a wrong provision has been cited.

In this case the defendant did not only cite a wrong provision of law but also one which does not exist. Instead of seeking to amend counsel boldly submitted that the application is proper. I hold that where a wrong provision of law is cited and no attempt is made to amend and state the correct provision the affected application stands incurably defective.

Even if the application were not fatally defective the same is for dismissing. It is trite law that when dealing with a preliminary objection that a plaint does not disclose a cause of action, only the plaint should be looked at – **Nyagah Vs Nyamu [1976] KLR 73**. And looking at the plaint if it is clear on the face of it that the claim is not maintainable or that an absolute defence exists then the court will strike it out. A pleading will, however, not be struck out if it is merely demurrable. It must be so bad that no legitimate amendment can cure the defect.

In this case the main objection taken is that the alleged defamatory words have not been stated. The plaintiff has however stated in paragraph 8 of the plaint that she intends to seek leave to amend the plaint and set out the defamatory words once she is able to get access to the police file. In my view if such an amendment is made the plaint will be proper.

This suit was filed only on 10th March 2005. It cannot therefore be said that the plaintiff has delayed in seeking leave to amend.

For these reasons the defendants application dated 5th May 2005 is hereby dismissed with costs.

DATED and delivered this 17th day of June 2005.

D.K. MARAGA

JUDGE