



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO.12 OF 2000**

**JOASH NYABICHA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NYANSIONGO TEA FACTORY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**G. S. OKOTH & CO. ADVOCATES.....INTERESTED PARTY**

**RULING**

1. Before me for determination is a Preliminary Objection dated **24<sup>th</sup> June 2015** filed by the Interested Party in which he contends that:

- 1. The suit registered as HCCC No.12 of 2000 at Kisii was dismissed and thus finalized and no application has been instituted to reinstate the same and therefore this suit is a nullity.**
- 2. A summon is said to be “originating summons” if the suit is starting a fresh and hence cannot be an application in another suit especially if the suit had been finalized.**
- 3. The suit is misconceived, misdirected and is not in compliance with the provisions of Order 52 rule 4(2) of the Civil Procedure Rules and should be dismissed with costs to the interested party (sic).**

2. Attached to the Notice of Preliminary Objection is a replying affidavit sworn by George Shane Okoth on **24<sup>th</sup> June 2015** in which he avers that he was not a party in **HCCC No.12 of 2000**, but there only existed an advocate/client relationship between his law firm and the Plaintiff and as such, he should be sued in a suit where he is a direct party and not in the same suit where he acted for a party.

3. The deponent further states that he had acted for the Plaintiff as his advocate in numerous related cases between the period of 1999 all the way to the year 2015 and therefore, any differences, or disputes that could arise relating to money owed to the client should be dealt with through the taxation of the advocate/client bill of costs or by a reference being made to the Advocate’s Disciplinary Committee.

4. The deponent/interested party therefore prayed for the dismissal of the suit for being improperly filed in a finalized suit.

5. The genesis of the Preliminary Objection is that the Plaintiff and the Interested Party had a client advocate relationship in which in the year 2000, the Interested party (*hereinafter referred in this ruling to*

as the 'advocate') represented the Plaintiff by filing this suit No. **Kisii HCCC No.12 of 2000** against the defendant seeking damages arising out of a road traffic accident that took place on 9<sup>th</sup> February 1998.

6. Judgment was delivered in the High Court Case No.12 of 2000 on **16<sup>th</sup> July 2010** in which the Plaintiff's suit was dismissed with costs.

7. The Plaintiff through the same advocate (*Interested Party*) appealed to the court of Appeal in Kisumu **CA No.302 of 2010** which on **24<sup>th</sup> October 2013** overturned the High Court's earlier judgment and awarded the Plaintiff the sum of Kshs.1,000,000/= General damages, Ksh.100/= Special damages plus costs.

8. It would appear that after the award was made and payments made to the Plaintiff, the Plaintiff was not satisfied with the amount of money remitted to him by his advocate thereby causing him to file an Originating Summons in the same High Court case in which he had sued the Defendant for damages. He has cited his advocate as an '*Interested Party*' in the Originating Summons dated 13<sup>th</sup> April 2015 in which he claims as follows:

1. **That the advocate/interested party has never paid a total sum of money he was paid to the Plaintiff/Applicant.**
2. **That the Plaintiff/Applicant went to the firm of the said advocate and was only paid Ksh.870,000/=.**
3. **The advocate promised to the invite the Plaintiff/Applicant to Kisii High Court for the purpose of taxation of the amount in dispute but has not to date done so.**

It is this Originating Summons that has given rise to the instant Preliminary Objection.

9. In his reply to the Preliminary Objection, filed on **25<sup>th</sup> September 2015**, the Plaintiff highlighted the background of the by stating that indeed his advocate was paid a total Kshs.1,700,000/= which sum was not agreeable to him thereby causing him to file this current Originating Summons.

10. The Plaintiff stated that he was justified in filing the Originating Summons by dint of the provisions of **Order 37 Rule 11** and that the provisions of **Order 1 Rule 10(2)** was specific as to who can be enjoined in a suit as an Interested Party.

11. The Plaintiff submitted that the matters raised in the Preliminary Objection are matters of fact and not matters of law, and therefore, the purely factual matters had to be ventilated before the court.

12. The Plaintiff submitted that his approaching the court through Originating Summons in the concluded suit No. **Kisii HCCC No.12 of 2000** was valid as the suit, according to him, was still alive.

13. The Plaintiff further stated that he had complied with the provisions of **Order 52 Rule 4**. The Applicant/Plaintiff relied on the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**.

14. The Plaintiff further quoted the cases of **The Trustees of Nigeria Railway Corporation Pension Funds -vs- AINA [1970] Supreme Court** and; **Brawal Shipping (Nigeria) Ltd -vs- F.I. Onwadike Co. Ltd & Anor (2000 Supreme Court)**.

15. In his reply to the Plaintiff's submissions, the advocate stated that **Order 52 Rule (4) (2)** of the **Civil Procedure Rules** pursuant to which the Plaintiff's application was filed provides that the case be brought by way of Originating Summons and **Section 51 (1)** of the **Advocates Act** states that such an application shall be made in the matter of that advocate, meaning that the summons shall originate as against the advocate.

**Analysis and Determination:**

16. **Order 52 Rule 4** of the **Civil Procedure Rules** states as follows:

***“4(1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for:***

***a. The delivery by the advocate of a cash account;***

***b. The payment or delivery up by the advocate of money or securities;***

***c. The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;***

***d. The payment into or lodging in court of any such money or securities;***

***e. The delivery up of papers and documents to which the client is entitled.***

***(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.***

***(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate’s lien, if any, as the court deems fit.”***

Under the above provisions, a court can allow proceedings initiated by way of Originating Summons to continue as if the cause had started by filing of a plaint. Originating Summons is intended for simple and straight forward cases. (See **Wepukhulu –vs- Secretary B.O.G Buruburu Secondary School [2005] KLR 743**).

17. The issue which arises in this instant Preliminary Objection is if the procedure adopted by the Plaintiff/Applicant, in filing an Originating Summons within a separate matter that had long been finalized, by seeking to enjoin or rope in his former lawyers as an interested party is proper.

18. Preliminary Objection has been raised as to the appropriateness of the procedure adopted in filing the Originating Summons. In the case of **Sirma –vs- Kiprono [2005] KLR 197** Dulu Ag. J, held inter alia that:

***“The court has powers, at any stage of the proceedings started by Originating Summons, to proceed as if the proceedings had been commenced by way of plaint.”***

19. At this stage of the proceedings, this court has not been called upon to determine the merits of the Originating Summons, but rather the procedure used in its filing. If an Originating Summons is a suit that hold an equivalent status as a plaint, then automatically, a plaint cannot be filed within another plaint and more so, if the initial plaint has already been concluded.

20. In the instant case, **Civil Case No.12 of 2000** was between the Plaintiff and a different Defendant in respect to a claim for damages arising out of a road traffic accident. The said case went to its logical conclusion.

21. I find that the Plaintiff/Applicant, in the event that he has a different claim against the lawyers that acted for him in the accident claim, ought to have filed his Originating Summons in a different cause and not seek to tie it with the accident claim that had been concluded because the matters not only have different causes of action, but also involve different parties as the Defendant.

22. For the above reasons I find that the Interested Party’s Preliminary Objection has merit and I allow it

by striking out the Originating Summons dated 13<sup>th</sup> April 2015 with costs to the Interested party.

23. It is so ordered.

**Dated, signed and delivered in open court this 11<sup>th</sup> day of December, 2015**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Plaintiff/Applicant
- Odhiambo Kanyangi for G. S. Okoth for the Respondent/Interested Party
- Ogega: court clerk