



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI

Civil Suit 189 of 2006

ABDULHALIM MOHAMED SHALLO.....1ST PLAINTIFF/APPLICANT
SHEIKH ABDULKADIR MOHAMED SHALLO.....2ND PLAINTIFF/APPLICANT
-VERSUS-
PANDYA MEMORIAL SOCIETY
[trading as Pandya Memorial Hospital].....DEFENDANT/RESPONDENT

RULING

The 1st applicant's Chamber Summons dated **12th May, 2008** and filed on 14th May, 2008 was brought under Orders 6 (rules 13(1)(b),(c) (d)),16, 6A (rules 7,8) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicants' prayers were: (i) that the amended defence and counterclaim filed on **29th April, 2008** be struck out, and that judgment be entered against the defendant as prayed in the plaint.

The grounds supporting the application were:

- (i) ***that the amended defence and counterclaim is scandalous, frivolous and vexatious;***
- (ii) ***that the amended defence and counterclaim may prejudice, embarrass or delay the fair trial of the cause;***
- (iii) ***that the allegations in the amended defence and counterclaim are clearly false, and the amended defence and counterclaim is otherwise an abuse of the process of the Court;***
- (iv) ***that the mode of amendment is irregular and improper, and the amended defence and counterclaim is therefore fatally defective;***
- (v) ***that the heading and/or citation of the amended defence and counterclaim is irregular, improper and/or erroneous.***

The 1st plaintiff has sworn an affidavit setting out facts in support of the application.

The defendant, through the firm of M/s. A.B. Patel & Patel, Advocates filed grounds of opposition, in response to the application. The defendant contends that the application is an abuse of Court process; that the defence and counterclaim raises serious triable issues; that the application ought to be dismissed with costs for lacking merits.

The 1st plaintiff/applicant appeared in person to prosecute his application, and he submitted that the amended defence and counterclaim was frivolous and vexatious, and an abuse of the process of the Court. He asked that the amended defence and counterclaim be struck out, and the suit be allowed with costs.

In the amended defence and counterclaim, a party was shown as "Additional Defendant"; and learned counsel **Mr. Jengo** submitted that the role of this Additional Defendant tended to nullify the role of the plaintiffs. Counsel submitted that the said amended pleading, in its formulation, was contrary to the terms of the leave granted by **Mr. Justice Njagi** for an amendment to be effected.

Counsel urged that whereas the defendant had to show triable issues, in the amended defence and counterclaim, no triable issue had been shown against the “Additional Defendant” – and thus the amendment was not done in good faith, and was only evidence of an abuse of process: since 1st and 2nd plaintiffs had admitted responsibility for the hospital bill, it followed that the Additional Defendant was an outsider. Counsel asked that the suit against the additional defendant be struck out.

Learned counsel for the defendant/respondent, urged that the application was an abuse of the process of the Court; because the defence was not a sham, and it related to a claim for a definite sum – whether payment was to be by the plaintiff or the Additional Defendant.

Mr. Situma submitted that there were a number of questions awaiting determination by trial, and therefore there was no basis for striking out the statement of defence.

This Court was asked to dismiss the plaintiffs’ application with costs for being wanting on merits; but the applicants maintained that the defence case was frivolous and vexatious, and an abuse of the process of the Court.

After observing the high-stakes approach of the parties, in which not much care was taken to clearly define the governing legal principles, I took time to have a view of the large file, as a whole. I found that the rather old suit of August 2006 has not been set down for hearing, mainly because there have been numerous interlocutory applications. The substantive issues of the suit, a resolution of which is required, as a basis for justice being done, have not been considered; and upon observing the mode of prosecuting and of challenging the instant application, it became clear to me that the apparent stridency of positions cannot lead to a just resolution of the main dispute.

I was not convinced by the applicants that the suit must be struck out and dismissed with costs at this preliminary stage. I will order as follows:

- 1. *The Chamber Summons dated 12th May, 2008 is disallowed.***
- 2. *The Registry shall list the main suit for hearing on the basis of priority.***
- 3. *The costs of the application shall be in the cause.***

DATED and DELIVERED at MOMBASA this 14th day of May, 2010.

J. B. OJWANG
JUDGE