



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 1863 OF 2000**

**MOSI .....APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

I have before me an application to strike out a plaint. It is expressed to be under order VI rule 13 (1) (a) (b) (c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

Order VI rule 13 specifies four distinct grounds on which an application to strike out a pleading may be grounded. These are that it discloses no reasonable cause of action or defence; that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the Court. If the application is made under the first ground, no evidence shall be admissible thereon but the grounds on which it is made shall be stated concisely. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1). All that is required is that the grounds relied on be specified in the application and that if they be other than the first one, then affidavit evidence is expected.

Now, although the application before me is expressed to be brought under all paragraphs of rule 13 (1), only three grounds are actually cited as the basis of the same. These are that the suit discloses no cause of action against the defendant; that it is an abuse of the process of the Court; and that it is frivolous and vexatious. These are the three grounds encapsulated under rule 13 (1) paragraphs (a) (b) and (d). I now proceed to consider the application in light of the pleadings, the affidavit evidence and the submissions of the advocates for the parties.

First, should the plaint be struck out as disclosing no reasonable cause of action? The defendant's attack is stated fully on the face of the application in the following terms: "This suit discloses no cause of action against the defendant as the dispute herein is in respect of a charge between the plaintiff and Kenya National Capital Corporation Limited to which the defendant is not privy". I remind myself that when a Court is considering to strike out a pleading on the ground of non-disclosure of a cause of action or defence the Court is enjoined to look at the pleadings only as no evidence is admissible to support an application under order VI rule 13 (1) (a). In *Halsbury's Laws of England*, 4th Edition, Volume 36, the following statement of the law is made at paragraph 73:-

"In judging the sufficiency of a pleading for this purpose, the Court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the Court will not strike it out. A pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases....."

I would adopt the above statement of the law with approval. The pith and marrow of it is that where on a consideration of only the allegations in the plaint the Court concludes that a cause of action with some chance of success is shown then that plaint discloses a reasonable cause of action. So I ask myself whether the plaint here shows some cause of action with some chance of success. It is noted that the

plaintiff boldly avers in paragraph 2 of the plaint that the defendant is sued in its capacity as the parent company of Kenya National Capital Corporation Limited, a subsidiary which recently merged with the defendant. The plaint then recites the existence of a contract between the defendant and the plaintiff and the frustration thereof by actions of the defendant. Relief is consequently sought against the defendant. The defendant's advocate submitted before me that merger of a parent company and its subsidiary does not in law extinguish the separate legal existence of either company and that it amounts to nothing more than an internal organization of business. The plaintiff's counsel was of the view that a merge results in the creation of one legal entity. I accept counsel for the defendant's submissions. The law is clear that a holding company is a distinct legal entity from its subsidiary and it cannot be sued for any breach of contract by its subsidiary.

A merger or amalgamation of the business of holding company (or a parent company in the language of some) with that of the subsidiary is a business decision with only administrative but not legal consequences as pertains to the legal status of the entities concerned. Taking that view of the law, can it be said that a plaint which initiates a suit against a parent company on behalf of its subsidiary does without more disclose a reasonable cause of action against the defendant? I think not. For this reason, the plaint herein is for striking out. I now turn to the second ground prayed in aid of striking out the plaint.

The plaintiff's suit is said to be an abuse of the process of the Court as the issues canvassed therein are the same issues in HCCC No 723 of 1999 which is pending in this Court for trial. The said suit is against Kenya National Capital Corporation Limited. Let me say at once that affidavit evidence is admissible in respect of this ground unlike the previous ground. The defendant has annexed the pleadings and orders made in the pending suit. The defendant submits that it is an abuse of the process of the Court to raise in subsequent proceedings matters which could have been raised in the earlier suit and that the plaintiff should have raised the present issues in the earlier and pending suit. He relied on the case of *Yat Tung Investment Company Limited v Dao Heng Bank Limited and another* [1975] AC 581. To my mind, this case is not relevant as the doctrine of *res judicata* was invoked to affirm that it was an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. Here, not only has the previous suit not been litigated to finality but, as the plaintiff points out in his replying affidavit, the parties are different. In the premises, I do not find this suit to be an abuse of the process of the Court as contended by the defendant.

The third ground canvassed for striking out the plaint is that the suit is frivolous and vexatious. Now, I apprehend that a frivolous matter is one which is not serious. And something is vexatious if it tends to annoy. In my view, a frivolous claim is *expost facto* vexatious for nobody can fail to be annoyed by a frivolous claim against him for it may lead to loss of time and money. From that perspective I am persuaded by the affidavit evidence herein that the plaintiff's claim is frivolous and vexatious. That is so for the evidence discloses that the contract subject matter of the suit was between the Kenya National Capital Corporation Limited, a subsidiary of the defendant bank, and the plaintiff. Yet the plaintiff seeks relief against the defendant. In the absence of evidence from the plaintiff that the contract was made for the benefit of the defendant and was intended to be enforced as against the defendant, or that the subsidiary has assigned its contracts to the defendant, and taking the view, which I do, that amalgamation or merger of the business of the defendant and its subsidiary does not amount to the creation of one legal entity or mean the extinction of their separate legal identities, the plaintiff's suit against the defendant cannot but be frivolous and vexatious. The plaint is also for striking out on this ground. The upshot of this matter is that the plaint herein is struck out with costs to the defendant on the grounds that it discloses no cause of action against the defendant and that it is frivolous and vexatious.

Dated and delivered at Nairobi this 21<sup>st</sup> day of March, 2001

**A.G. RINGERA**

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**JUDGE**