



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL SUIT NO. 113 OF 1994**

**KENYA COMMERCIAL BANK LTD ..... PLAINTIFF/RESPONDENT**

**VS**

**SAABAH BARAKA BAKERY ..... DEFENDANT /APPLICANT**

**RULING**

Saabah Baraka Bakery, sought to strike out the plaintiff's defence to the counter-claim and for Judgment pursuant to the provisions of order VI rule 13 of the Civil Procedure rules. The summons contained the grounds it is based. It is also supported by the affidavit of Mohamed Ahmed Mohammed sworn on 22nd December 2003.

It is stated by the defendant that the defence to the counter-claim is a sham and discloses no triable issues. This was one of the grounds argued in support of the summons.

The plaintiff resisted the application by filing grounds of opposition dated 12th January 2004. It was argued by the plaintiff that the defendant's application is fatally defective in that the application does not specify the sub-rule under order VI rule 13 which this application is based.

It is also argued by the plaintiff that the defendant's affidavit contravenes the provisions of Order XVIII rule 3 (i) of the Civil Procedure rules. It was further stated that the annexures were not commissioned.

The defendant has also exhibited 2 annexures to show that the plaintiff breached the contract between them. It is these two documents which the defendant wants them struck out because they were not commissioned.

I have considered the submissions tendered by the learned advocates. I have also taken into consideration the pleadings placed before me. I have formed the opinion that there are three preliminary issues which should be disposed of first of first before going into the merits of the application.

The first issue is whether the application has been properly premised under Order VI rule 13 of the Civil Procedure rules. The provisions of Order VI rule 13 (I) (a) – (d) reads:

*“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: (*

*a) it discloses no reasonable cause of action or defence or*

*(b) it is scandalous, frivolous or vexatious, or*

(c) it may prejudice, embarrass or delay the fair trial of the action or

(d) it is otherwise an abuse of the process of the court; .....

Rule 13 (2) states:

*“No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.”*

It is clear from the above provisions of the law that the applicant must clearly state under which paragraphs he or she bases his/her application. This is so because under sub-rule 2, no evidence is required under paragraph (a). In this case the applicant did not cite the relevant paragraph.

I think the failure to cite the relevant paragraph renders the whole of this application fatally defective. I therefore agree with the submissions of Mr. Were for the plaintiff that the summons is incurably defective.

The other issue is whether the documents annexed to the affidavit of Mohammed Ahmed Mohammed were commissioned. I have carefully examined the documents annexed therein. What the commissioner did is to seal and mark a plain paper placed on top of the intended exhibit. This of course goes against the provisions of rule 9 of the oaths and statutory declarations rules. Rule 9 provides:

*“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”*

The wording is couched in mandatory terms. I therefore hold the view that the annexures attached to the applicant's affidavit are not properly commissioned. The same are improperly on record. Consequently I will order that they be struck out and expunged from record.

The third matter, which was drawn to my attention is that the deponent of the supporting affidavit has not disclosed the sources of his information. It is also averred that the deponent did not have authority to swear the affidavit in support of the summons. On the first limb it is clear that Mr. Mohamed Ahmed Mohammed did not disclose the sources of his averment in his affidavit contrary to the provisions of Order XVIII rule 3 (I) of the Civil Procedure rules. On the second limb Mr. Mohamed did not disclose whether he had authority from the defendant company to commence the application or institute the suit as required under Order III rule 2 (c) of the Civil Procedure rules. Consequently the summons and the affidavit in support are incompetent.

I find these three issues falling within the definition of a preliminary objection given in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. VS WEST END DISTRIBUTORS LTD (1969) E.A 659.**

In the final analysis the summons is ordered struck out with costs to the plaintiff.

**READ AND DELIVERED THIS 8th DAY OF March 2004**

**J.K. SERGON**

**JUDGE**