REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL CASE NO 953 OF 1999

KENYA TEA PACKERS LIMITED...APPLICANT

V

KAMA INTERNATIOAL LIMITED (IN RECEIVERSHIP).......RESPONDENT

RULING

When this application came up for hearing before me on December 18, 2000, learned counsel for the plaintiff (Mr Issa) raised a preliminary objection, having given notice of his intention to do so, that the application had not been made promptly in accordance with the law applicable to such applications and that it had been made *mala fides* . On those two grounds Mr. Issa sought to have the application made by the 2nd and 3rd defendants to strike out the plaint, struck out.

Learned counsel for the applicant (Miss Muthuri) did not of course agree with the Mr Issa's contentions. She said that there was no *mala fides* in bringing the application. And with regard to the time for bringing applications under Order VI rule 13(1), she submitted that there was no time limit.

In support of his argument, Mr Issa cited the Tanzanian case of Sobayaga *Framers Co -operative Society Ltd v Mwita* (1969) EA 38. In that case Seaton J makes the following observations in his judgment:-

> "The application to strike out a pleading under this rule (Order 6 rule 6 of the Civil Procedure Code of Tanzania) should be made with reasonable promptitude, and as a rule before the close of the pleadings."

While this court is of course not bound by the decision of the Tanzanian High Court, it would appear that the rule the Tanzanian court was considering is to a large extent different from our Order VI Rule 13(1) (a). From what I can glean from the judgment of Seaton, J, the Tanzanian rule gives the court power to order struck out or amend matters in pleadings:-

> "which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit."

Our rule 13(1) (a) is on the other hand in the following terms:-

> "At any stage of the proceedings (emphasis mine) 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."

It is necessary to observe (a) that the Tanzanian rule is more akin to our rule 13(1) sub-rules (b) (c) and (d) which talk of "scandalous … may prejudice, embarrass or delay the fair trial of the action" and in respect of which no evidence is permitted and (b) that there is no time frame within which an application under rule 13(1) (a) can be made. Indeed in my view, it would be a contradiction of the very express wording of the rule to attempt to limit the time within which an application under rule 13(1) (a) can be made when the same rule states that the court may "at any stage of the proceedings" order to be struck out or amend a pleading which discloses no cause of action.

For the above reasons, I do not think the authority cited by the learned counsel for the plaintiff has any

application to the matter before this court. As to the alleged *mala fides*, no evidence was or could (for the obvious reason that no evidence is permissible in a preliminary point which the law requires be based on a pure point of law) tendered to support thereof.

In the event, the preliminary point fails and is overruled with costs.

Delivered at Nairobi this 20th day of December, 2013.

T Mbaluto

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JUDGE