Case Number:	Civil Appeal 35 of 2000
Date Delivered:	27 Oct 2000
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Kiptoo Tunoi, Abdulrasul Ahmed Lakha, Moijo Matayia Ole Keiwua
Citation:	Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR
Advocates:	-
Case Summary:	**Yaya Towers Limited *v* Trade Bank Limited (in liquidation)** Court of Appeal, at Nairobi October 27, 2000 Tunoi, Lakha & Keiwua, JJ A Civil Appeal No 35 of 2000 (Appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts (Mr Justice Mbaluto) dated 4th February, 2000 in HCCC No 235 of 1998) ***Civil Practice and Procedure*** *– striking out pleadings – grounds for striking out – failure by plaintiff to supply particulars – whether this would be a proper ground for striking out.* The suit as pleaded by the plaintiff was that at all material times, the defendant operated an account with the plaintiff. In or about July, 1992, at the request of the defendant, the plaintiff extended an overdraft facility to the defendant in the said account. At the time the plaintiff was put under

management and later liquidation the defendant was indebted to the plaintiff by way of an overdraft account in the sum of Kshs 195,684,223.30 together with interest. In the alternative, the plaintiff claimed the said sum being the amount due for monies lent by the plaintiff to the defendant and for monies paid by the plaintiff for and on behalf of and to the use of the defendant at the request of the defendant. In iÑs defence, the defendant denied virtually every allegation in the plaint. The defence was followed promptly with a request for particulars. The particulars as supplied by the plaintiff did not show that the account opening forms related to the defendant nor did they show that the account was opened and operated by any of the directors of the defendant. The defendant, therefore, applied for the plaintiff's suit to be struck out under order VI rule 13(1)(b) (c) and (d) of the Civil Procedure Rules. The High Court disallowed the application hence this appeal.

Held:

1. Particulars form part of the pleadings and they bind the party furnishing them. No case inconsistent with the pleadings would be allowed to be set up at the trial.

2. On an application to strike out a plaint under order VI rule 13(1) (a) of the Civil Procedure Rules on the ground that it discloses no reasonable cause of action, the truth of the allegations contained i~ the plaint is assumed and evidence to the contrary is inadmissible.

3. Where the application to strike out a plaint is made under order VI rule 13 (1) (b), or (c) or (d) of the Civil Procedure Rules or the inherent jurisdiction of the court on the ground that the claim is 'frivolous' or is an abuse of the process of the court, evidence is admissible to show that this is the case.

4. The power to strike out pleadings is one which should be exercised only in plain and obvious cases. The summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it

	is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case. 5. Where a plaintiff brings an action where the cause of action is based on a request made by the defendant, he must allege and prove, *inter alia*, both the act done and the request made for the doing of such an act. *Appeal allowed.* **Cases** 1. *Lawrence v Lord Norreys* (1890) 15 App Cas 210; [1886] All ER Rep 858 2. *Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 3. *Hubbuck & Sons Ltd v Wilkinson Haywood & Clark Ltd* [1899] 1 QB 86; [1895-99] All E R Rep 244; (1898) 79 LT 429 4. *Dyson v A-G* [1911] 1 KB 410; [1912] 1 Ch 158 5. *Nagle v Feilden* [1966] 2 QB 633 6. *Drummond - Jackson v British Medical Association* [1970] 1 All ER 1094; [1970] WLR 688 7. *Murri, Paolo v Gian Battista Murri & another* Civil Appeal No 59 of 1997 8. *Melas v New Carlton Hotel Ltd* [1977] KLR 47 9. *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1969] 3 All ER 897; [1970] Ch 506 10. *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 **Statutes** Civil Procedure Rules (cap 21) Sub Leg) order VI rules 13(1) (a)(b)(c)(d), (2)

Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	HCCC 235 of 1998
Case Outcome:	Appeal Allowed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, LAKHA & KEIWUA JJ.A.)

CIVIL APPEAL NO. 35 OF 2000

BETWEEN

YAYA TOWERS LIMITED.....APPELLANT

AND

TRADE BANK LIMITED (IN LIQUIDATION).....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts (Mr Justice Mbaluto) dated 4th February, 2000

in

HCCC No 235 of 1998)

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JUDGMENT

Lakha JA. These proceedings arise from yet another action in the long running battle relating to the construction and development of a building complex in Nairobi now popularly called “Yaya Centre”. They are by way of an appeal by the unsuccessful defendant from a decision of the superior court (Mbaluto J) given on 4th February 2000 whereby the learned judge dismissed the defendant’s application dated 22nd October 1999 to strike out the plaint and dismiss the suit brought against it by the plaintiff by a plaint dated and filed on 15th June 1998 claiming Kshs 195,684,223/ 30 together with the interest and costs. The grounds of the application were that the suit was an abuse of the process of the court or, alternatively, the claim was frivolous.

The plaintiff’s case as pleaded can be summarized as follows: (1) At all material times the defendant operated a banking account with the plaintiff being Account No 569960 through which the defendant transacted and paid for all expenses relating to the construction and development of Yaya Centre through this account. (2) In or about July, 1992 at the request of the defendant the plaintiff extended an overdraft facility to the defendant in the said account. At the time the plaintiff was put under management and later liquidation the defendant was indebted to the plaintiff by way of an overdraft account a sum of Kshs 195,684,223-30 together with interest. (3) In the alternative, the plaintiff claimed the said sum being the amount due for the monies lent by the plaintiff to the defendant and for monies paid by the plaintiff for and on behalf of and to the use of the defendant at the request of the defendant. (4) In the further alternative, the plaintiff claimed the said sum being money payable by the defendant to the plaintiff as money had and received by the defendant to the use of the plaintiff as stated in paragraph 6 of the plaint.

It is right, I think, to say at once that the defendant promptly and emphatically denied the plaintiff’s claim and virtually every allegation in the plaint which was capable of being disputed was put in issue by the

defendant. In particular, it was denied that the defendant opened or operated with the plaintiff Account No 569960 as alleged or at all or that it made any payments of alleged expenses as alleged or at all. It stated that the said account was entitled “Yaya Development Account” and was created and opened by the one Al Noor Kassam and/or other officers and directors of the plaintiff. It was further denied that any banking facilities or overdraft was extended by the plaintiff to the defendant as alleged or at all. The alleged loan was also denied or that the defendant had received any monies to the use of the plaintiff as alledged and, in any event, this latter plea was misconceived.

The defence was following promptly with a request for particulars. On 15th June1999 the defendant requested for particulars – in particular that of the alleged request allegedly made by the defendant for an overdraft facility, for monies lent or paid by the plaintiff on behalf of and to the use of the defendant. In response, the plaintiff’s advocate furnished specimen signature cards and opening accounts forms in respect of the Account No 104-082088-001 and number CA 569960.

The particulars furnished and relied upon by the plaintiff to support and substantiate the allegations made in the plaint do not, upon a cursory examination of the specimen signature cards and opening accounts forms, show that they related to the defendant but they are in respect of Yaya Centre Development Account. Nor do they show that the account was opened or operated by any of the directors or officers of the defendant but to the contrary by the directors and officers of the plaintiff and, most importantly, they do not show that the defendant made any request for overdraft facility or loan or for any monies to be paid on behalf of the defendant.

In the circumstances, it might be convenient at this stage to remember the effect of the particulars furnished. It is trite that particulars form part of the pleadings and they bind the party furnishing the same. No case inconsistent with the pleadings would be allowed to be set up at the trial, particulars pleading request in writing will not permit a case of request which is implied.

On an application to strike out a plaint under order VI rule 13(1) (a) of the Civil Procedure Rules (the Rules) on the ground that it discloses no reasonable cause of action (which the present case is not) the truth of the allegations contained in the plaint is assumed and evidence to the contrary is inadmissible (see order VI rule 13(2) of the Rules). This is because the Court is invited to strike out the claim *in limine* on the ground that it is bound to fail even if all such allegations are proved. In such a case the court’s function is limited to a scrutiny of the plaint. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the Court’s function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.

Where, however, the application is made under order VI rule 13 (1) (b) or (c) or (d) of the Rules or the inherent jurisdiction of the court on the ground that the claim is ‘frivolous’ or is an abuse of the process of the court (as in the present case) evidence is admissible to to show that this is the case. A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said:-

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini-trial upon the affidavits. As Danckwerts, LJ, said in *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244:-

"..... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce the trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent powers of the court and not a proper exercise of that power."

In *Hubbuck & Sons Ltd v Wilkinson Haywood & Clark Ltd* [1899] 1 QB 86 at 90-91, Lindley MR said:

".....Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim is proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by order XXV r 2; the other is to apply to strike out the statement of claim under o XXV r 4. The first method is appropriate to cases requiring arguments and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved to entitle the plaintiff to what it asks."

In *Dyson v A-G* [1911] 1 KB 410 at 414, 419 Cozens-Hardy MR said the procedure 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance' and

Fletcher Moulton LJ in the same case thought it should be confined to cases where the cause of action was 'obviously and almost incontestably bad'. More recently Salmon L J said in *Nagla v Feilden* [1966] 2 QB 633 at 651:

"It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable."

Of course, it is true, as was pointed out by Sir Gordon Willmer in *Drammond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1105: "The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result". However, it is not the length of arguments in the case but the inherent difficulty of the issues which they have to address that is decisive.

It is convenient at this stage to refer to what was stated in *Paolo Murri v Gian Battista Murri & another* Civil Appeal No 59 of 1999 (unreported):

"....., it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgment, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse on the process of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case. The summary jurisdiction was stated by Lord Greene, MR in *Cow v Casey* [1949] 1 KB 474 at 481 as follows:-

.... "however difficult the point of law is, once it is understood and the Court is satisfied that it is really

unarguable, it will give final judgment."

This robust approach was followed in our jurisdiction by Sheridan, J in *Melas v New Cartton Hotel Ltd* [1977] KLR 47. And as was said by *Buckley, J (as he then was) in Carl-Zeiss-Stiftung v Rayner* [1969] 3 All ER 897 at 908:-

"It has been suggested in this case that, if the question whether the issue is *res judicata* is a difficult or complicated one, this in itself is a sufficient ground for refusing to strike out the plea. I cannot think that this is right. If, as will normally be the case, the relevant information is before the Court before which the interlocutory application comes, the judge ought then to decide whether the issue is *res judicata* or not. However difficult or obscure the point may be, for it will not become less so by waiting for the trial. If, on the other hand the necessary information is not before him, the application will be premature and should fail."

.... I would add that the object of the summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. ..... The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation.

Where, as here, a plaintiff brings an action where the cause of action is based on a request made by the defendant, he must allege and prove, *inter alia*, both the act done and the request made for the doing of such an act. These are distinct, and the one cannot be inferred from the other. In the absence of any request shown to have been made by the defendant in the particulars delivered of such an allegation, it would not be possible for the plaintiff to prove any request made by the defendant. Without this, it is clear to me that the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail. I do not find anything in the material before me to support or substantiate the allegation that the defendant made any request as alleged or at all. Once the point is argued, examined and considered it appears to me to be a simple, plain and obvious case and the plaintiff's pleaded cause of action can, in my judgment, be properly characterized as unarguable or almost incontestably bad.

For these reasons, I reach the conclusion that it would be right to characterize the bringing of these proceedings in the ordinary Courts as an abuse of the process of the court. In the circumstances, it would be inappropriate to embark upon any discussion of the other issues canvassed in counsel's submissions on the hearing of the appeal .

The learned judge, with respect, erred in law in failing to appreciate that the allegation that the defendant had made any request was ill-founded, could not be sustained by the admitted documents, was not supported by the particulars on which the plaintiff relied for any support with the result that the plaintiff's action as pleaded was unarguable. His discretion was therefore clearly vitiated and led him, with respect, to reach a conclusion which was plainly wrong and this Court is bound to interfere.

Accordingly, I would allow the appeal with costs, set aside the order of the superior court given on 4th February, 2000 and substitute in its place an order that the plaintiff's plaint be struck out and the suit be dismissed with costs (including those of the striking out application) to be paid by the liquidator of the plaintiff to the defendant as prayed in the defendant's application in the superior court dated 22nd October, 1999.

Tunoi JA. I have had the advantage of reading the draft judgment of Lakha, JA with which I am in full agreement.

It is manifestly clear that the appellant did not open or operate with the respondent Account No 569960. It is further admitted that neither did the directors of the appellant nor its shareholders approve of the account. On the contrary, the account was opened and operated by the employees of the respondent without express authority of the appellant. As the suit is based on an overdraft extended to the appellant at its request, it is my view, that in these circumstance, it has no semblance of a cause of action and no amendment whatsoever can inject any life into it.

The suit obviously discloses no reasonable cause of action and the learned judge ought to have struck out the plaint and to dismiss the suit.

As Keiwua, JA agrees, the orders proposed by Lakha, JA shall be the orders of the court.

Keiwua JA. This appeal arises from the decision of the superior court, (Mbaluto J) delivered on February 4th, 2000, in which the learned judge dismissed the application dated October 22nd, 1999 brought by the appellant under the inherent powers of the court and under order 6 r 13(1) (b) and (d) of the Civil Procedure Rules contending that the said suit was an abuse of the process of the court or alternatively the claim therein was frivolous and should be dismissed. The application was supported by an affidavit of one Ian Clifford Rayner sworn on October 19th, 1999 and to the extent relevant on the plaintiff's reply to the request for further particulars filed in Court on October 13th, 1999.

The respondent on October 28th, 1999 had filed grounds of objection to the said application together with an affidavit of Elizabeth O Okoth who after examination of the records of the respondent deponed that the Account No 569960 titled "Yaya Centre Development" was operated by named employees of Yaya Centre together with one Alnoor Kassam, Gideon Ndambuki, James Mwangi and Ian Rayner. That sharply contrasted with Ian Clifford Rayner's assertion that the account was not that of the appellant and accordingly Rayner was equally unaware of any transactions connected therewith. The affidavit of Elizabeth O Okoth averred that Ian Clifford Rayner was one of the signatories to the said account. In the same affidavit of Elizabeth O Okoth a letter from M/s Esmail & Esmail Advocates of November 1, 1994 had been exhibited and under which it had been said the respondent had paid rates for 1992 as according to that letter the property in respect of which the rates arose had been sold to the appellant who was then care of the respondent. The affidavit of Okoth had also exhibited a letter dated July 6th, 1992 from the previous owners of Yaya Complex in which the sale to the respondent had been referred together with some development which had been undertaken by the previous owner who sought payment theretofore from the respondent.

In the said affidavit of Elizabeth O Okoth the following had been deponed to:-

"6. Consequent upon the judgment in HCCC No 3791 of 1993 of Hon Justice Pall on 9th January 1998, the defendant /applicant took possession and control of Yaya Centre together with the developments upto that date. The defendant has therefore taken benefit of all works of development therein. 6 (sic) The account in question was an overdraft account in which Yaya Centre expressly and /or impliedly agreed to pay interest on pursuant to the banking practice".

The appellant had also filed an affidavit by one A A K Esmail who described himself as the sole Director of the appellant in 1992 and 1993 with authority to open and operate bank accounts of the appellant and he deponed that at no stage did the appellant open or authorise anyone else to open with respondent a bank account called Yaya Centre Development Account. The deponent came to know of that account for

the first time in 1997 or 1998. However, the deponent had in the affidavit disclosed that the respondent had taken over possession of Yaya Centre in 1992 and there was some ongoing development in some part of the complex which would have required no more than Kshs 35 million to complete. But instead of taking that course, the respondent embarked on converting the premises into a hotel which conversion called for demolition of some of the existing internal structures in the portion to be converted and in the process thereof the appellant claimed to have lost considerable income due to the delayed completion in its own construction.

The deponent had averred that no payment from the said account had been made to contractors, suppliers and consultants of Yaya in respect of building work and development of unfinished residential tower at Yaya Centre and all payments were made on the unauthorised project of the hotel construction embarked upon by the respondent without authority of the appellant, as such the appellant was under no obligation to pay for such an unauthorised construction. The said deponent laid emphasis on the fact that specimen signatures supplied by the respondent on the opening of the said account were not those of the officers of the appellant.

The deponent has also drawn attention to an affidavit of one Matilda Onyango an employee of Central Bank of Kenya in which she stated that she had investigated the accounts held by the respondent with its customers and among which was an account the respondent opened in the name of Yaya at the time the respondent had the *defacto* direction of officers of the respondent. Matilda Onyango says she came to the conclusion after investigation that a very substantial proportion of the transactions passing through that account had nothing to do with Yaya and had been improperly passed through the account.

The foregoing was the state of facts that was before the learned judge and upon which his ruling, dismissing the application to have the suit dismissed, was based. The trust of the appeal is that the learned judge had failed to appreciate that there existed no reasonable grounds for the allegations that the appellant had operated Account No 569960 through which the appellant transacted and paid the construction and development of Yaya Centre and that on the request of the appellant the respondent had granted it overdraft facility in that account and there had been outstanding a sum of Kshs 195,684,223/20 which the plaintiff had claimed. The learned judge has also been criticized for not holding that there existed nor reasonable grounds for the allegation that Kshs 195,684,223.20 was due from the appellant to the respondent on account of money lent and for money paid by the respondent for and on behalf of and to the use of the appellant at the request of the appellant and that there existed no reasonable grounds for the allegation that the said money is money that had been received by the appellant to the use of the respondent.

In my judgment I have no hesitation in pointing out the fact that the learned judge had correctly directed his mind to what in my view is the applicable law regarding the summary jurisdiction of the court when dealing with an application to strike out or dismiss a pleading as that which was before the learned judge in this case. I also endorse the statement of Madan, JA in the case of *DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & another* (Civil Appeal No 37 of 1978) in which he stated that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendments, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it”.

I am, however, far from persuaded that to have acceded to the appellant’s application, to have the suit dismissed in terms of the inherent powers of the court and order 6 r s 13(1) (b) and (d) of the Civil

Procedure Rules, the learned judge would have been engaged in a minute and protracted examination of documents or facts of the case in order that he can see that the suit was not frivolous or not an abuse of the process of the court – [per Lord Danckwerts in *Wenlock vs C Moloney* [1965] 1 WLR 1238 at p 1244]. I am also not persuaded that the learned judge would have acted in darkness without the full facts of this case if he allowed the appellant's application. For in my judgment the factual basis of the application is to me abundantly clear in that both parties are agreed that the property known as Yaya Centre or Yaya Centre Complex had at one time changed hands between the appellant and the respondent and there were ongoing developments to be completed in respect thereto.

It is here that I pause and set out what these parties say transpired between them. Though the appellant had conceded in the affidavit of Esmail that there were ongoing developments when the property's possession went to the respondent, Esmail averred that the respondent in fact did not continue with those developments but abandoned and initiated a completely different development of a hotel outfit which the appellant never sought or authorised the respondent to initiate or carry on with it. In which event, if any account was opened in that behalf it indeed, and I agree with that assertion that, had nothing to do with the appellant and who cannot in law be prevailed upon to make good the cost thereof. There is even evidence that a substantial proportion of transactions passing through the said account had nothing to do with the appellant and had been improperly passed through that account.

On the face of the foregoing facts, I do not agree that in retaking possession of the property, the appellant had taken any development thereto to qualify to have taken a benefit of any of the "works of development" for which the appellant is in law under a duty to reimburse the respondent. It is a known fact that the said account had been opened at the time when the respondent had taken possession of the Complex from the appellant and could not, as it is now shown by particulars supplied, have been opened by anybody purporting to be acting for the appellant.

I would in these circumstances allow the appeal with costs, set aside the ruling and ordes of the superior court and dismiss the suit in the superior court with costs to be paid by the liquidator of the respondent.

Dated and delivered at Nairobi this 27th day of October, 2000.

P.K. TUNOI

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JUDGE OF APPEAL

A.A.LAKHA

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JUDGE OF APPEAL

M.KEIWUA

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR