



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 1801 of 1998**

**RAGATI FACTORY COMPANY LIMITED – SHAREHOLDERS .....PLAINTIFF**

**VERSUS**

**JOHNSON K GICHURU .....1ST DEFENDANT**

**PETER MUCHIRI NJOROGE .....2ND DEFENDANT**

**DUNSTAN M NGUMO.....3RD DEFENDANT**

**BONIFACE G MUHAMI.....4TH DEFENDANT**

**JOSEPH M NJOGU .....5TH DEFENDANT**

**WILLIAM I. NDUGI .....6TH DEFENDANT**

**R U L I N G**

The defendants by a chamber summon brought under Order VI Rule 13 (1) (a) and (b) of the Civil Procedure Rules seeks the following orders:

(1) That the plaintiff’s pleadings and claim against the defendants be struck out with costs;

(2) That the defendant’s costs of this suit and the present application’s costs be borne by J A B Orengo Advocates.

The defendants have relied on the grounds; that the plaintiff is a non-existent entity with no legal capacity to use or be sued. That it is not legally possible for a court of law to grant the prayers sought in the pleadings. That the defendants cannot be expected to act, be liable, answerable and/or owe duty to a fictitious and a non-existent entity. That the pleadings do not state the defendants are sued in their personal capacity or as directors of Ragati Tea Factory Company Limited.

That the firm of J A B Orengo recklessly and negligently drew and filed pleadings in incompetent manner and therefore the costs of the suit are recoverable from them.

The defendants have moved the courts order OV1 R 13 (1) (a) and (b) which empowers the court to strike out pleadings which disclose no reasonable cause of action or which are scandalous, frivolous and vexatious.

The defendant main ground, and indeed the only one argued by their counsel, is that the plaintiff is non-

existent entity. The defendants did not have an affidavit in support of the application. There was, therefore, no evidence that the court could place reliance upon, in reaching a decision, that the plaintiff is a non-existent entity. It was the defendant's burden to prove to the court, by evidence, that there was no entity registered at the company registry known as Ragati Tea Factory Company Limited Shareholders. I accepted that indeed it is strange for an entity to be described as Limited shareholder and strange it may be, it was still necessary to prove that no such entity has been registered.

Section 107 of the evidence provides

**“Whoever desires any court to give judgment as at any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

The defendants failed to prove the facts of the non-existent of the entity known by the name of the plaintiff. Accordingly it does not lie with the defendant to say that J A B Orengo Advocates were negligent or reckless, such allegations were not proved.

The court similarly cannot strike out the pleadings on the basis that they do not state whether the defendants were shied as directors or in their personal capacity it is open to the defendants to apply for further and better particulars as provided for in OV1 Rule 8.

The end result is that the defendant's application dated 29th June 2000 is dismissed with no orders as to costs.

Dated and delivered this 5th day of July 2005.

**MARY KASANGO**

**JUDGE**