REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 513 of 2004

YASMIN AMIRALI SHARIFF ……...……..……1ST PLAINTIFF

ZULOBIA HASSAN FATEHALI DHALL..…...…….……2ND PLAINTIFF

SHAHIN AMIRALI SHARIFF (of unsound mind suing by her sister and next of friend

ZULOBIA HASSAN FATEHALI DHALLA ……..…..……3rd PLAINTIFF

VERSUS

KENLIFE PROPERTIES LIMITED…….……...……1ST DEFENDANT

HABIB BANK LIMITED……..……...…….2ND DEFENDANT

SHIRINKHANU SHARIFF ……..……...3RD DEFENDANT

RULING

The plaintiff filed a chamber summon dated 23rd November 2004, which was brought under section 3A of the Civil Procedure Act and Order VI Rule 13 (1) (b) and Rule 16 of the Civil Procedure Rules.

The plaintiff's seek the following prayers: -

(1) That the contents of paragraphs 4,5,6,7,8,9,10,11,12,13,14,15,16,17,18 and 19 of the First Defendant's defence be struck out.

(2) That the contents of paragraphs 2,3,4,5 and 6 of the second defendant's defence be struck out.

(3) That the judgment be entered for the plaintiffs in terms of prayer (a) (b) (c) and (j) of the plaint.

(4) That the suit be fixed for formal in respect of the remaining prayers in the plaint.

Before that application could be heard the 1st defendant raised three grounds of preliminary objection on points of law. I intend to deal with each ground of objection at a time. The first ground of preliminary objections is;

"That the orders sought cannot be granted as the application is founded upon a contention that the

defence is not "sustainable."

The 1st defendant's counsel argued that the plaintiff, in the application had stated in one of the grounds in support of the application, that, **"the defences of the first and second defendants are not sustainable."** This word, unsustainable, counsel said, is also repeated in the affidavit in support. That the order 16 Rule 13 (1) (b) does not have, as one of the grounds of striking out the defence, that it is **"sustainable"**. Counsel stated that the plaintiff can only come under a ground known in order 16 Rule 13 and that it was not open to her to introduce another ground or category for striking out. On this argument counsel relied on the case D.T. DOBIE & COMPANY (KENYA) LIMITED – VERSUS – MUCHINA [1982] KLR 1. Counsel referred to the following portions of that case.

"In the instant case before us, the second defendant's application stated that the plaint disclosed no cause of action against the second defendant while the rule provides that a pleading might be struck out, not on the ground that it discloses no cause of action, but on the ground that it discloses no reasonable cause of action. The second defendant's application was therefore incompetent."

> **"An affidavit sworn by the General Sales Manager…….in support of the second application under sub-rule (d) that the plaintiff's suit was only an abuse of the process of the court. By itself, this part of the application was also incompetent for sub paragraph (d) requires that the pleadings are otherwise an abuse of the process of the court. Counsel engaged himself in redrafting both sub paragraph (a) and (d) while preparing the application."**

In response, plaintiff's counsel said that the plaintiff had satisfied the requirements of Order 50 Rule 12. Having cited the relevant rules the plaintiff relied on, plaintiff's counsel said that the application showed grounds upon which the plaintiff relied on to show that the defence was frivolous, scandalous and vexatious, that the one of those grounds was that the defences were unsustainable.

I have considered this first objection I find that the same must fail. The plaintiffs, in the body of their application state the rule they rely upon, then pray that certain paragraphs of the 1st and 2nd defendant's defences "be struck out." Order 6 Rule 13 does not require that the body of the application must repeat verbatim, its wordings to succeed, I find that it suffices if an application seeks for the striking out of a pleading after citing the appropriate rule. The only requirement perhaps is that an applicant make an election whether he relies on the grounds of scandalous, frivolous or vexatious. But I, on that issue, do also find myself persuaded by the ruling Justice Ringera (as he then was) in the case MPAKA ROAD DEVELOPMENT COMPANY LIMITED – VERSUS – ABDUL CAFUR KANA t/a ANIL KAPURI PAN COFFEE HOUSE HCCC (MILIMANI) NO. 318 OF 2000

> The Judge stated: -
>
> **"Obviously it would annoy or tend to annoy if it was not serious or contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and or frivolous pleading is Ipso facto vexatious."**

The 1st defendant did not raise an objection on the plaintiff's failure to elect which ground in sub-paragraph (b) she was relying on.

I have considered the authority of the D.T. DOBIE case cited by the 1st defendant and I find that the authority did not make it clear whether the redrafting of the subparagraphs occurred in the body of the application or else where. I also find that the judges of the court of appeal, on page 10, thereof, stated, "**by itself, this part of the application was also incompetent**." Does that mean that, that was the only ground on the application, and hence when it failed, the application had to fall. It is difficult to ascertain that from the authority. Suffice it to say that this ground of objection fails. The second ground of preliminary objection stated: -

"The affidavit in support contains hear say evidence and can only be struck off."

The 1st defendant's counsel drew the court's attention to the various paragraphs of the plaintiff's supporting affidavit where the deponent stated some time, "I am advised by the advocate on record M/s Shapley Barret & Co.", further stated "I am further advised by the said advocates" and also stated "I am advised and verily believe." 1st defendant's counsel argued that the said paragraphs contained hear say evidence which requires to have the source disclosed, if this was an interlocutory application as per **Order VIII Rule 3** of the Civil Procedure Rules. But counsel further argued that since the present application was not interlocutory, by the nature of the prayers sought, the more the reason why hear say evidence should not be allowed. Counsel sought that those offending paragraphs be expunged. Counsel relied on the case ROSSAGE – V – ROSSAGE AND OTHERS [1960] 1 ALLER, 660. The court held in this case in case where the orders sought were to decide the rights of the parties, hear say evidence would be inadmissible. The court also held that since the proportion of the irrelevant information in the affidavit, to the relevant information was so high the affidavit was struck out entirely.

The 1st defendant did request that the plaintiff's affidavit be struck out for containing hear say evidence without disclosing source on numerous paragraphs. 1st defendant also relied on the case HCC NO. MILIMANI 1595 OF 2001 HARDIAL SINGH HUNJAN & ANOTHER – V – GLAD AK FINANCE LTD & ANOTHER. Where Justice Mbaluto held that; **"It is therefore unsafe and unsatisfactory to rely on such hearsay evidence in a matter where final orders are sought."**

Plaintiff's counsel responded by saying that what is categorised as hearsay, by the 1st defendant, was indeed legal advise given to the plaintiff by her counsel, and the court, was not in any case, bound by that advise. He said that the plaintiff stated the source to be the advocate at paragraph 8 of the affidavit and thereafter where the plaintiff failed to state source it was clear that the source of the advise was her counsel. He ended his response by stating that the court can strike out the paragraphs it finds offend their rules.

The paragraph targeted by this objection state that the deponent is '*advised and verily believes that it is true*.' The concise Oxford English Dictionary defines the word, 'advise' as recommend (a course of action). Offer advise to. "Inform about a fact or situation." It is clear from that definition that it can either be to recommend course of action or inform. Counsel for the plaintiff argued that the plaintiff was offered legal advise.

I have looked at those affidavits and a part from 37, I find that the plaintiff simply repeat the legal advise offered to her. I find that such advise cannot offend **OXVIII Rule 3**, particularly when one considers the definition hereof of advise. I do therefore reject the 1st defendant's objection on the basis that a counsel's advise cannot offend OXVIII Rule 3 and also because **OXVIII Rule 3** grants the court, a discretion to grant a party leave to rely on hearsay evidence without disclosing the source.

The third ground of objection is that: -

> **"The application seeks a pre-trial evaluation of the respective pleadings, a procedure unknown to the law."**

1st defendant counsel made a statement that "*in our jurisdiction the law does not allow trial by affidavit on contested issues and facts"* he relied on the case WENLOCK – MOLONEY AND OTHERS [1965] ALLER 871, and quoted the following: -

> **"There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute to try the issues in this way is to usurp the functions of the trial judge."**

The plaintiff's counsel responded by stating that in application such as this it was necessary for the court to look at the pleadings.

I find that I must also reject this ground. This ground seeks the court to look at the affidavits and

pleadings and make an assessment whether the issues raised therein, merit to decided or oral or affidavit evidence. That is to seek this court to invoke its discretion in reaching such a conclusion, and it would not be proper for a preliminary point. I therefore reject it.

The court's order is that the 1st defendants preliminary objection dated 6th November 2005 is dismissed with costs to the plaintiff.

Dated and delivered this 28th day of November 2005.

MARY KASANGO
JUDGE