BURNING ISSUES IN CIVIL AND CRIMINAL PROCEDURE AND PRACTICE

ESSAYS IN HONOUR OF

HON. JUSTICE OMOTUNDE ILORI

CHIEF JUDGE OF LAGOS STATE

BY

INTERNATIONAL LEGAL RESEARCH HOUSE

BURNING ISSUES IN CIVIL AND CRIMINAL PROCEDURE AND PRACTICE

ESSAYS IN HONOUR OF
HON. JUSTICE OMOTUNDE ILORI
CHIEF JUDGE OF LAGOS STATE

BY

INTERNATIONAL LEGAL RESEARCH HOUSE
1999

Complimentary Copy to
Kunle Aina Esq.

ISBN.....978-028-656 -X
INTERNATIONAL LEGAL RESEARCH HOUSE LTD.

Printed by Adesola Print & Company
27 Oteomi Street, Mushin, Lagos

CONTENTS

CRIMINAL PROCEDURE

CHAPTER SEVEN

NON - DISCLOSURE OF REASONABLE CAUSE OF ACTION – A CRITICAL APPRIASAL

BY KUNLE AINA*

This is a dangerous and unnecessary assumption that all pleadings normally disclose a cause of action and so in most cases, even when the judge knows from the onset of a matter that the issues as disclosed in the statement of claim is a non issue or that the issues as formulated in the pleadings are absolutely unreasonable if the opposing party does not raise any objection, the case will go on to hearing and eventually the matter will be dismissed. The pertinent question is why waste such time? Why the waste of so much resources? In fact a lot of the cases before the courts today do not disclose any reasonable cause of action.

This paper will discuss the position of the law when the pleadings do not disclose any reasonable cause of action, what options are available under the law to both the defence and the courts, and we shall make appropriate suggestions for reform.

HISTORICAI ARTEFACTS: DEMURRER

In Nigeria and in England[2] demurrer has been abolished; it is therefore now impossible to initiate a demurrer proceedings.

The word 'demurrer' was coined from the latin word "***demorari***" translated to 'wait' or "Stay". Before its abolition it was on effective way of fighting a defective pleading[3] Demurrer has been explained as *"where on allegation of a plaintiff, by complaint or bill (equity action) even if held to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer, or that, for some reason, apparent on the face of the complaint or bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer*[4]"

In effect it is an allegation that even if the facts as stated in the pleadings are true, yet their legal consequences are not such as to put the defendant to a necessity of answering them or proceeding further with the case[5].

Formerly at Common Law, specialty creditors may sue infant heirs for debts of their progenitors, either party may apply by way of demurrer for a stay of the proceedings until the infants are of age, or in cases of partition and foreclosure, and either of the parties are yet infants, either of them may apply for a "demur' until the infant comes of age. This type of demurrer was abolished in 1830[6].

A demurrer afforded a rapid and inexpensive mode of determining a point of law in question between the parties, and if the whole case is hinged on that question, then the determination of the demurrer determines the suit. If however, there are several causes of actions in the suit, and a demurrer is raised on one point, the determination of that point may not necessarily determine the Suit, as the remaining questions have to be decided and consequent amendments may thereafter be allowed by the court.

Before the Judicature Acts 1873-75 the nature of demurrers differed according to whether it was the Common Law Court or Court of Equity - At Common Law, there are two types – demurrer upon pleadings and demurrer upon evidence. Demurrers upon pleadings were of two types, general demurrers or demurrers to the substance, that is, raising a point of law, and special demurrers or demurrers to the form used where the pleadings being objected to do not follow the rules of pleadings. It is special because the defect had to be specified in the demurrer. Special demurrers were abolished by the Common Law Procedure Act 1852[7]. A demurrer to evidence could be raised during trial, that the evidence offered do not support the suit.

In Equity, demurrers were not popular, but it could be raised for various reasons e.g, for want of equity, want of parties etc[8]. Demurrers were finally abolished in 1883. R.S.C. Order 18 rule 11, provides that a party may by his pleading raise any point of Law, which may be tried as a preliminary issue. If the pleadings discloses no reasonable cause of action or defence it may be struck out[9]. In Criminal cases, the only demurrer available is the general demurrer, but rarely used. Lord Parker in **R V Deputy Chairman of Inner London Sessions, Ex p. Metropolition Police Commissioner**[10] said *"I hope demurrer in criminal cases will be allowed to die naturally"*

Demurrer had been abolished in England since 1883, and in the current English rules of Court, it is no longer necessary to disclose that demurrers had been abolished, but in the rules of court in Nigeria we still think it is important to state "No demurrer shall be allowed[11]

Rule 1 of Order 23 of the Lagos State Rules is therefore unnecessary and it is confusing. It should be removed, its inclusion does not add anything to the Law.

REASONABLE CAUSE OF ACTION

All actions before the court must have a reason, a purpose, there must be a grievance that must be adjudicated upon. A party (the plaintiff) must have been aggrieved by the action of the defendant as to force him to commence an action in court. The reason or the source of his grievance is the cause of action. The grievance must however be known to Law. A cause of action has been defined as, *"every fact (though not every price of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to judgement of the court"*[12].

A cause of action forms the totality of facts that must be proved in court to support a particular claim. It must be facts placed before the court to ground judgement in favour of the plaintiff. In the words of **Diplock C.J.,** *"The words "cause of Action" have been defined as simply a factual situation the existence of which entitles the person to obtain from the court a remedy against another person"*[13].

In Ireland, a "cause of action" has been defined as, *"the subject-matter or grievance founding the action, not merely the technical cause of action"*[13].

A much more practical definition would emerge, that a cause of action is the determination as to the court rights and obligations of the plaintiff. **Obaseki JSC,** defined a cause of action as

"the question as to the plaintiffs founding the action to be determined by the court in favour of one party against the other party"[14]

It is the totality of the rignts and obligation of the plaintiff. Where therefore pleadings do not disclose any questions as to the civil rights and obligations of the plaintiff then there is no cause of action whatsoever.[15]

One may say that all causes of action by law is a reasonable one[16]. Why use the word reasonable? Where the pleadings fail to disclose any cause of action, then there is strictly nothing upon which the court could adjudicate. It is either there is a cause of action or there is none. But the law strictly

requires that a cause of action must be reasonable. One may assume that the law prefers a higher standard, that the pleadings must not only disclose a cause of action, but also that the cause of action must also be reasonable.

From the case law, the above position may not be entirely correct. The words "cause of action" may be taken as synonymous with reasonable cause of action", as reasonable cause of action could be defined as

"a cause of action with some chance of success when only the allegations in the pleadings are considered".[15]

It will have a chance of success if it discloses the plaintiffs civil rights and obligations. Much will depend on the facts of each case and on the solicitor handling the matter. Because a cause of action while being a factual matter is also based on law. It is a

(a) cause of complaint;
(b) a civil right or obligation fit for determination by a court of law; and
(c) a dispute in respect of whic urt of law is entitled to involve its judicial powe ine.[16]

It is a factual situation which enables on obtain a remedy from another person in court with respect to It consists of every fact which it would be necessary for the plain prove, if traversed in order to support his right to judgment[17]

The facts of the case as presented in the pleadings therefore is very important. It is the case of the plaintiff, and under our law, the parties are bound by their pleadings[18]. It is an established fact that pleadings are meant to contain essential fact though briefly and succintly stated, but should as much as possible disclose that a dispute exists between the parties and the nature of such dispute. It is not evidence, neither is it required to argue the case or place the issue at stake under any general law, but it must be clear as to the civil rights and obligations that the plaintiff desires to enforce.[19]

A reasonable cause of action therefore depends on the factual situation as presented to the court in the pleadings.

Justice Warihi-Whyte in the case of **Bello v A.G Oyo State,**[20] said

".... The factual situation which the plaintiff relies upon to support his claim must be re-organized by law as giving rise to a substantive right capable of being claimed and enforced against the defendant, in other words the factual situation relied upon must constitute the essential ingredients of an enforceable right or claim "[21]

The legal practitioner must be very careful in drafting the pleadings, a pleading must show not only the facts of the case being presented to the court but also disclose triable issues, a cause of action known to law, where none is disclosed the matter will be struck out as it has not disclosed a reasonable cause of action.

When Action Does Not Disclose a Reasonable Cause of Action:-

Order 23 rule 4 of the High Court of Lagos State Civil Procedure Rules States:

"The Court or Judge in Chambers may order any pleadings to be struck way out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous, or vexatious, the Court or Judge in chambers may order the action to be stayed, or dismissed, or judgement to be entered accordingly as may be just "[22]

In England, the Judge is empowered to strike out pleadings at any stage of the proceedings if it does not disclose any reasonable cause of action or defence, as the case may be[23]. A very important addition which is non-existent in the Nigeria rules of court is paragraph (2) thereof, that "no evidence shall be admissible on an application under paragraph (1)(a)[24] The provision above are provided in lieu of demurrer, as stated earlier demurrer has been abolished. The present procedure is easier, it is an improvement on, and faster than the old demurrer proceedings.

The courts have had cause to interpret the rule and determine when an action discloses no reasonable cause of action. A reasonable cause of action as explained earlier is a cause of action with some chance of success. It is a good cause of action possessing legal validity and sustainability. It need not invariably succeed, but must have good chance of success on the face of the claim and the pleadings.[25] The court will not permit a plaintiff to be driven from the judgement seat except where the cause of action is obviously bad or incontestably bad.[26]

The facts disclosed in the statement of claim will be taken as true[27] and correct, but that in spite of that it will be impossible for the court to give judgment in favour of the plaintiff based on the statement of claim.
The statement of claim must therefore obviously need no defence, as it cannot attract any favourable judgment.

It must be an unarguable case and on the face of the pleading having no chance of success.[28] The cause in issue must be clear and absolutely beyond any doubt whatsoever,[29] wherever there is doubt, then the doubt must be resolved in favour of the plaintiff.

The courts have emphasized that it will not strike out the statement of claim where it could be saved by amendment,[30] but where no amendment no matter how ingenious could save the pleadings, then it will be struck out.[31]

It is clear that the court will not strike out a case for non-disclosure of reasonable cause of action merely because the legal practitioner committed errors that could be amended on the pleadings. In practice, lawyers have raised the issue of non-disclosure of reasonable cause of action merely for typographical errors.[32] Where the error could be corrected by an amendment of the pleadings, immediately the defendant raised the issue, the plaintiff should not wait for arguments to commence, but should file a motion for amendment of the pleadings, this will in effect prove that the error could be rectified by amendment. Also, the court should exercise restraint, and take the application for amendment before the motion to strike out the pleadings, and after the amendment has been taken, and the pleadings still do not disclose a reasonable cause of action, then it should be struck out.

The court will not strike out a matter for non disclosure of a reasonable cause of action, if there are facts that are seriously in dispute, and there is no way to access the truth except the matter go on to trial.[30] Affidavit evidence will be totally unacceptable, and in fact, the applicant need only raise the issue of law in his defence and notify the other party (plaintiff) that he intends to raise the issue as a preliminary legal objection to the entire suit, or in the alternative file a notice of preliminary objection. It is not proper to file a lengthy affidavit in support of the application or any affidavit whatsoever, and the plaintiff opposing such application should not bother to file any counter–affidavit where there is an affidavit in support of the application.[34] In England, the English rules specifically declared that no evidence shall be admissible to support such application.[35] Though not specifically stated in our

rules, the court has declared that extraneous evidence will be inadmissible;[36] whether oral or affidavit. It is therefore our submission that the court should summarily strike out any affidavit that may be filed in support of an application under this rule[37] as its prejudicial value will outweigh its probative value.

The pleading will be struck out where even though the facts are well stated, but the facts short of the required legal requirement, or where the essential ingredients of a civil liability is not pleaded. In a case of libel, it is important to plead the exact offensive words, it is not enough to plead the medium of libel but the particular words must be pleaded; so, where this was not done, the case will be struck out for not disclosing a reasonable cause of action.[38]

The law is very clear, the applicant must assume that the pleadings are correct, accepted and clear, but is saying in spite of that the case cannot still be sustained.[39] The only pleading for consideration shall be only the statement of claim and writ of summons. The court held inter alia in the case of **Chief Frances Spanner Okpozo v Bendel Newspapers Corporation**[40] that

"...the appellants claim was rightly held to disclose no cause of action as he failed to set out verbatim the label complained of in his wait of summons or to plead same verbatim in his statement of claim".

In simple terms therefore the case as it has been formulated before the court even if admitted has no chance of success and should therefore be terminated.

WHEN APPLICATION UNDER THE RULE SHOULD FAIL.

Where it will entail a prolonged and minute examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action, the court should strike out the application and allow the matter to proceed to hearing[41]. It also ought to fail in cases where there is doubt as to whether the pleadings disclosed a reasonable cause of action or not[42] every doubt should be resolved in favour of the plaintiff as *"the court will not permit a plaintiff to be driven from the judgement seat except where the cause of action is obviously bad or almost incontestably bad "*[43].

In cases, where though there is possibility of raising a substantial legal defence to an action, the court may have to exercise some caution, since the statement of claim and the writ of summons are the only documents for

consideration and no defence or affidavit filed by the applicant could be used. The application will only succeed if and only if, the statement of claim mentioned and specifically pleaded the defence to its action in the statement of claim i.e the defence being raised in the application must be apparent on the pleadings filed by the plaintiff; if such is not possible, it will be wrong to strike out the pleading or dismiss the suit. The defence must first have to be raised in the statement of defence. This applies in cases where there is a bar to the suit under the Limitation Acts, or where there is defence of illegality to the whole transaction, in such cases it is not the duty of the court to assume that the defendant will raise or resort to the defence or law. In the case of **Romex Properties Ltd V John Haing construction Ltd**[44], the court said;

"...In such a case, it is not possible to say that no reasonable cause of action is disclosed since a defence under the Limitation Acts barred the remedy and not the claim and that the defence had to be pleaded".

In all borderline cases, just like in doubtful cases the court should refuse the application. The court must also reject the application where there is need for investigation, or cases that will involved matters of historical research, or traditional evidence[45]

WHAT THE APPLICANTS MUST SHOW:-

The application must be made after service of the writ of summons and the statement of claim, it could be made after filing a statement of defence but before the trial. Though the rules do not specify at what point the application could be made[46]. However the English Rules of the Supreme Court in England Specifically states, " at any stage of the proceedings", we may therefore safely conclude that it could be made at any stage of the proceedings. But it is better made before the trial, or made promptly, much more preferably before the close of pleadings. The applicant is free to raise the issue that the pleadings do not disclose a reasonably cause of action by applying under Order 23 rule 4 by motion or Notice supported with a short affidavit (if necessary) or the applicant may file a defence to the claim and notify the plaintiff of his intention to raise the point as a preliminary objection to the whole suit.

The applicant must thereafter notify the court of his intention to raise the objection.

The applicant must also specify exactly what order is being sought from the court, whether the action should be stayed, dismissed or judgement to be entered as the case may be. It is also better to specify what exactly is being attached whether part of the pleadings or the whole, or indorsement and if it is part of the pleadings the part should be stated clearly[47].

The applicant must be careful to confine the objection to the writ of summons and statement of claim, as no evidence will be allowed, and, even if the applicant filed on affidavit he may not refer to it, neither could he refer to the absence of a counter affidavit in support. Where the applicant has filed a defence, he cannot refer to the defence[48] **Obaseki JSC in Bello V A.G.** [49] emphatically declared that: *"the proposition that a plaintiff has no cause of action merely because the defence has a valid defence is clearly not accepted"*[50]

The applicant must consider the facts of the case as disclosed in the writ of summons and statement of claim, - and ask the basic question – assuming the statements in the pleadings are taken as true and admitted, could a reasonable court of law give judgement in favour of the plaintiff? If the answer is in the negative, then the application will succeed. The facts disclosed therefore are important, the facts must also relate to the substantive law, in fact most pleadings had been held to disclose no reasonable cause of action because the pleading do not comply with the law.

In the case of Okpozo V Bendel Newspaper Corporation[51], where the plaintiff failed in a libel suit to specifically plead the offensive words verbatim in its pleadings, the court held:

"where the alleged libel is published in a newspaper, it is not a sufficient compliance with Order 2rule 5 for a plaintiff to merely set out in his statement of claim the name of the newspaper, its date and the heading of the alleged libelous publication contained therein. He must set out the full text of the publication or any part complained thereof verbatim in the pleading and it is not enough to set out the substance or effect of the libel or, even as in the instant case, merely to refer to the caption of the publication. In the instant case, the appellants claim was rightly held to disclose no reasonable cause of action as he failed to set out verbatim the libel complained of in his writ of Summons or plead same verbatim in his statement of claim.."[52]

It is therefore possible for the facts to disclose a cause of action, but under the law (either procedural or substantive) the cause of action may not be reasonable or sustainable even if proved.

In the case of **Panache Communications Ltd V Aikhomu**[53], another libel case, where the offensive publication was properly stated in the statement of claim, the court after examining the full text of the publication complained of come to a conclusion that they convey a libelous meaning and so disclosed a reasonable cause of action, and the fact that the case is weak or not likely to succeed is immaterial.

In the case of **Shodipo V. Lemminkanem OY & Anor**[54] the Supreme Court held that what is important in this type of case is that the writ of summons or the statement of claim indorsed therein discloses **ex facie** or **Prima facie** illegality in that case no court should discountenance such illegality. But it was **Kalgo** JCA in the Part 2 of the same case [55] who put the point beyond every doubt, when he said:

"the issue of illegality was first raised in the Statement of Defence of the Appellant. The Appellant has a duty to prove such illegality in the light of the reasonable cause of action disclosed in the statement of claim. The pleadings of the appellant did not in my view prove the illegality alleged "[56].

It follows that whatever defence the defendant may wish to raise whether on the jurisdiction of the court, locus standi, or statute of limitations cannot be the basis of an application that the pleadings do not disclose a reasonable cause of action, except disclosed and apparent on the face of the plaintiff's pleadings itself such defence could be appropriately raised in the statement of defence, or subject of another point of preliminary objection entirely, but not under this rule of practice.

DUTY OF COURT.

The court must warn itself that the effect of the application if successful will terminate the proceedings and entirely shut out the plaintiff. The burden must therefore be upon the applicant to show without any iota of doubt that the pleadings are unsustainable. In the words of **Tobi** JCA, *"A court of law which is called upon to invoke any or all the above grounds should remind itself that a successful application runs contrary to the tenor and intendment of fair hearing provisions in S.33 of the 1979 constitution ...the burden is*

heavy, very heavy in an applicant to prove the merits of his application. it is not a playing matter ".[5]

Indeed it is not a playing matter, and all aspects of the application must be considered; the option of amendment should also be explored to save the pleadings.

CONCLUSION

Indeed, the rule is a potent weapon to terminate worthless suits, and if well used congestion in our courts will be reduced. We suggest however, that our rules be expanded along the rules in England to remove doubts as to time of filing the application, and whether affidavit evidence would be allowed as discussed above.

END NOTES

*KUNLE AINA ESQ: - LECTURER FACULTY OF LAW, UNIVERSITY OF IBADAN

1. The States Civil procedure Rule .e.g Order 23.r 1 Lagos State Civil Procedure Rules 1994 (Lagos State Rules) Order 24.r 1 of the Oyo State Civil Procedure Rules 1988.etc.
2. Rules of the Supreme Court (R.S.C.) in England (White Book)
3. Tijani Bambe & Ors. V Alhaji Yusuf Adetunji Aderinola & Ors (1977) ALL NLR 5
4. Balsbangh v Rowland 447 Pa.423,290 A.2D.85,87
5. Black's Law Dictionary 6th Ed. P.432. See also generally Jowit's Dictionary of English Law 2nd Ed. Vol. 1.P.589
6. Debts Recovery Act 1830.S.10.
7. S 5 1id
8. Milford, P1.107
9. 1883 R.S.C. Order 18 rule 19.
10. (1970) 2 Q.3.80
11. Order 23 rule 1 Lagos State Rules 1994
12. per Lord Esher; Read v Brown (1888) 22 QBD 128 at page 131.
12. Letang v Cooper (1965) 1 QB.222 at 242
13. O'keefe v Welsh (1903) 21r. R.P. 718
14. Chief Irene Thomas v Olufosoye (1986) 2S
15. Chief Irene Thomas v Olufosoye Supra
16. Rep. of Peru v Peruvian Guano Co. 35 Ch.D, 95

17. Lord Pearson in **Drummond – Jackson v British Medical Association** (1970) 1 WLR 688
18. **Afolayan v Ogunrinde**. (1990) INWLR (Pt.127)369
19. **Adigun v Aina** (1964) 1 AUNLR 127, **Adimora v Ajufo** (1988) 3 NWLR (Pt.80), **Bello v A.G.Oyo State** (1986) 5NWLR (Pt.145)828, **Utih v Enger** (1990) 5NWLR (Pt.153)771
20. **Isobella Akinhanmi & ors v Omotayo Daniel & ors** (1977) All NLR229.
21. Ibid.
22. (1986)5 NWLR (Pt45) 828
23. Ibid at Page 876
24. See also Order 24 rule of the High Court of Oyo State Civil Procedure Rules 1988.
25. Order 18 rule 19 R. S. C. 1991 para (1) (a)
26. Order 18 rule 19 rule 19 (1) (a) R. S. C. 1991
27. per Tobi, J.C.A in **Sodipo V Lemininkanem** OV (1992) 8 NWLR (Pt258) 229
28. Annual practice 1966. P. 430, **Fletcher Moulton L. J in Dyson V A.G.** (1911) 1KB. 419
29. **Sule Kotagun V Roberts** (1967) AUNLR 137
30. Dankwerts and Salmon L.JJ in **Nagle V Feilden** [1966] 2 QB 633 at 648
31. **Lindley L.J; in Kellaway v Bury** (1892) 66L.T.599
32. **Chief Irene Thomas v Olufosoye** supra.
33. **Romex properties Ltd v John Laing Construction Ltd.** [1983] Q.B 398
34. Chief Irene Thomas v Olufasoye supra
35. **Western S.S.Co. v Amaral Sutherland & Co.** (1914) 2 KB 55, Shell-B.P. **Petroleum Development Co. of Nigeria Ltd v Onasanya** (1976) 6 SC 89, **wenlock v Moloney** (1965) 2 All ER 871
36. Sellers L.J in Wenlock v Moloney supra
37. 0rd.18 rule 19(1) (a) R.S.C. 1991
38. **Ogbor v Adoga** (1994) 3 NWLR (Pt 333) 469
39. Order 23 rule 4, Lagos State Rules 1994.
40. **Wood v Langley** (1845) 5 DEGM & G.44, Foko v Foko (1968) NWLR 441, **Adewale Fashanu v Govt. of western Nigeria** (1955-56) WRNLR 138.
42. Op. Ct
43. **Evans V Barclays Bank** (1924) W. N. 97
44. **Dyson V A.G.** (1911) 1 k B 414
45. 023, Lagos State Rules 1994
46. Op. Ct
47. **Evans V Barclays Bank** (1924) W. N. 97
42. **Dyson V A.G.** (1911) 1 k B 414
43. 023, Lagos State Rules 1994
44. **Walliouson V London** etc. (1879)12Ch. D. 787 **Carl Zeiss Stifung V Rayner** & Ltd (No3) (1970)Ch. 506

45. Kusada V Sokoto N.A. (1968) 1AUNLR 377, Balaji V Bamgbose (1986) 4NWLR (Pt 37) 632 Hispanic Constrution Nig. Ltd V Odogiyan (1986) 4NWLR (Pt34)248
Adesokean V Adegoroiu (1991)3 NWLR (Pt179) 293
46. (1986) 5NWLR (Pt45) P. 828 at 876.
48. op. Cit.
49 ner Ogundore J C A Ibid >P. 658 see also Okafor V Ikeanyi (1979) 3-4 SC99 at 104
50. (1994)2NWLR (Pt327) P. 420
51. (1986) INWLR (Pt15) 220 (part 1)
52. (1992) 8NWLR (Pt258)229
53. Ibid.
57. Sodipo Vlemminkanem OY (1992)8 NWLR 229 at 243