



**Karia v Khaemba (Civil Appeal E094 of 2022)  
[2023] KEHC 19365 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19365 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E094 OF 2022**

**DK KEMEL, J**

**JUNE 30, 2023**

**BETWEEN**

**FREDRICK KIRUGU KARIA ..... APPELLANT**

**AND**

**ENOS WANYONYI KHAEMBA ..... RESPONDENT**

*(An appeal from the Ruling of Hon J.O Manasses R.M  
in Sirisia PMCC No. 47 of 2021 delivered on 21/7/2022)*

**JUDGMENT**

1. The appellant had filed an application dated March 15, 2022 before the trial court in which he sought the following orders;
  - a. The plaintiff's plaint dated August 23, 2021 be struck out.
  - b. Costs of the application.
2. The application was premised on the fact that the respondent had, prior to instituting the suit under review, had instructed the firm of M/S Robert Wamalwa to file suit No. Bungoma CMCC 202 of 2021 against the appellant which matter was similar to the suit giving rise to this appeal. That therefore, according to the appellant, the latter suit was unsustainable for being a duplication and an abuse of the court process.
3. The respondent filed his response to the application by way of grounds of opposition which inter alia; that the issues raised were factual and counsel could not have been in the knowledge of counsel and that the affidavit offends the provisions of the Statutory Declarations Act and finally, that the application is bad in law.



4. The trial magistrate considered the rival positions and determined that he would not strike out the suit but stay proceedings in that suit to await the outcome in Bungoma CMCC 202 of 2021.
5. Aggrieved, the appellant approached this court on appeal vide a Memorandum of Appeal dated October 7, 2022 where he raises the following grounds;
  - a. The learned trial magistrate erred in failing to strike out the respondent's pleadings in Sirisia PMCC No. 47 of 2021- Enos Wanyonyi v Fredrick Kirugu Karia for duplicity with another suit in Bungoma CMCC No. 202 of 2021 Enos Wanyonyi Khaemba v Fredrick Kirugu & another.
  - b. The learned trial magistrate erred by applying the wrong principles of law in multiple suits by the same parties and over the same subject matter.
6. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged their respective submissions.
7. I have given due consideration to the rival submissions. The main issue in this appeal relates to striking of a suit on grounds of duplicity.
8. The general position on striking out of a suit was stated in *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, Madan JA, stated:

“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 amendment, 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.”
9. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the court expressed itself thus:

321 A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) 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...It cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
10. In this appeal, it is contended that there are two suits which are similar in nature. The first suit is Bungoma CMCC 202 of 2021. In that suit, the plaintiff and the defendant are the respondent and appellant respectively and Equity Bank Limited. The prayers sought therein are general damages and costs of the suit.
11. The suit arose out of a road traffic accident involving motor vehicle registration number KCD 383V, lorry and motor cycle registration number KMET 805P. The appellant and Equity Bank have been sued as the owners of the lorry.
12. The suit giving rise to this appeal was instituted against the present appellant wherein the respondent claims general and special damages as a result of a road traffic accident involving motor vehicle



registration number KCD 383V and the motor cycle the respondent was riding. In that suit, the appellant has been sued as the lorry's registered owner.

13. Looking at the two sets of suits as filed, I am satisfied that the cause of action is similar. The date of the accident is stated as 14/7/2021 in both cases. The issue then is whether the trial magistrate ought to have struck out the suit.

14. Section 6 of the *Civil Procedure Act*, states thus:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

15. The above section is a bar to parallel prosecution of cases in two fora of equal jurisdiction. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR, the court pronounced itself on the subject of sub judice thus;

“Before the court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

16. A careful scrutiny of the two suits shows that the subject matter is the same, the cause of action is similar, the parties are similar and even the prayers sought are the same. The parallel prosecution of the two suits constitutes a waste of judicial time and abuses the due process of the law in that the appellant will have to incur costs defending two suits which may ultimately have the same outcome.

17. In the circumstances therefore, I find the pendency of Sirisia PMCC No. 47 of 2021 to be sub judice Bungoma CMCC 202 of 2021 and it is inevitable that the suit in Sirisia ought to have been struck out but not stayed as there was no reason why the respondent should continue with such a suit even having been made aware of the existence of the one at Bungoma. I find that staying the suit in Sirisia court would serve no purpose other than to saddle the appellant with unnecessary anxiety when the suit related to one cause of action. Further, I find it is illogical for the respondent to abandon his suit at Bungoma which he had filed earlier and rush to Sirisia law courts to institute another similar without withdrawing the one at Bungoma. The only reason can only be said to be forum shopping which is an abuse of the court process and which ought not to be countenanced. In that regard I must agree with the appellant that the trial magistrate erred and thus the order should be reversed.

18. The upshot of the foregoing observation is that I find merit in the appeal. The same is hereby allowed. The ruling by the trial magistrate dated July 21, 2021 is hereby set aside and substituted with an order striking out the respondent's suit vide Sirisia PMCC No 47 of 2021 *Enos Wanyonyi Khaemba*



*v Fredrick Kirugu Karia* for duplicity with another suit in Bungoma law courts namely Bungoma CMCC No 202 of 2021. The appellant is awarded costs of this appeal and in the subordinate court.

**DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023**

**D.KEMEI**

**JUDGE**

**In the presence of :**

No appearance Ngaywa for Appellant

Machuma for Respondent

Kizito Court Assistant

