



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.41 OF 2009

EDWIN OTIENO OCHOLA.....PLAINTIFF

FISHERMAN'S PRODUCTS LTD

VERSUS

MANDHIR CONSTRUCTION LTD

EQUATOR BOTTLERS LTD.....DEFENDANT

RULING

1. This is a ruling on a Preliminary Objection whose notice was filed here on 29/5/2013. The notice is dated 27/5/2013 and was argued before me on 2/12/2013.
2. The premise on which the objection is based is that there is a previous suit filed by the plaintiff vide **KISUMU HIGH COURT CIVIL CASE NO.181 OF 2000: EDWIN OTIENO OCHOLA, PAA PRODUCTS LIMITED, and FISHERMAN'S PRODUCT LIMITED VS MANDHIR CONSTRUCTION LIMITED AND EQUATOR BOTTLERS COMPANY LIMITED**. In that suit, the parties were the same as the parties in this suit; the claim is the same; the parties here in are litigating under the same title as in that suit; and the issues in the two suits are the same.
3. During hearing of the objection, Maube for the defendant reiterated the averments made in the notice of preliminary objection. He then referred the Court to a replying Affidavit sworn by one **JOACHIM KIMOJA** in reply to plaintiff's application dated 6/4/2011. In the replying affidavit the pleadings and proceedings in the previous were annexed as "**J.K -1a – f**".
4. In this suit, the plaintiff failed to disclose the existence of the previous suit. Infact he deponed that there had been no previous suit between himself and the defendants. Maube argued that this suit is an abuse of the court process and asked the court to strike out or dismiss the suit.
5. Maube further asserted that the plaintiff cannot feign ignorance of the previous suit, having been jailed for 4 months for contempt of court. The plaint in this suit is said to be a replica of the plaint in the previous suit.
6. Two decided authorities were availed for guidance.

They are **LILIAN MWIKALI MAINGI VS DANIEL MAINGI KIMANI: MACHAKOS HCC NO.93 OF 2003** and **ALAN OKAL AYIEKO & ANOTHER VS EQUATOR BOTTLERS COMPANY LIMITED: NAIROBI HCC NO.1390 OF 2004**. I have read the authorities. In both of them, the suits were struck out upon finding that apart from proven existence of previous similar suits, the plaintiff's had deliberately lied that the previous suits did not exist.

7. The defendant in this suit admitted the existence of the previous suit. He however asserted that the file in the previous suit was lost and that his advocate in that suit had also failed him. He

- asked the court to hear this case.
8. Maube had a brief reply to all this. He averred that the file in the previous suit has never disappeared and that the annexures availed in the replying affidavit were easily given to them by the court registry.
 9. But even assuming the file was lost Maube went on, the solution is not to file another suit but to seek a reconstruction for the previous suit.
 10. I have considered the rival arguments made by each side. I have considered the decided authorities availed. It is very clear that a previous suit - **EDWIN OTIENO OCHOLA, PAA PRODUCTS LIMITED and FISHERMAN PRODUCTS LIMITED VS MANDHIR CONSTRUCTION LTD and EQUATOR BOTTLERS COMPANY LIMITED: KISUMU HCC NO.181 OF 2000** – which was similar to this one herein was filed by the plaintiff.
 11. I have had a look at the pleadings and proceedings in that suit as availed by the defendant. It is clear that all the parties in this suit were parties in that suit. The subject matter is the same; and so also are the issues. At paragraph 3 of the verifying affidavit accompanying the plaint in this case, the plaintiff deponed

“That there is no suit pending as between the plaintiff and the defendant's herein relating to the matter”.

12. During hearing of this preliminary objection on 2/12/2013, the plaintiff said as follows:

“There was a previous suit yes.” And before saying this he had also said **“Those advocates I had hired in the previous case let me down..”**. It therefore follows that when the plaintiff deponed that there was no previous suit between himself and the defendants, he was telling a lie.

13. Ordinarily, this suit is supposed to be stayed. This is the import of Section 6 of Civil Procedure Act (Cap 21). But that is normally done where it is possible to presume good faith on the part of the person who filed the latter suit. As things stand, it is not possible to make that presumption here. The plaintiff filed this suit knowing that he had filed an earlier one similar to it. He then proceeded to prejure himself by denying knowledge of the earlier suit.
14. The verifying affidavit accompanying the plaint in this suit is one for striking out because it tells a lie. It is not reliable. And I hereby strike it out. That, then, leaves the plaint without a verifying affidavit; and such a plaint cannot stand. It is also a plaint for striking out and I hereby strike it out. The plaintiff's case then stands struck out; and that is the proper thing to do because the whole suit is an abuse of the court process.
15. The preliminary objection therefore is upheld. The plaintiff's suit is struck out with costs to the defendants.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a – C/C

Plaintiff – Present

Defendant - absent

Interpretation: English/Kiswahili

Lore for Maube for 2nd defendant

COURT: Ruling on Preliminary Objection dated 27/5/2013 and filed on 29/5/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015