REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 450 OF 1988

L VADGAMA ……………………………..APPLICANT

VERSUS

ARYA SAMAJ………………………………DEFENDANT

RULING

The defendant Arya Samaj has moved this court by motion on notice for orders, inter alia, that suit herein be struck out for being an abuse of the process of the court is scandalous, frivolous or vexatious and or for want of prosecution.

The application has been expressed to be brought under Orders XVI rule 5, L. Rule and VI rule 13 (b) (c) and (d) Civil Procedure Rules.

The plaintiff as respondent in the application has raised objection, in limine, arguing the prayer for striking out should not have been joined with one for dismissal of the suit for want of prosecution. In his view the prayers are contradictory. He has also raised objection that the application for striking out having not been made promptly that it is to say, before the close of pleadings it has been made too late. In his view it is an abuse of the process of the court, there are other grounds raised but I propose to come to them if need be, later on.

Mr. Oyatsi, Counsel for the defendant/applicant urged the view that because O.VI rule 13 and O. XVI rule 5, make provision for the same remedy he did not think there was any conflict. The two orders merely provide different grounds for the remedy, he said.

The applicant withdrew a prayer for the striking out of the suit on ground of it being scandalous, frivolous or vexatious. So the prayers which were left were, firstly that the suit be struck out for being an abuse of the process of the court and for want of prosecution.

An application under O. XVI rule 5 Civil Procedure Rules presupposes that the pleadings are proper. Dismissal under the order and rule would only be sought on the ground of delay in prosecuting the suit. An application under that rule may only be properly made after the close of pleadings and when all the preliminaries in the preparation for trial have been concluded, not before. Consequently, in suits before the High Court if summons for directions have neither been taken nor been dispensed with by the parties by consent, no application may properly be made to the court for the dismissal of a suit. Summons for directions is a step in the suit in preparation for the hearing of the suit.

It is in directions given on a summons that the court states where the suit will be heard, the length of the hearing and the issues to be canvassed during the hearing. Hence the statement I rule 5 (b) in the High Court. An order for the hearing....”

Directions on a summons under O. 51 Civil procedure Rules have not been given. The Principal Deputy Registrar declined to give the same in a ruling heard on 3rd February, 1995, arguing that they would, if necessary be preceded by a ruling of this court on the application by the defendant for the striking out of this suit. He was not right. Directions on a summons are not subject to a decision in an application for the dismissal of the suit under O. XVI rule 5 Civil Procedure Rules for reasons I have already given. However, he was right that an application under O. XVI rule 13, once filed must first be determined before directions on a summons are given under O. 51. That is the moreso because if the court exercises its discretion under that order and rule the suit may be brought to an abrupt end and would thereby render the directions futile.

In the above circumstances it is my view that the application for the dismissal of this suit for want of prosecution under O. XVI rule 5 is premature.

As to whether it conflicts with the prayer for the striking out of the suit I would say it does. I have already said that an application under O. XVI rule 5 presupposes that the pleadings are proper. So to again pray for the striking out of a suit for being an abuse of the process of the court is in effect to say that there was no matter properly for the court's determination. O. VI rule 13 is, in my view, designed to remove from the court's register of pending cases suits which clearly have no genuine matters in controversy to go to trial. Trials are preserved for genuine and serious controversies. So once directions have been given or dispensed with it means that the parties and in some cases the court are satisfied as to the existence of a genuine and serious or substantial controversy to be heard by the court.

I have already ruled that the application for dismissal of the suit for want of prosecution is premature. That prayer having being consolidated with a prayer for striking out the suit, is the latter severable and would entitle this court to consider it separately? I do not think so. The application is one which was supposed to be brought by summons while the former was supposed to be by motion. Moreover on the merits, the grounds relied upon for seeking to strike out the suit are not referable to the date of the suit but on certain alleged defaults to comply with terms of a certain order made herein by consent.

An issue was raised by plaintiff to the effect that the application did not particularize which pleadings should be struck out. Considering what I have already stated consideration of this issue is not necessary. However, considering that there appear to be a misunderstanding as to what constitutes "pleadings" I have been constrained to say something on that. The plaintiff appears to think that pleadings are paragraphs or averments in a plaint, defence, reply to defence or defence to counterclaim. When we talk of pleadings, we are in effect talking about either a plaint, a defence, reply to defence or counterclaim or defence to counterclaim. That emerges clearly from the definition of counterclaim. That emerges clearly from the definition of "pleading" in S. 2 of the Civil Procedure Act. It says:-

> "Pleading includes a petition, a summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of defendant."

So when the defendant applied for the striking out of a suit it clearly meant the plaint O. IV rule 1 makes that abundantly cleat. It states:-

> "Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

Here we are not concerned with the such "other manner" but only with the plaint because this suit was commenced by the presentation of a plaint.

There are other issues which were raised but they do not merit consideration considering that I have come to the conclusion that the preliminary point must be upheld. The result is that the application dated 30th March 1994 must be and is hereby struck out.

Costs to the plaintiff/respondent.

Orders accordingly.

Dated and delivered at Nairobi this October 30, 1995

S.E.O BOSIRE

JUDGE