



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 101 OF 2013.

WEST KENYA SUGAR CO. LTD. ::::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

TOM MZEE MUKHWANA:::RESPONDENT.

JUDGEMENT

INTRODUCTION.

1. This is an appeal against the ruling in BUTALI SRMCC No. 101 of 2011 delivered on the 2nd day of August, 2013 by a plaint dated 28th June, 2011 the appellant WEST KENYA SUGAR CO. LTD was sued by the respondent TOM MUZEE MUKHWANA for negligence. The appellant then filed the Notice of Motion dated 29th November, 2012 seeking the suit to be struck off on grounds that it was sub-judice amongst other prayers.

2. After hearing the parties the trial court made a filing on the 7th March, 2013 dismissing the Notice of Motion dated 29th November, 2012. The appellant by an application dated 14th May, 2013 therein sought for orders that the trial court review/set aside the orders delivered on 7th March, 2013. The trial court on 1st August, 2013 also dismissed the said application on grounds that it lacked merit.

The appeal.

3. The appellant was aggrieved and dissatisfied by the said ruling and has filed the appeal herein on the following grounds:-

1. That the learned trial magistrate erred in law and in fact in dismissing the defendant's application dated 14th May, 2013 whereas the defendant had proved its case on a balance of probability;

2. That the learned trial magistrate erred in law and in fact holding that the Kakamega suit which was filed in court on 6th July, 2011 was the subsequent suit whereas Butali suit filed on 22nd July, 2013 was the former contrary to law;

3. That the learned trial magistrate erred in law and in fact in disregarding the defendant's application and submissions wholly in arriving at her decision contrary to law;

4. That the learned trial magistrate erred in law and in fact in failing to take into consideration the issues brought before her which she ought not to have considered in arriving at her decision and

considering those that he ought not to have considered in arriving at her decision;

5. That the learned trial magistrate erred in law and in fact in applying wrong principle while dismissing the defendant's application.

4. The appellant want that the ruling of the honourable court of first instance be set aside and the suit in Butali SRMCC No. 101 of 2010 be stayed with costs.

Submissions and determination.

5. It is the appellant who filed their written submissions. They submit that the trial court noted that where two suits are substantially the same like the case herein, the law requires that the later suit be stayed. They have cited the cases of **TOTAL KENYA LTD VS. FANANA INVESTMENT LTD CIVIL CASE NO. 743 OF 1999** and the case of **GRACE WANYAMA WAMALWA VS. PATRICK WAMUKOTA [2013] eKLR.**

6. It further submitted by the appellant that the trial court in dismissing the appellant's application dated 14th May, 2013 found that it is **BUTALI SRMCC No. 101 of 2011** which was filed on 22nd July, 2011 that ought to proceed whereas **KAKAMEGA CMCC NO. 208 OF 2011** filed on 4th December, 2011 ought to be stayed. The only issue for determination therefore is whether the trial court was right to dismiss the appellant's application even after finding that the two cases hereinabove mentioned were subjudice.

7. The provisions of section 6 of the Civil Procedure Act sets out the doctrine of subjudice where it states as follows:-

"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 their litigate."

8. The trial court rightly found and stated:-

"From the above provision it is so obvious that if applied in this case it does mean that this court is barred from handling the respondent's case which involves a matter in issue that is the same as that before the Kakamega Court the parties also being the same and the Kakamega Chief Magistrate's Court has competent jurisdiction to hear and determine the same."

9. I think at this point, the trial court ought to have barred itself from hearing the suit filed in its court being BUTALI SRMCC NO. 101 OF 2011 and allowed the one filed at Kakamega CMCC No. 208 of 2011 to proceed. She misdirected herself by staying the suit at Kakamega which was the one that was filed first and proceeding to rule that the Butali case would proceed. It is on record that Kakamega Civil suit No. 208 of 2011 was filed on 4th July, 2011 while Butali Civil Suit No. 101 of 2011 was filed on 22nd July, 2011. The suit which ought to be stayed is the one that was filed later and this is the Butali Civil Suit No. 101 of 2011.

The appeal is therefore allowed in its entirety as it has merits.

The suits are hereby consolidated to be heard in kakamega under file no208 of 2011. Case 101 of 2011 in Butali is transferred to kakamega law courts for consolidation.

Costs of the appeal to abide with the result of the suit.

SIGNED, DATED AND DELIVERED at **KAKAMEGA** this 22ND day of **NOVEMBER**, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

Simiyu h/b for Kigen.....for the Appellant.

Rauto for Kitiwa.....for the Respondent.

Anunda Court Assistant.