



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 42 OF 2016

DANTE BURBA (K) LIMITED.....1ST PLAINTIFF

IQBAL SADRUDIN KASSAM.....2ND PLAINTIFF

RAHIM BHANJI.....3RD PLAINTIFF

-VERSUS -

DANTE BURBA DIESEL WORKSHOP [1981] LIMITED.....1ST DEFENDANT

JOSEPH THOMAS O'BRIEN.....2ND DEFENDANT

WANDA GAY TWYNEHAM O'BRIEN.....3RD DEFENDANT

RULING

1. The defendants application dated 21st October 2016 seeks the stay of proceedings in this case until the hearing and determination of the case **DANTE BURBA DIESEL WORKSHOP [1981] LIMITED Vs DANTE BURVA (K) LTD Hccc No. 520 of 2010**.
2. In the alternative, the defendants ask that this suit be struck out, because the issues it raised can be ventilated conclusively in Hccc No. 520 of 2010.
3. It was the defendants' case that by filing this suit when they were aware of the existence of an earlier suit, which had arisen from the same cause of action, the plaintiffs' action constituted an abuse of the court process.
4. In the opinion of the defendants, it would be in the interests of justice to stay these proceedings because otherwise there would be two suits running parallel to each other, yet the said suits were in respect of the same issues, which had arisen between the same parties.
5. If the plaintiff had a counter-claim, the defendants say that that should have been brought in the existing suit, instead of filing a new case.
6. In answer to the application the plaintiffs conceded that the two cases;

“...have the same parties, arise out of the same cause of action and are on the same issues?.

7. However, the plaintiffs added, that because of the features which are common to the 2 cases, the same should be consolidated. Indeed, the plaintiffs had already lodged an application in court, seeking the consolidation of the 2 cases.
8. And in the opinion of the plaintiffs an order for consolidation of the suits, if it was made, would negate the need for stay of these proceedings.
9. In determining this application I begin by noting that whilst the applicant's alternative prayer was for the striking out of the suit, the applicants did not pursue the said alternative relief.
10. Indeed, even in the heading of the application, the applicants did not invoke any of the provisions pursuant to which courts are ordinarily asked to strike out pleadings.
11. On the other hand, the respondents appeared to focus their response to the alternative prayer.
12. As the applicants did not pursue the alternative prayer, the same is deemed to have been abandoned.
13. However, if it had not been abandoned, I would have held that the applicants failed to demonstrate grounds that would warrant the striking out of the suit.
14. Nonetheless, I must not be understood to imply that when a party files a second suit, which has the same parties and issues, and which arises from the same cause of action, the court cannot strike out the said second suit.
15. To the contrary, if the court came to the conclusion that the second suit was frivolous; or that it may prejudice, embarrass or delay the trial of the action; or that the said second suit was otherwise an abuse of the process of the court, it would be perfectly in order to strike out the suit.
16. When the second suit raises issues that can be determined in the first suit, it may be difficult for the party bringing the suit to justify the filing of the second suit.
17. And even if the second suit raised a new issue, the party bringing the second suit may still face the uphill task of demonstrating why that new issue could not have been raised within the first suit, either from the start or through an amendment.
18. The overriding objective is to provide facilitation of a just, expeditious and proportionate resolution of civil disputes, as the respondents have clearly articulated. However, by bringing a second suit which raises issues which could be determined in the first suit, the respondents were actually negating the overriding objective.
19. In this case, the respondents have reasoned that if this suit were to be struck out, they would be compelled to seek leave to amend the plaint in the suit which was filed earlier. If that were to happen, the respondents feel that the cost of litigation would increase and so also that there would be a waste of judicial and administrative resources.
20. Perhaps it had not dawned upon the respondents that it is the filing of a second suit which had an even greater impact in terms of duplicating costs and the resources which would be needed to resolve two cases, where one would have been sufficient.
21. But it is also significant that the respondents are tacitly acknowledging that that which they wanted to achieve through the second suit, could have been easily achieved through amendments to the first pleadings.
22. The introduction of a claim for damages, in the second suit, did not alter the fact that the matters in issue in the said suit were directly and substantially in issue in the first suit. Therefore, as the parties are essentially the same in both suits, and because the suits arose from the same cause of action, the second

suit meets the description set out in Section 6 of the Civil Procedure Act.

23. It follows that the Court cannot proceed with the trial of the second suit.

24. Accordingly, the application for stay of proceedings is successful, and is therefore granted. The respondent will pay the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of October 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Oseko for the 1st Plaintiff

Miss Oseko for the 2nd Plaintiff

Miss Oseko for the 3rd Plaintiff

Were for the 1st Defendant

Were for the 2nd Defendant

Were for the 3rd Defendant

Collins Odhiambo – Court clerk.