Case Number:	Civil Case 41 of 2003
Date Delivered:	04 May 2005
Case Class:	Civil
Court:	High Court at Machakos
Case Action:	Ruling
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	MARY KALOLIA MUTISYA v JOEL NGUI MWEU [2005] eKLR
Advocates:	Mr. Mbindyo for the Defendant Mr. Nduva Kitonga for the Plaintiff
Case Summary:	[Ruling] Civil Practice and Procedure - preliminary objection to a chamber summons - chamber summons seeking to have the suit struck out for not disclosing a cause of action and for being an abuse of the court process - grounds of the objection: that the application was fatally defective because under rule 13(a) of the Civil Procedure Rules no evidence is required in support of the application - that contrary to the rule, the applicant had filed an affidavit with annexures - whether the chamber summons was incompetent - Civil Procedure Rules Order 6 rule 13(1)(a), (d); Order 50 rule 7 - Civil Procedure Act section 3A
Court Division:	Civil
History Magistrates:	-
County:	Machakos
Docket Number:	-
History Docket Number:	-
Case Outcome:	struck out with costs
History County:	-
Representation By Advocates:	Both Parties Represented

Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 41 of 2003

MARY KALOLIA MUTISYA …….. PLAINTIFF

VERSUS

JOEL NGUI MWEU …….. DEFENDANT

R U L I N G

Mr. Nduva Kitonga counsel for the Plaintiff/Respondent filed a Notice of Preliminary Objection dated 14.4.2005. Objecting to the chamber summons dated 14.10.2004 in which the Defendant/Applicant was seeking orders under Order 6 Rule 13 (1) (a) and (d) Civil Procedure Rules, Order 50 Rule 7 Civil Procedure Rule and Section 3A Civil Procedure Act to have the Plaintiff/Respondents suit struck out for not disclosing a reasonable cause of action and for being an abuse of the court process. The Plaintiff/Applicant also sought costs.

Mr. Kitonga only argued the 1st ground in his preliminary objection which is that the application as filed is incompetent and fatally defective and offends provisions of Order 6 Rule 13 Rule 1(a) because under Rule 13 (a) no evidence is required in support of the application but the applicant has filed an affidavit to which are annextures. That the applicant should only have filed grounds to support his application.

The objection was opposed by Mr. Mbindyo who submitted that the application is also brought under Order 6 Rule 13 (1) (d) which talks of the suit being an abuse of court process, and that under that sub rule there is no bar to one adducing evidence.

Order 6 Rule 13 (1) provides as follows:

At any stage of the proceedings, the court may order to be struck out or amended any pleadings on the ground that

(a) It discloses no reasonable cause of action or defence or

(d) It is otherwise an abuse of the court process and may order the suit to be stayed or dismissed or judgement to be entered accordingly as the case maybe."

The above sub rule are the ones under which the applicant seeks to strike out the plaintiff's suit. Rule 13 (2) supplements subrule 1 (a) and it provides as follows:

(3) "No evidence shall be admissible on application under subrule

1 (a) but the application shall state concisely the grounds on which it is made."

What rule 13 (1)(a) and (2) read together mean is that the party who seeks to have the suit stuck out for disclosing no reasonable cause of action shall not file any affidavit or file any annextures as the applicant has done. The applicant only needs to rely on the application and grounds. Reasonable cause of action means that an action has some chance of success when only the allegations in the paint or pleadings

are considered. The court need not look at any other evidence like affidavits or annextures.

For an application under Order 13 Rule 1 (d) for allegation that the suit is an abuse of court process, one needs to adduce evidence by way of affidavits or annextures as the applicant has done. The question is whether the two prayers under Rule 13 (1) (a) and 13 (1) (b) can be sought together as the applicant has done. In my considered view the applicant cannot seek the two prayers together as has been she has done because evidence has been adduced to support his first prayer under sub rule 1(a). The way the applicant has framed the prayers is such that they can not be separated. If the applicant had sought them as two different prayers then the court would consider proceeding with one and striking out the other. I find that the Chamber Summons is indeed incompetent as the orders sought can not issue. The chamber summons dated 14.10.2004 is therefore struck out with costs to the plaintiff/respondents.

Dated at Machakos this 4th day of May 2005.

Read and delivered in the presence of

R. V. WENDOH

JUDGE