



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

Civil Suit 862 of 2000

SAFEPACK LIMITED 1ST PLAINTIFF

TUSHAH SHAH 2ND PLAINTIFF

DINESH SHAH 3RD PLAINTIFF

VERSUS

GUL CHEMICAL INDUSTRIES LTD 1ST DEFENDANT

M. HASSAN MANDANI 2ND DEFENDANT

RULING

In this application, made under Order 6 Rule 13 (1) (a) of the Civil Procedure Rules, the applicant wants the suit against the 2nd defendant struck out with costs, on the ground that the Plaintiff discloses no reasonable cause of action against him.

In an application under this rule, no evidence is admissible, and the matter is determined by simply looking at the pleadings to assess whether it discloses a reasonable cause of action. Mr Kibet, Counsel for the Applicant, submitted that the complaint in this action is against the 1st Defendant, as is evident from the demand letter issued to the 1st Defendant. According to him, the only reference to him is in paragraphs 5 and 7 of the Plaintiff, and those references do not constitute a cause of action.

Ms Mungai, Counsel for the Respondent, submitted that the cause of action against the 2nd Defendant arose in paragraphs 10 and 11 of the Plaintiff. I would agree with her. It is clear from the Plaintiff that there are two distinct claims: the first clearly for goods sold and delivered against the 1st Defendant; and the second for general damages for libel against both the Defendants. There is, in my view, a reasonable cause of action disclosed against the 2nd Defendant.

In any event, the Court's summary powers should not be invoked except in very clear situations.

Madan, J A, as he then was, has placed the law of striking out the pleadings in proper footing in the case of *D. T. Dobie & Company (K) Limited vs Muchina & Another (Civil Appeal No. 37 of 1978)*. He stated:

“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” .

He has adopted various definitions of a cause of action and one of them is as per Lord Pearson who observed that **“a cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”**

In ***Trade Bank Ltd vs Kersam Ltd (HCCC # 6662 of 1991 – Nairobi)*** Pall, J, (as he then was) stated that “the exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable.”

In ***Samuel Gitonga vs Peter Mugweru (HCCC # 3356 of 1989 – Nairobi)*** Bosire, J (as he then was) said “striking out pleadings is a draconian measure. It must and can only be done in the clearest of cases – viz. where it is clear that the defence or plaint as the case may be is beyond resuscitation by amendment.”

This is clearly not one of those situations where the Court should invoke its summary jurisdiction.

Accordingly, the application dated 5th February, 2005 is dismissed with costs to the Respondent/Plaintiff.

Dated and delivered at Nairobi this 15th day of November, 2005.

ALNASHIR VISRAM

JUDGE