REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2122 OF 1999

KASSAM.....PLAINTIFF

VERSUS

BANK OF BARODA (KENYA) LTD.....DEFENDANT

RULING

By an application dated January 15, 2002, filed on January 17, 2001 by way of chamber summons under Order 6, rule 13(1), the plaintiff sought orders that the defendant's defence be struck out and judgment entered in favour of the plaintiff as prayed (presumably as prayed in the plaint in the suit). The application was founded on grounds that the defence has admissions, bare denials, raising no triable issues; and that it is frivolous, vexatious; and may prejudice, embarrass or delay a fair trial; and is otherwise an abuse of the process of the court. In addition, the plaintiff swore and filed an affidavit to elaborate and support his position.

After that application was filed, the defendant filed on January 28, 2002 its own application dated January 25, 2002, under Order 6A, rule 3, by chamber summons, seeking an order that the defendant do have leave to amend the defence in the manner shown in a draft of the proposed amended defence, annexed to an affidavit of an advocate from the defendant's firm of advocates, in support of the application. As it can be seen from the record, this application was filed more than one year after the plaintiff's application was filed in the year 2001. Indeed, this was after the plaintiff's application had come up six times in the year 2001 for hearing since early that year, but had been adjourned for a variety of reasons, including occasions to accommodate the defendant, and occasions when it had been indicated to the court that an amicable settlement of the claim was afoot, but now it is not spoken of in court.

In the application for leave to amend the defence it is said that the application is founded on a need to amend the defence to "enable the real question in issue between the parties to be raised on the pleadings". And, according to the affidavit of Joseph Gregory Nyamu supporting the application, "the real question in issue between the parties is whether the defendant did defame the plaintiff"; and it is necessary to amend the defence to enable the real question in issue to be raised on the pleadings and determined. It is said that the defendant has a meritorious defence and it is in the interest of justice to allow the defendant to amend the defence; for, to do so will not prejudice the plaintiff.

These two applications – one by the plaintiff, and the other by the defendant – were heard before the same judge in one sitting, and a decision was required on each one of them in this one ruling of the court. So this ruling is in respect of the two applications.

The applications are taken in a suit in which the plaintiff claims damages for an alleged libel by returning to a payee, unpaid, a cheque issued by the plaintiff, for the reason that title differed. Undeniably, the plaintiff who is an advocate of the High Court of Kenya, issued to the payee a cheque in the payee's

favour for Kshs 8,000, and drawn on the plaintiff's bank account at ABN-AMRO Bank in Nairobi; but when the following day the payee deposited the cheque with the defendant bank (Bank of Baroda (Kenya) Ltd) for clearance of the cheque with ABN-AMRO Bank so as to credit the proceeds thereof to the payee's account with the defendant bank, the defendant returned the cheque to the payee, with a debit advice to the payee signed by a manager of the defendant bank stating, in relation to the debit of the said sum of shs 8,000, that the payee was to note that the defendant bank had debited that amount to the payee's account as per particulars set out in the said debit advice by the defendant bank; and those particulars were:

> "To amount of your cheque deposited on 31.8.'99 Unpaid, reason: 'Title Differs''…… Kshs.8,000".

The plaintiff complains to the court in his plaint that the action of the defendant bank in returning the cheque unpaid and for the stated reason, meant that the cheque was duly presented by the defendant bank, for clearance, to the plaintiff's bank which declined to honour it, returning it to the defendant bank for the aforesaid reason, thereby questioning the plaintiff's title in relation to the cheque. He complains that the effect of the reason appearing in the debit advice, on the payee, was to induce in him a belief that the plaintiff had issued to the payee a dead cheque which had no or no proper title, thus leading to its dishonour by the bank upon whom it was drawn.

It was pleaded in the plaint that the payee sent the said cheque back to the plaintiff under a covering letter stating that he (payee) was surprised that an advocate of the plaintiff's standing had his cheque unpaid, and that the payment must be in cash, which, to the plaintiff, showed that the payee no longer had trust of faith in a cheque drawn or issued by the plaintiff. So the plaintiff paid in cash in lieu of the cheque, very much to his embarrassment and humiliation. And yet the plaintiff had sufficient funds to the credit of his account with his bank upon which the cheque had been drawn, and there was no apparent defect of title or any other irregularity on the face of the unpaid cheque. His bank denied that the cheque was ever presented to it for clearance, and assured the plaintiff that the cheque would have been duly and promptly honoured if it had been presented for payment; but it was never presented by the defendant to the plaintiff's bank for clearance, and was returned by the defendant bank to the payee, with a false allegation published to the payee, impugning the plaintiff's integrity and bona fides. The plaintiff's position is that the words complained of are defamatory of him and have degraded and disparaged him, and in consequence he has been injured in his character, credit and reputation, and has suffered damage.

A written statement of the defence, which is sought to be amended, by the defendant, and to be struck out by the plaintiff, was filed denying all allegations of defamation, and stated, among other things, that the plaint'"is misconceived and does not disclose any cause of action and should be dismissed with costs". In it, the defendant made no reply to the plaintiff's allegation in his plaint, that he issued to the payee the cheque for Kshs 8,000 drawn by him on his account with his bank. The defendant admitted the plaintiff's pleaded facts that the payee deposited the cheque with the defendant for clearance with the plaintiff's bank and for the proceeds to be credited to the payee's account with the defendant bank, but the defendant returned the said cheque to the payee, with the debit advice addressed to the payee who received it, refusing to clear and pay, as earlier stated above.

The defendant in its defence, however, denied the meaning ascribed to its action by the plaintiff; the payee's subsequent reference to the plaintiff and insistence on payment in cash, and loss of trust or faith with the plaintiff, and the latter's cash payment in lieu of the cheque; the sufficiency of funds on the plaintiff's account with his bank and the absence of defect or irregularity on the face of the cheque, and the failure by the defendant to present the cheque to the plaintiff's bank for clearance; the falsity of the representation to the payee by the defendant; and the false implication that the plaintiff had no or no proper right or title to the issued cheque, thereby impugning his integrity and bona fides; as well as the defamatory nature of the words in the writings of the defendant. These denials are carried in paragraph 6 of the defence, as follows:

> "6. The defendant denies the contents of paragraphs 6,7,8,9,10 and 11 of the plaint and puts the plaintiff to strict proof thereof".

This paragraph is followed by the seventh one, in which the defendant states that the said cheque was payable to a third party as the defendant did not have an account in the name of the third party. What is meant by that is not clear. The defendant further stated that the cheque was returned because it could not be cleared to the drawee bank since the defendant does not allow third party cheques in savings account. In addition, the defendant denied that the plaintiff suffered damage "since there is truth and justification in the words" complained of. So, as far as the defendant is concerned, the plaintiff's demand and notice of intention to sue are of no consequence because the defendant does not admit liability.

The pleadings of the parties were in the above outlined state when the plaintiff sought an order to strike out the defence, and the defendant in turn sought the leave of the court to amend its statement of defence.

The proposed amendments to the defence were to reflect a change of advocates acting for the defendant; striking out paragraph 4 of the defence which said that the defendant makes no reply to paragraph 3 of the plaint (regarding the issuance of the cheque by the plaintiff to the payee) and instead to admit the issuance as alleged in the plaint; to include a new paragraph 6 in which the defendant denied that the words "Title Differs" referred to or were understood to refer to, or were capable of referring to the plaintiff. The defendant seeks to include in its written statement of defence the following matter:

> "6 (a) Further if which is denied the said words were understood to refer to the plaintiff it is denied that they bore or were understood to bear or were capable of bearing the meanings pleaded in paragraphs 8,9,10 and 11 of the plaint or any meaning defamatory of the plaintiff. In particular for a cheque to be understood to be unpaid, it must bear such words on the cheque face and it must have been presented to the paying bank and the cheque complained of was never presented and it did not on its face bear the words "unpaid". The meaning and understanding conveyed in the plaint is not that of the right thinking members of the society.
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> 6(b) The defendant states that if which is denied, the words complained of are defamatory of the plaint the said words were published on an occasion of qualified privilege.
>
> PARTICULARS
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> i. The defendant was *inter alia* responsible for advising and giving reasons to its customers on the fate of any cheque and it had a duty to give the advice in the circumstances and its customer had the corresponding duty to receive the advice. This is a confidential banker/ customer relationship and information was intended to be confined to the parties to that relationship and the defendant did not publish anything or any defamatory words in the circumstances.
> ii. The payee as a customer had a duty to receive the advice or reasons given by the defendant
> iii. In the premises the defendant and the payee had a common or corresponding interest in the subject matter of the debit advice complained of."

Those are the only amendments sought to be made if the court gives its leave to the defendant to carry out the proposed amendments to its defence. The rest of the defence is to be left intact.

In this ruling I have decided to dispose of the application for leave to amend the defence before I proceed to deal with the plaintiff's application for orders striking out the defence. My reason for adopting that order of dealing with the two applications, is that if leave to amend is granted and such permitted amendment would improve the defence so as to remove the cause of concern to the plaintiff, then his application will have been thereby addressed and the worries done away with. If, on the other hand after permitted amendment, the defence is still sufficiently bad, or if amendment is refused the defence stands impeached in material respects, then it may go as prayed by the plaintiff. If after amendment the defence looks good in the eye of the law, the prayer to strike it out fails. Likewise if, even without amendment it is alright, it will not be struck out.

It is to-day a trite matter, that while after the pleadings are closed no party can amend his pleading without the leave of the court, very wide and comprehensive powers are given to the court to allow any amendment which may be necessary, at whatever stage of the suit the application for amendment is made.

It must, however, be remembered that voluntary amendment of one's own pleading after the statutory free time for amendment can, in no case, be claimed as a matter of right, but it is in the discretion of the court, which of course, is a judicial discretion not to be exercised arbitrarily. The court "has power to allow necessary amendments to pleadings at any stage, but the granting or refusal of an application for such leave to amend is a matter within the discretion of the trial judge": Crabbe, JA, in the Court of Appeal for Eastern Africa, in *Khan v Roshan* [1965] EA 289, at p 297.

A lot of principles have now been stated at all levels of courts, on how that discretion should ordinarily be exercised. And so you will find it said over and over again, that as a general rule leave to amend pleadings ought not to be refused unless the court is satisfied that the party applying is acting *mala fide* or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise: *McCoy v Allibhai* (1938), 5 EACA 70; that the rules of the court should be observed, and a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties: Bramwell, LJ, in the oft-quoted case of *Tildesley v Harper* (1878), 10 Ch D 393, at p 397, adopted in *Khan v Roshan*, supra, that applications for leave to amend, even if necessitated by negligence or carelessness will be granted so as to enable the right question to go to trial unless the party applying was acting *mala fide* or by his blunder he has done some injury to his opponent which cannot be compensated by costs or otherwise: *Patel v Joshi*, (1952), 19 EACA 42; that in respect of defences, leave to amend a defence should be given where it is sought at an early stage of the litigation, no reply has been filed and the plaint itself is very vague: *Kara v Makan*, (1950), 17 EACA 16; that an amendment ought to be allowed if thereby the real substantial question can be raised between the parties and multiplicity of proceedings avoided: *Karsan v Raghavjee* (1943), 10 EACA 10; *Manji v Singh*, [1962] EA 557; that, in particular, amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side: *Eastern Bakery v Castelino*, [1958] EA 461; but that amendment may be allowed at a very late stage, where it is necessitated solely by a drafting error and there is no element of surprise or prejudice: *General Manager, East African Railways and Harbours Authority v Thierstein*, [1968] EA 354; that unrestricted leave to amend may be given but is generally undesirable in contested cases: *Meralli v Javer Kassam & Sons, Ltd*, [1957] EA 503; and *Meru Farmers Co-operative Union v Suleman*, [1966] EA 436.

There are many other propositions in the many cases on the subject, but for our present purpose these ones will do to point the way; always remembering, without saying it, that since an amendment cannot be claimed as of right but is discretionary with the courts which must act judicially in the exercise of their discretion, no hard and fast rule to guide the courts can be laid down, and no ironclad tenet or precept stands stiff as a ramrod, as a rule of the road in all cases: leave to amend a pleading may be granted or refused according to the circumstances of each case and with due regard to the interests of all the parties and the policy and object of the law. Facts differ from case to case, and unless the facts and circumstances and situations are similar, an earlier authority may not apply to a subsequent case. See, for example the distinction between *Khan v Roshan* [1965] EA 289, and *British India General Insurance Co. Ltd v G M Parmar & Co* [1966] EA 172.

Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice.

The authorities also show, that when it is said that amendment may be allowed however late the proposed amendment may be, it does not mean that a party or his advocate may unnecessarily delay an amendment.

It is of the first importance that an amendment should be applied for immediately it is seen that an amendment is necessary. A late amendment may be done, but the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate. Late applications for amendment are liable to be rejected, if there has been unexplained delay in making the application. Any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion.

In applications for amending pleadings, the court has, among its chief concerns, the need to protect the applicant's opponent from undue prejudice, and to prevent the valid policies embodied in statutes from being undermined by amendments. The concept of prejudice in the context of amendments may be broadly stated to be this. If the amendment contains allegations which would have been allowed inclusion in the original pleading, the question of prejudice is presented by the time at which it is offered rather than by the substance of what is offered; and the possible prejudice stems from the fact that the new allegations are offered late rather than in the original pleading, and not from the fact that the opponent may lose his case on the merits if the amendment is allowed, whereas he may win it if the amendment is denied. Lateness or delay may cause prejudice in a number of ways:

> (1) the additional claim, or, as in the present case, defence my have become stale by the time the amendment is offered, by the death or disappearance of witnesses or records, or by the fading of recollections;
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> (2) a course of action which could have avoided the thrust of the amendment at an earlier time may have become foreclosed when the amendment is proposed;
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> (3) if the amendment is sought near trial or at the trial, the opponent may be deprived of a reasonable chance to prepare his case against it unless he is granted a postponement of trial,
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> (4) if the amendment is offered after trial, it is then too late to offer evidence against it, unless the trial is to be reopened.

In some of these instances there is no practical way to allow the amendment and at the same time avoid the prejudice. In others an adjournment may be necessitated. In its turn this may, however, bring with it other evils, such as further delay of the case and concomitant expense, disruption of the court calendar, and so on. The problem may call for the balancing of several factors. In the exercise of the court's discretion one or more of the following factors may be considered.

1. Whether the amendment sought embodies a legally valid claim or defence (the situation in the instant case concerns defence). This is because there is not much point in wasting time and effort over a new claim or defence which has no legal merit.
2. The reason why the subject matter of the amendment was not included in the original pleading or offered sooner than it was. These reasons range over a wide field, some good, and some bad. The subject matter may not have been in existence when the original pleading was filed, e.g. the defence of *res judicata* may arise only after judgment in another action after the written statement of defence was filed; other reasons may reveal bad faith, e.g. an intent to obstruct the proceedings by deliberately withholding allegations in order to offer them by amendment at a strategic time. In other cases the reason may be that the applicant did not know or appreciate the new fact when he drafted the original pleading. Such ones depend on the degrees of diligence and the lack of it, and whether amendment would work prejudice to the opponent or disrupt judicial administration.
3. Delay or disruption of judicial administration. If prejudice to the opponent can be prevented only by delay in the progress of the case, the extent of the hardship which this delay imposes upon the opponent and the system of judicial administration is a factor to be considered in deciding whether to allow the amendment.
4. The extent to which the amendment departs from the original claim or, as in our case, defence, or tends to complicate the issues.
5. Whether the amendment is offered by the plaintiff or defendant. Thus, if an amendment will necessitate delay in bringing the case for trial, there may be undue hardship to the plaintiff. Delay

more often works against a plaintiff's interests than against those of a defendant.

Bearing all the foregoing propositions of law and principle, and some of the factors, in mind, the application for leave to amend the defence in the instant case can easily be resolved.

In the affidavit of Joseph Gregory Nyamu, an advocate in the firm of advocates acting for the defendant, the explanation given for seeking leave to amend the defence is this: that the suit was instituted on October 25, 1999 and the defendant made its defence on November 24, 1999; that on January 18, 2002 the advocates were appointed by the defendant to act for it in place of its former advocates; that it is necessary to amend the defence to enable the real question in issue between the parties to be raised on the pleadings and determined; and that the defendant has a meritorious defence and it is in the interest of justice to allow the defendant to amend its defence, and, after all, there will be no prejudice to the plaintiff.

Looking at everything on this file, it is to be noticed that this application has come after a delay of nearly three years after the defence was filed; and it seems to have been a reaction to the plaintiff's application for an order to strike out the defence. It was filed in a manner which gives a legitimate impression that if the plaintiff had not moved in this manner the defendant would simply have stayed put and done nothing about its defence. Such a reactionary conduct of a party points to a bad view of that party unless he explains his waiting for the other side to move before he also moves There is no explanation given in the instant matter for that conduct. It may be true that sometimes an amendment is sought after the party seeking it has seen the next line of action by his opponent; but in the absence of an explanation as to why voluntary amendment was not sought without it being prompted by the other party's move, the *bona fides* of the desire to amend is put in question.

It was said that it is the second lot of advocates who are now seeking to amend a pleading drawn by a different advocate. But there is no explanation by the second advocate or the defendant itself, as to why it took so long to engage a new advocate. When a party takes an unreasonably long time to change advocates and he does not explain the delay, and after he changes advocates he takes steps which may push the clock of litigation back so that the determination of the suit is delayed or further delayed on his account, injustice and undue prejudice is likely to result. The court may properly have regard for such an unexplained change or delay. No explanation has been offered in this regard and I have taken that aspect into consideration along with the other factors present in this matter.

Then, I have looked at the proposed amendment. If allowed, this amendment will obfuscate, and not clarify, the issue for determination. It will introduce insurmountable confusion on fundamental facts, and unnecessarily introduce unhelpful splitting of the hairs. For instance, witness these serious contradictions which will be introduced. In paragraph 7 of the defence as it stands and will stand if amendment is allowed, it is said that the defendant does not have any account in the name of the payee in whose favour the plaintiff wrote and issued the cheque. In which case, the payee was not the defendant's customer, or so it appears from the way the defence is worded in this respect. It is not pleaded so as to show that the payee was the defendant's customer in any other manner other than having an account with the defendant bank. Yet, in the proposed particulars of alleged qualified privileged sought to be introduced by amendment, it is sought to be said, that the defendant was entitled to advise and give reasons to "its customers". So it is being denied in paragraph 7 that the payee was a customer of the defendant, and at the same time it is sought to say that the same payee was a customer receiving advice and getting reasons from the defendant bank which did not hold his account. This would be a contradiction and confusion which will neither clarify issues nor shorten litigation and save expense.

There would be unhelpful splitting of hairs about publication. On the one hand there is admission of sending the offending matter to the "customer" (payee) who is simultaneously denied the status of "customer" because there was no account at the defendant bank for such a person, but denying that as it was publication to a "customer" in confidence between a banker and "customer" there was publication at all. This mode of pleading can only be intended to be evasive, and evasive pleading is not permissible in our system of pleading, and the court will not allow its introduction by amendment where it will not be allowed in an original pleading.

To allow the proposed amendment would be to allow the defendant to embark on a legal discourse and legal dissertation in a pleading by which the defendant is to dissertate and discourse on the law of banking and bank–customer relations under the law. Pleadings are not the place for a dissection of legal theorems, and except where by statutory rules a particular law is required to be pleaded expressly, pleadings are reserved for material facts only. Unnecessary matters should be omitted from a pleading; and facts should be pleaded with sufficient definiteness, concisely and precisely. There is a vital distinction between pleading law, which is not normally permitted, and raising a point of law in a pleading, which is permitted. For, pleading law obscures or conceals the facts of the case; raising a point of law defines or isolates an issue or question of law on the facts as pleaded.

Normally delay in applying for leave to amend a pleading is not in itself fatal. Considerable delay in filing an application accompanied with the opponent acquiescing in the delay at all times relevant, may be excused: *Epaineto v Uganda Commercial Bank* [1971] EA 185. Thus, a long delay in making an application was excused when there was an explanation for it in that the parties were attempting to reach a settlement and there was every hope of a settlement out of court: *Motokov v Auto Garage Ltd* and others (No 2), [1971] EA 353. In the instant application the only implied reason (appearing as a side wind and obliquely) for the delay appears to have been a change of advocates. There is no attempt to explain the late change of advocates. To accept this as an explanation for this delay might send a wrong message that a party who switches advocates may on that account alone get special treatment and get leave to come late to amend his pleading in a substantial way even if to do so may occasion a delay and disrupt judicial calendar. His substitution of lawyers needs to be explained. This was not done here. This delay in the absence of a good or any reason in the circumstances of this case suggests that the application was brought in *mala fides*, and simply to delay justice.

Putting all the foregoing factors together, and not acting on only one consideration, I find that to allow the requested amendments would be to facilitate abuse of the process of the court. The power of amendment is to be most carefully and jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense. The defendant is attempting to do so; it is seeking to unduly delay justice and disrupt judicial administration and put the court calendars upside down; it is attempting to prejudice the plaintiff through delay which has its own attendant evils; it is seeking to add obscurity and concealment in its defence instead of opening up its merits. For the reasons I have attempted to show, this is not a proper case in which leave to amend the defence should be granted.

I am quite alive to the liberal practice in the exercise of discretion whereby amendments of pleadings are freely allowed where this can be done without injustice and nearly always on terms (which sometimes may be so stiff as to be prohibitive), varying with the stage at which the amendment is sought to be made. But the special circumstances of the instant application make it unjust to allow the amendments to be made at this stage even though they are sought before trial. The factors which I have borne in mind include, as I have already shown, the material admissions which will still remain (not being a confession and avoidance); attempts at evasion; failure to plead facts from which it will be explained the circumstances of the defendant's conduct complained of; the defendant's substantial contribution to a number of adjournments of the hearings fixed by the plaintiff; frivolity sought to be perpetuated or introduced; likely delay of a fair trial; obvious attempt to abuse the legal process. Other factors have already been adumbrated to. It is in this context that leave to amend the defence is refused, and the application of the defendant is hereby dismissed with costs thereof in any event.

On his part, the plaintiff applies for orders striking out the whole defence of the defendant, and judgment to be entered for him, against the defendant. He asks for these orders under Order 6, rule 13(1) of the Civil Procedure Rules, and the inherent powers of the court. Rule 13, sub-rule (1), seeks to combine three different things, namely, (1) a jurisdiction to put a summary end to a suit where a litigant has put up some palpably absurd claim or defence (what is involved in the instant case is a defence); (2) a jurisdiction to intervene where the claim or defence (the present situation) as such may not be untenable but the circumstances surrounding the case make it an abuse of the process of the court to plead in this way (and this power is ancillary to the court's inherent right to prevent abuse of its process); and (3) a power to control the form and substance of pleadings so as to secure compliance with the rules and to give each

side a definite and unambiguous picture of the other side's case.

In books on pleadings in civil litigation and in eminent judges' *dicta*, there are many propositions of leading principles upon an application for an order to strike out a pleading or part of it. The power to strike out a pleading, like the power to amend or disallow amendment, is discretionary, and the court's discretion is a judicial discretion exercised along sound judicial principles and the law. It has been said, time and again, that the power to strike out a pleading is a very strong power indeed, and one which, if it is not most carefully exercised might lead a court to set aside a suit or defence in which there might really after all be a right or defence and in which the conduct of the opposite party might be very wrong and that of the other party might be explicable in a reasonable way. So, generally, unless it is a very clear case indeed, the power ought not to be invoked, and unless the case is absolutely clear, a pleading ought not to be struck out as not showing a reasonable cause of action or defence, as the case may be.

Whenever an application has been sought to have a pleading struck out on the ground that it discloses no reasonable cause of action or defence, courts have always emphasized that the very strong power to do so should only be exercised in cases which are clear, and where the court has seen that the party whose pleading is so attacked has got no case or defence at all, either as disclosed in the pleading, or in such affidavits as he may file with a view to amendments. It is a power to be resorted to only in plain and obvious cases, and the jurisdiction must be exercised with extreme caution.

Similarly, the court has an inherent, as well as a statutory, jurisdiction to strike out a pleading which is an abuse of the process of the court; but even there, too, it is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. It is not exercised merely because the story told in the pleadings is highly improbable and one which it is difficult to believe: it is only in plain and obvious cases and where the party's stand point cannot prevail or is in some way an abuse of the process of the court. If the applicant relies on non-disclosure of a reasonable cause of action or defence, the matter must be shown to be unarguable; if it involves the parties in a preliminary hearing (as it is in criminal practice) by affidavit, the matter is not a plain and obvious case on its face, and the summary disposal cannot be attempted.

As it is often said, the summary jurisdiction of the court is not intended to be exercised by a minute and protracted examination of documents and the facts of the case in order to see whether there is a reasonable cause of action or defence, as the case may be. For, to do that is to usurp the position of the trial court and to produce a trial of the case in chambers, on affidavits only without discovery and without *viva voce* evidence with a fair opportunity to test if by cross examination in the ordinary way. The power to strike out any pleading or any part of it is not mandatory, but permissive, and it is in exercise of the discretionary jurisdiction, involved with due regard to the quality and all the circumstances relating to the pleading put under attack. If there is a reasonable substratum of fact, the pleading or paragraph in a pleading, will not normally be struck out.

So, as it was summarized by Madan JA (as he then was) after an extensive review of the relevant authorities, when dealing with applications for orders to strike out pleadings or aspects of pleadings, it is relevant to consider all allegations and prayers in the pleadings, in order to see whether a reasonable cause of action or defence is disclosed. For the purposes of discovering a reasonable cause of action or defence, it is not permissible to look at affidavit evidence filed. The court ought to be very cautious and carefully consider all facts of the case and circumstances touching on the case, without embarking upon a trial, before it decides the application founded on a failure to disclose a reasonable cause of action or defence, or abuse of the process of the court. At this stage you do not go into the merits of the case: that is a function reserved for a trial court after full information on discovery (if any), oral evidence given under the usual safeguards of procedural fairness at a plenary session in ordinary fashion. As far as possible, there should be no opinion expressed upon the application, which may prejudice a fair hearing or make it uncomfortable or restrict the freedom of the trial court in disposing of the case at the final hearing.

As the learned judge further said, if an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action or strike out a defence on the ground that nothing reasonably arguable is disclosed on the pleadings. Normally a lawsuit or defence is for pursuing, and a court should aim at sustaining it rather

than terminating it in a summary fashion. To resort to the summary power, the suit or defence must appear so hopeless that it plainly and obviously discloses no reasonable cause of action or defence, and is so weak as to be beyond redemption and incurable by a harmless amendment.

All these propositions may be found in the case of *D T Dobie & Co (K), Ltd v Muchina*, [1982] KLR 1, at pp 6-9, in the Court of Appeal of Kenya, where the summary process was held to be inapplicable in the circumstances of the case; but cf *Wamutu v Kiarie*, [1982] KLR 480, where Madan, JA, with Law and Potter, JJA, held that in the different circumstances of that case, the striking out of the plaint was the right thing to do; and, said Madan, JA, "Even if the defendants had not applied to strike out the plaint the court was bound to … do so of its own motion". (at p 484).

All these cases show that a court hearing an application for striking out a pleading or parts of it exercises a discretion by considering every relevant factor touching on the case in a significant and substantial way; but not with an obsessive fixation on purism for its own sake only. According to case law, a pleading put up contrary to a mandatory statutory prohibition will be struck out (the *Wamutu v Kiarie* kind of situation); matter which is unnecessary, or matters which embarrass or my delay a fair hearing and determination of the suit, or those which are an abuse of the legal process, or are frivolous, justify striking out pleadings or severable portions thereof. With specific reference to attacking a defendant's pleading, as is the case here, the court has a right to stop a defence if it is wantonly set up without a reasonable shadow where to permit it to persist through the ordinary stages up to trial would be to allow the other party (in this case the plaintiff) to be vexed under a pretended legal process when there could not be any sensible doubt that the defence is baseless or almost incontestably bad and incurably so. The length of the time for which the defect in the pleading has lasted, taken together with likely prejudice to the opposite party, if no remedial step is taken by the court, are relevant factors.

In the instant application the plaintiff asks for orders to strike out the defendant's defence and to enter judgment for him against the defendant as prayed in the suit. Admittedly, the plaintiff issued a cheque for payment to a third party in whose favour it was written. The plaintiff is an advocate of the High Court of Kenya. His professional standing is a vital piece in his stock-in-trade. The third party, a customer at the defendant bank duly presented the cheque at the defendant bank for clearance by the drawee bank for payment. There was nothing on the face of the cheque, or otherwise, to raise doubt about it in any particular respect.

The defendant bank did not set in motion the process of clearing that cheque; so, the plaintiff's (drawee) bank never saw the cheque for clearance. Instead, the defendant bank returned the cheque to the third person (the payee). Written by the defendant on the cheque were the words, "Title Differs". The payee read those words. According to the plaintiff, the payee returned the cheque to him and demanded payment in cash: the plaintiff said he had to replace the cheque with a cash payment of the sum of money in the cheque.

The payee must obviously have wondered as to why the plaintiff, an advocate of his professional caliber, should issue a cheque for payment when there was something in the cheque which prevented the intended payment to be effected. Ordinary people's perception of the plaintiff may reasonably dive towards the negative of the plaintiff. Publication of the words "Title Differs", to the payee was publication to a person other than the plaintiff. It is not reasonably contestable or arguable, that the words complained of, written on a cheque issued by a plaintiff whose name in a profession, which heavily depends on good reputation of its members, would lower his esteem in the eyes of the right thinking section of society generally. The factual narration of what happened is not in serious dispute.

In the face of all this, the defendant put up as its defence irreconcilably contradictory allegations: calling the payee as its customer entitled to receive advice from the defendant, while at the same time denying holding his bank account; admitting communicating the offending debit advice to him, and simultaneously denying publication to him as a third party; and attempting to have its own internal regulations and practice to be upheld by the court as law, without showing that all the world knows or ought to know those regulations. It is the kind of defence which is an abuse of the legal process, or intended to delay justice, or to prejudice a fair trial. It is the kind of defence which calls for the

exceptional exercise of the power of the court to strike out a pleading in its entirety.

If there were redeeming features or aspects of it, those ones would be left to proceed to trial. But this is not one where parts of it can be expunged and others retained. This is not one which can be cured by suitable amendments to the defence. Already an attempt to amend has been shown herein to be one taken in bad faith, intended to be an abuse of legal rules of procedure, likely to be unduly prejudicial. No case is made out and none is before me, for amendment to be the redeeming option. Drastic it may be, as summary procedure often is, but the only just conclusion in the interest of justice is to grant the plaintiff his prayers for striking out the defence. The defence is, accordingly struck out, and judgment on liability is entered in favour of the plaintiff against the defendant.

The suit may be set down for assessment of general damages, on a date to be fixed at the registry, so that evidence affecting the quantum of damages (if any) may be received for the court to determine the issue of damages.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of December , 2002

R.C.N KULOBA

JUDGE