REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CIVIL CASE NO. 49 OF 2013

MACHARIA WAIGURU……..…...1ST PLAINTIFF

JOHN WAINAINA MWATI……..……..…..…….2ND PLAINTIFF

VERSUS

WILSON KAMAUNYA, SECRETARY BOARD OF

GOVERNORS KIAGUTHU BOYS SCHOOL….....1ST DEFENANT

MR MAINA……..….2ND DEFENDANT

MR KARANJA……...…3RD DEFENDANT

EQUITY BANK LIMITED…….....….....4TH DEFENDANT

RULING

This is a ruling on preliminary objections filed by the defendants objecting to the filing and hearing of the plaintiffs' suit; the notices were respectively filed in court on 23rd August, 2013 and 26th August, 2013.

On 9th July, 2013 the plaintiff's lodged in court a claim, by way of a plaint, against the defendants. At the outset, I must confess that the cause of action and the prayers being sought are rather unclear and incomprehensible.

The little that I can gather from the plaint is that there appears to have been a dispute between the parties which according to the plaintiffs, was resolved in favour of the plaintiffs in the **Principal Magistrate's Court** at Murang'a in **Civil Suit Number 316 of 2011**.

The dispute seems to have been over either the ownership or the possession of a bus registration number **KAW 486 Z**. In the civil suit in the magistrates court, judgment is alleged to have been entered against the defendants and that damages were assessed at Kshs. 50,000/= a month until the bus was released.

In execution of the decree extracted out of the judgment, the plaintiffs sought to attach the 4th defendant's bank account but their efforts were allegedly frustrated by the defendants. Their cause of action appears to

me to have been rooted in their failure to execute their decree which failure they attributed to the defendants herein.

Several applications were subsequently filed by the plaintiffs and the defendants; however, before these applications could be heard, the defendants brought to the attention of the court notices of preliminary objection which, in a nutshell, questioned the validity of the suit itself.

The first notice of preliminary objection was dated 23rd day of August, 2013 filed by counsel for the 3rd, 4th and 5th Defendants. In this notice, the defendants contented that this court lacks jurisdiction to entertain the suit because it would be contrary to **section 6** and **section 7** of the **Civil Procedure Act, Chapter 21 Laws of Kenya** as the issues raised by the plaintiff's had been raised against the defendants in a court of competent jurisdiction. It was the defendant's argument that if the plaintiffs had any issue with the decision of the court that was properly seized of the dispute between themselves, it was incumbent upon them to appeal.

The second notice of preliminary objection was dated 26th August, 2013 and was filed by the 1st Defendant's counsel. In this notice, counsel argued that there were pending suits over the same subject matter and between the same parties in the chief magistrates court at Murang'a being civil cases numbers **299 of 2010**, **316 of 2010** and **High Court civil case number 50 of 2013** (Murang'a). By purporting to institute the suit herein when these suits were still pending, the plaintiffs were being vexatious and frivolous litigants.

On 28th November, 2013, the court directed that before any application is heard the preliminary objections be heard first; this decision was informed by the fact that the notices touched on the jurisdiction of this court and the determination of the legal issues raised in those objections may as well determine the fate of the entire suit.

When the preliminary objections were finally heard on 21st March, 2014, counsel for the 1st Defendant argued that this suit sought to enforce orders which apparently had been set aside in the **Chief Magistrates Court** in **civil cases numbers 299 of 2010 and 316 of 2010.** According to counsel, the plaintiffs had initially obtained *ex parte* judgment in civil case number 299 of 2010 but that the decree thereof was set aside and therefore the plaintiff could not be heard to seek to enforce, through the suit herein, a decree and a judgment that had been set side. Counsel for the 2nd, 3rd and 4th defendants associated himself with the 1st defendant's submissions and sought to have the suit dismissed with costs.

The second plaintiff did not attend court though he was duly served. When the 1st plaintiff was asked to respond, he stated that he was not prepared to respond to the preliminary objection because he had ceased to be party to this suit. When he has asked how he had ceased to be a party he cited a letter of consent which he claimed was filed in court on 6th December, 2013.

The purported consent was actually an undated document signed between the plaintiffs themselves purporting to agree on a raft of incomprehensible issues none of which in my view amounted to a withdrawal of the current suit.

The procedure on withdrawal and discontinuance of suits is governed by **Order 25 of Civil Procedure Rules**; Rule 1 of that order is more pertinent to the question herein. It states as follows:

1. ***At any time before the setting down the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.***

No notice was ever filed by the plaintiffs and none was served upon any of the defendants. A consent, which the plaintiffs claimed to have filed, is not the sort of consent contemplated under **Order 25 Rule 2(1) of the Rules** which states:

> ***Where a suit has been set down for hearing, it may be discontinued, or any part of the claim withdrawn, upon filing of a written consent signed by all the parties.***

In this case the purported consent on record was signed by the plaintiffs themselves without any reference whatsoever to the defendants; in any event, the suit had not been set down for hearing and therefore the only option open to the plaintiffs to terminate the suit was by way of a notice under **Rule 1** of **Order 25**.

In the premises, the purported withdrawal from the suit by the plaintiffs could not have been the reason for plaintiff not to respond to the objections. In the absence of their response, it can only be concluded that the preliminary objections were not opposed.

I have duly considered the preliminary objections. Among the documents filed in court by the plaintiffs were two orders extracted in civil suit **numbers 299 of 2010** and **316 of 2010**. In the order extracted in civil suit **number 299 of 2010** it is clear that the judgment and decree obtained against the 1st defendant and the Hon. Attorney General in that suit were set aside. In the order extracted in civil **suit 316 of 2011**, it is clear that the judgment in that suit was only interlocutory and in any event the court had directed that no execution should proceed.

It follows that if this suit was initiated on the presumption of existing judgments or decrees in the suits in the magistrate's court, then it has no basis because such judgments or decrees do not exist. Secondly, the dispute between the parties is properly before a court of competent jurisdiction and there is no reason why the plaintiffs should have filed a parallel suit in the High Court. I agree with the learned counsel for the defendants that this suit is *sub judice* and contrary to **section 6** of the **Civil Procedure Act**. This section provides:-

> ***6. 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, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

And even if the plaintiffs' case is, as they seem to suggest, that the suits in the magistrates court had been heard and determined, then **section 7 of the Civil Procedure Act** would come into play and bar them from filing any other suit on the same subject against the same parties because those cases would be res judicata; they would not be regurgitated in the High Court.

For the foregoing reasons I uphold the defendants' preliminary objections and strike out the plaintiff's suit. The plaintiffs shall bear the costs thereof.

Dated, signed and delivered this 10th day of April, 2014

Ngaah Jairus

JUDGE