



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 140 OF 2003**

**VINODEEP INVESTMENTS PROPERTY LTD..... PLAINTIFF/APPLICANT**

**VERSUS**

**HENKEL POLYMER CO. LTD.....1ST DEFENDANT/RESPONDENT**

**RUTH N. HENKEL.....2ND DEFENDANT/RESPONDENT**

**CAROLINE V. HENKEL.....3RD DEFENDANT/RESPONDENT**

**RULING**

By Notice of Motion of 7th November, 2003 brought under Orders XXXV rule 1(1) (a) and (2) VI rule 13(1) (b), (c) and (d) L rule 1 of the Civil Procedure Rules, the Plaintiff applied for certain Orders to be issued by the Court:

(i) summary judgement against the Defendants as prayed in the Plaint of 10th February, 2003 and filed on 14th February, 2003; or in the alternative,

(ii) striking out of the Defendants' Statement of Defence dated 14th April, 2003 and filed on 15th April, 2003 – on grounds that the Defence is scandalous, frivolous and vexatious; likely to embarrass or delay the fair trial of the Plaintiff's suit; an abuse of the process of the Court.

To the Plaint of 10th February, 2003 the Defendants duly responded with their Memorandum of Appearance of 31st March, 2003 and with their Statement of Defence of 14th April, 2003. The Plaintiff filed a Reply to Defence on 28th April, 2003. On 7th November, 2003 the Plaintiff filed the Notice of Motion application which is the subject of this Ruling. On 24th November, 2003 the Notice of Motion application was duly served on the Advocates on record for the Defendants, M/s Muturi Gakuo & Co. Advocates and this is evidenced by the Affidavit of Service of Samuel Githui Kariungi dated 8th December, 2003 and filed on the same date.

The Notice of Motion was accompanied by the Supporting Affidavit of Vimal Vidodrai Radia sworn on 7th November, 2003 and filed on the same date. To this affidavit were annexed several documents as follows:

(i) copy of Indenture of Assignment in respect of L.R. No. 37/88 (original number 37/2/23), between Haven Court Ltd. and Vinodeep Investment Properties Ltd., and in favour of the Plaintiff/Applicant;

(ii) copy of lease dated 4th December, 1997 between Haven Court Ltd. and Henkel Polymer Co. Ltd. (1st Defendant) and with respect to L.R. No. 37/88 (original number 37/2/23) – under which the 1st Defendant was a tenant of Haven Court Ltd.;

- (iii) copy of an Investment of Guarantee accompanying the lease (in (ii), above), executed between Haven Court Ltd. for the one part, and Ruth N. Henkel (2nd Defendant) and Caroline V. Henkel (3rd Defendant) for the other part;
- (iv) copy of a letter by the Executive Chairman of Henkel Chemicals (EA), Mr. H.R.W. Henkel to the Management, Vinodeep Towers, dated 1st April 1999 and giving three months notice to terminate lease;
- (v) copy of a letter from the Directors of Vinodeep Investment Properties Ltd. (the Plaintiff) to the Managing Director of Henkel Chemicals, dated 7th April 1999, stating: “We would... like to inform you that your lease does not have any provision for a break clause and therefore we cannot stop you from leaving, but you would either have to pay the remaining rent up to the expiry of the lease or get us another tenant...”;
- (vi) copy of letter dated 26th April, 2000 from Chief Accountant of Henkel Chemicals to Managing Director of Vinodeep Investment Properties Ltd (Plaintiff) regarding proposed negotiations on rent reduction. The letter refers to “the year 2002 when the lease is supposed to be revised”;
- (vii) copy of letter from Director of Plaintiff to first Defendant, dated 18th October, 2000 and recording that the rent reduction negotiations which had taken place on the same day (18th October, 2000) had been unsuccessful, and reminding the Defendants that the rental invoices for October, November and December, 2000 together with invoice No. 224 for electricity and water for September were still outstanding;
- (viii) Defendants now raised objections to noises at the business premises, for which the Plaintiff was apparently responsible: Mr. H.R.W. Henkel’s letter to the Director of the Plaintiff, dated 19th October, 2000;
- (ix) copy of notice letter from H.R.W. Henkel to Plaintiff as landlord, dated 2nd March 2001 objecting to the noise and stating : “we shall hand this matter over to our lawyer, and extend to you a premature notice of our rent contract immediately on the next re-occurrence.”
- (x) copy of a letter dated 11th July, 2001 from Defendant to Plaintiff, indicating: “Although our lease... is only expiring on 31st December, 2001, we were forced to start vacating our second floor office...”;
- (xi) copy of first Defendant’s letter to the Plaintiff dated 20th July 2001 informing the Plaintiff that, due to defects in the rented premises, all management staff of the Defendant have already been re-located, leaving only the department of accounts and general administration in the Plaintiff’s building;
- (xii) copy of letter from H.R.W. Henkel and Karoline Henkel dated 20th September, 2001 to Director of the Plaintiff, indicating that extra expenses had been incurred by the lessees due to the unsatisfactory conditions of the leased premises;
- (xiii) copy of Plaintiff’s letter to Defendant dated 25th September, 2001 giving excuses on the state of disrepair, particularly of the lift. But the letter says the lease has no mention of a functional lift;
- (xiv) copy of Plaintiff’s letter to the Defendant dated 26th September, 2001 –making some sort of apology regarding the non-operational lift;
- (xv) copy of Defendant’s letter to Plaintiff dated 26th September, 2001, complaining about the rent charged and about the bad state of leased premises;

(xvi) copy of Defendant's letter to Plaintiff dated 27th September, 2001 – "it is now a matter of urgency, with the rent payment being overdue, that you offer to us a fair compensation... with you not being able to maintain the absolutely essential lift operation, the cause of our problems"; (xvii) copy of letter from Defendant to Plaintiff dated 1st October 2001 – notice that the offer of a new lease after 31st October 2001 will not be taken up by the Defendant;

(xviii) copy of letter dated 8th October, 2001 from Defendants' lawyers, M/s Ochieng Oduol & Co. Advocates to the Plaintiff – stating the decision not to renew lease on expiry on 31st December, 2001. The Advocate stated: "Our client further points out that the tenancy period has been characterised by a series of fundamental breaches of such a magnitude as would raise a set-off against the outstanding rent";

(xix) copy of the response to the letter of 8th October, 2001 of the Defendants' Advocate, dated 17th October, 2001 and coming from Plaintiff's Advocates. The Plaintiff was disputing the set-off demand by the Defendant;

(xx) copy of letter from Plaintiff's Advocate dated 30th October, 2001 to Defendants' Advocate demanding payment of outstanding rent arrears;

(xxi) copy of letter from Plaintiff's Advocate, dated 19th December, 2001 to Defendants' Advocate demanding repairs and restoration to the leased premises before the termination of the lease;

(xxii) copy of letter from Plaintiff's Advocates dated 20th November, 2002 to the Defendants making demand for payments amounting to Kshs.2,685,874/20;

(xxiii) copy of Defendants' handing-over notes, dated 25th April, 2002 to the Plaintiff;

(xxiv) copy of letter of 29th April, 2002 from Plaintiff's Advocate to Defendants, contesting the quality of repairs to the suit premises; (xxv) copy of letter from Plaintiff's Advocates dated 3rd January, 2002 complaining to Defendants' Advocates that the Defendants had not yet vacated the premises; he stated that mesne profits would be demanded;

(xxvi) copy of letter dated 27th June, 2002 from Defendants to Plaintiff's Advocates, indicating that: "our lease expired in December, 2001 and we are therefore under no obligation to pay rent for 2002".

It is clear from the record, a point also taken up by counsel for the Plaintiff on the occasion of the hearing of the Notice of Motion application, that the Defendants neither filed nor served any Grounds of Opposition or Replying Affidavits. Counsel submitted, on that account, that all the averments and all the claims of the Plaintiff were uncontroverted and hence there was no basis for entertaining any case on behalf of the Defendant.

Should this Court, on that basis, strike out the Defendants' Statement of Defence? I think it would in principle not be right, in the absence of the most weighty considerations, to lightly strike out the Defence because of a failing in respect of an interlocutory application such as the Notice of Motion Application under consideration. It is from the full hearing of the suit, based on the Plaintiff and the Statement of Defence, that ultimately the justice of this case must be expected to emerge. In order, therefore, for the Defence (or indeed the Plaintiff, had there been an application for such) to be struck out in the course of an interlocutory application it must be shown manifestly that the Defence clearly discloses no cause of action. If I were to hold that the Statement of Defence in this case does not stand to be struck out, then any dispute between the parties would have to be settled at the instance of the Plaintiff, through the prosecution of the main suit, with the eventual outcome going either way. It follows that the Defendant's non-response to the Notice of Motion application is by no means fatal to that party's case.

I have to deal, in relation to the Application, with the principles of law that relate to the striking out of

pleadings. Counsel for the Plaintiff did draw the Court's attention to several authorities and I have had the opportunity to accord them due consideration. In *ROYAL CREDIT v. SAMUEL MADOKA*, Civil Case No. 6240 of 1992, the Plaintiff had applied for summary judgement against the Defendants for a sum of Kenya Shillings 579, 939/80 with costs and interests as prayed in the Plaint, and the Plaintiff sought that the Defence be first struck out. The Honourable Mr. Justice Moiwo Ole Keiwua held as follows:

**“In those circumstances I hold that there is no defence to the Plaintiff's claim and the one filed is a sham and constitutes an abuse of the process of the Court as there are no triable issues. It is struck out as urged and judgement as prayed in the Plaint is entered for the Plaintiff...”**

The emerging principle here is that a Defence can indeed be struck out if it does not raise any triable issues and, on this account, amounts to an abuse of the process of the Court.

In *MUGUNGA GENERAL STORES v. PEPCO DISTRIBUTORS LTD.* (1987) KLR 150, the Plaintiff had applied for summary judgement against the Defendant, under Order XXXV of the Civil Procedure Rules.

In the High Court, judgement was entered *ex parte* in favour of the Plaintiff; and thereafter the Defendant applied to the same Court unsuccessfully for the setting aside of the judgement. This position was upheld in the Court of Appeal (Platt, Gachuhi & Apaloo, JJA). In the words of the Court:

“[Order XXXV rule 6] provides that if it appears to the Court that any Defendant has a good Defence, then he may be allowed to defend, while if there is not a good defence, the Plaintiff shall be entitled to judgement. In this case the Defendant had put no Defence upon the record by affidavit or otherwise. The *ex parte* judgement was regularly ordered by Schofield, J. as a consequence.”

The emerging principle is that, for the Defendant's case to survive upto the full trial, in the face of an adverse interlocutory application, the Defence must be a “good” Defence; and my understanding is that the Defence must not only exist in some form, but must also raise triable issues. If this is achieved, then the Plaintiff will not be allowed a striking-out of Defence.

The next case is *NJUKI v. COMMISSIONER OF LANDS AND FOUR OTHERS* [1987] KLR 46. In that case the Applicants brought an application by way of Chamber Summons, under Order VI rule 13(1), seeking an Order to strike out proceedings that had been filed by Originating Summons. The grounds proffered were that the four respondents were not entitled to any compensation in respect of the suit premises under the Land Acquisition Act (Cap. 295, Laws of Kenya), because the agreement for sale between the respondents and the Applicant's father whereunder the respondents were claiming, did not have the consent of the Land Control Board. It was further argued that the respondents were not entitled to any compensation because even if the agreement was held to be valid, the respondents would be entitled only to a refund of money paid under the agreement, in the event that it failed. The learned Judge, Owuor, J., declined to strike out the proceedings and remarked as follows:

“The practice in our courts which is now well established is that the court will only exercise its discretion under [Order VI rule 13(1) (a)] when it is satisfied that the Defence on record, in this particular case the replying affidavit, does not raise any triable issues at all.”

In *WACHIRA WARURU AND ANOTHER v. FRANCIS OYATSI*, Civil Appeal No. 111 of 2000 the Court of Appeal (Gicheru, Kwach and Shah, JJ.A.) had to deal with the same subject – the striking out of pleadings. The respondent had filed an application by Notice of Motion, in the High Court, seeking to strike out the whole Statement of Defence on the ground that it was scandalous, frivolous and vexatious. He also sought an Order for entry of judgement on liability. The learned Judge (Patel, J.) held as follows:

“Having considered the application dated 5th November, 1999, filed on 9th November, 1999 with care I am satisfied that the Plaintiff/Applicant is entitled to [the] Order asked for therein. Indeed it

[may] be noted that the application is not opposed. I make the Order as prayed for in prayers Nos. 1, 2 and 3 of the application.”

The Court of Appeal reversed this decision. Among the authorities the Court relied on was WATERS v. SUNDAY PICTORIAL NEWSPAPERS LTD. [1961] 2 ALL ER. 758, where Wilmer, L.J. had remarked (P.761):

“It is well established that the drastic remedy of striking out of a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been conceded before us that the rule applies only in plain and obvious cases. It is perhaps not without significance that we managed to spend the whole of the day yesterday in listening to an argument whether or not the matter objected to did set up an arguable case. For the purposes of this appeal, we are not in any way concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine . I have come to the conclusion, in relation to each of the four headings, that it is quite impossible for us to take this drastic course.”

In agreement with this principle, the Court of Appeal quashed the decision of the Court below, making the following remarks:

“It is not clear...what was carefully considered by the learned Judge. We would presume he considered the Plaintiff, the application, the affidavit in support thereof and the annexures thereto. He does not say so. Why we say this is obvious. Striking out of a defence is a drastic remedy and it is incumbent upon a Judge to give good reasons for doing so.”

From the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a Statement of Defence be entertained:

- (i) because such an act is fatal to the litigious initiative of the Defendant, and could well embody the seeds of injustice for the party;
- (ii) it is a requirement, for the striking out of a Defence, that it be ascertained that the Defence discloses no arguable case, carries no triable issues; (iii) a decision to strike out a Defence should, on the whole, be taken only in plain and obvious cases which will not require the adduction of evidence and the making of submissions in a full hearing;
- (iv) the decision to strike out a Defence should not be based on the unlikely success of the Defence case.

I must now ask the following questions, in relation to the present application:

- (a) Is the Statement of Defence so simple, so plain, that it can straightaway be discerned that it lacks arguable, triable issues?
- (b) In the light of the content of the Plaintiff’s application by Notice of Motion, is there a danger of the Court being influenced by a perception that the Defence would be unsuccessful in the main suit?
- (c) In the light of the content of the Statement of Defence, and of all the correspondence between the Defendants and the Plaintiff already set out above, is it fair to the Defendants to strike out their case in limine and to enter judgement for the Plaintiff?
- (d) Would it be right to strike out a Statement of Defence just because when it was impugned in an interlocutory application, the Defendant failed without good cause to respond to that application?

The Statement of Defence is a long document of 20 paragraphs, each addressing the specific assertions in the Plaintiff's Statement of Defence. The Statement of Defence questions cardinal aspects and premises of the Plaintiff – such as the Plaintiff's locus standi (para.4); the implied terms of the contract (para.18); the financial responsibility for improvements to the suit premises (para.7); the date of the handing over of the suit premises from lessee to lessor (para.11); the question whether set-offs might be effected against rents falling due, on account of alleged defects in the suit premises.

The complexity of some of these questions is more than evident from the letters and documents pertaining to the lease of the suit premises, attached to the Supporting Affidavit accompanying the Notice of Motion application.

A careful consideration of all these circumstances raises serious doubts as to whether the Defendants' case can be stopped in limine by an interlocutory application. I think it would be a serious error to do so, as this would not only be inconsistent with the established principles guiding summary judgements and regulating the striking out of pleadings, but would also be profoundly unfair to the Defendants.

It is my observation that the critical subject in the determination of the justice of a case is the suit itself, as it may be prosecuted inter partes and through evidence. Consequently an interlocutory application such as the present one must be regarded as subject to the merits of the main suit; and where the Defendant's case has merits at the forthcoming trial stage, it cannot be pre-empted by the technicalities of an interlocutory application the gravamen of which is only or mainly that the Defendant failed to respond.

Consequently I make the following Orders:

1. Prayer No. (i) of the Plaintiff's application by Notice of Motion of 7th November, 2003 is not granted.
2. Prayer No. (ii) of the Plaintiff's application by Notice of Motion of 7th November, 2003 is refused.
3. The Plaintiff/Applicant shall bear its own costs in respect of the application.

**DATED and DELIVERED at Nairobi this 13th day of February, 2004.**

**J. B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J., Court clerk: Mwangi**

**For the Plaintiff/Applicant: Mr. Mogeni, instructed by Ramesh Manek Advocate**

**Defendants/Respondents: Unrepresented**