



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL CASE NUMBER 50 OF 2013

MACHARIA WAIGURUPLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

EQUITY BANK LTD.....2ND DEFENDANT

RULING

This is a ruling on notices of preliminary objection dated 26th August 2013 and 14th January, 2014 respectively filed by 2nd defendant and the plaintiff.

In a plaint dated 25th July, 2013 and filed in court on the same date, the plaintiff herein sued the defendants for what he claims to be special and general damages arising out of alleged acts of negligence by the defendants.

The plaintiff contended that sometimes in the year 2007, he filed a suit in the High Court at Nairobi which was resolved in his favour. The plaintiff claims that due to the 1st defendant's negligence "execution took place and a school bus was sold to a third party". I have not been able to understand what this means.

To compound this suit even further, the plaintiff claims that since the 1st defendant failed to advise "the school" to release the bus, the plaintiff had to file another suit in the magistrate's court at Murang'a being civil suit **number 316 of 2011**. According to the plaintiff, judgment was entered against the defendant and "the school" was ordered to pay the sum of Kshs. 50,000/= per month "from the date of the sale until they release the bus".

It is just not clear what the "bus" was all about and which "school" the plaintiff is referring to and the relationship between them and the Attorney General.

The plaintiff claims that on 28th February, 2013 he obtained an order from the subordinate court attaching the school's money but that the 2nd defendant's operations manager refused to release the money; it is this refusal that occasioned this suit.

In the defence filed by the 1st defendant on 13th August, 2013, and from what I can gather from that defence, the *ex parte* judgment which the plaintiff seems to be referring to in his suit was successfully challenged in the magistrates' court at Murang'a and therefore the issue of execution does not arise. In any event, as far as civil suit number 316 of 2013 is concerned, the execution proceedings thereof were

halted and the order staying those proceedings is in place.

The counsel for the 2nd defendant filed a notice of preliminary objection to the suit stating that the suit offends the provisions of **sections 6 and 7 of the Civil Procedure Act** contending that the suit is not only res judicata but that it is also sub judice.

Apart from the preliminary objection counsel for the 2nd defendant also filed a notice of motion seeking to set aside an *ex parte* judgment entered in default of appearance and defence. The plaintiff countered this motion by a notice of preliminary objection in which he argued that the applicant was not only in contempt of court but that the application itself had been overtaken by events. The plaintiff also filed his own motion in which he sought a raft of prayers including seeking to join almost all the magistrates at the Murang'a chief Magistrates court to his suit.

The preliminary objections were heard on 21st March, 2014 and in their submissions counsel for the defendants adopted their submissions on the preliminary objections filed in **High Court Civil Suit No. 49 of 2014** which had been filed by the plaintiff and another party against the defendants. Because of the similarity of the issues raised in **High Court Civil Case No. 49 of 2014** and **High Court Civil case No. 50 of 2014**, the court directed that both matters be handled on the same date and it is for this reason that the defendant's counsel adopted similar arguments in both the cases.

In summary, counsel's argument against the suit was that it was based on the presumption that there were orders or decrees from the magistrate's court for execution against the defendants. Those purported orders or decrees had either been set aside or stayed. These orders staying or setting aside those orders or decrees were exhibited in court and there was nothing on record to suggest that they were not in force.

The plaintiff responded and argued that this suit is independent of the civil suits in the magistrate's court. In any event, so he argued, he had obtained a garnishee order in civil suit number 316 of 2011 and had even attached the money he was looking for. Since the bank had refused to release this money, he had sought for appropriate orders for leave to cite the bank for contempt.

Having considered the parties' arguments and having considered the pleadings in **High Court Civil Case Number 49 of 2014** and that of **High Court Civil Case Number 50 of 2014**, it is apparent that the issues in dispute are common to both suits and the parties are the same save that in **High Court Civil Case Number 49 of 2014** there is an additional plaintiff and additional defendants who are merely sued because they are agents or servants of the second defendant. The other party is a school which the plaintiff must have been referring to in his plaint in this suit.

It would appear that the suits are similar both in terms of parties and the subject matter. That being the case, this suit having been filed after **civil suit number 49 of 2014** is *sub judice* in terms of section 6 of the **Civil Procedure Act**. Section 6 of the Act provides as follows:

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.

Secondly, it has been demonstrated that the orders or decrees which the plaintiff is seeking to enforce in this suit were either stayed or set aside and the suits in which those decrees or orders were obtained are still pending and therefore there is nothing to enforce. In any event, the institution of the suit of the nature filed by the plaintiff as a way of enforcing or executing those orders or decrees does not appeal to me to be the correct execution process. This then implies that even if the suit was not caught out by **section 6** of the Civil Procedure Act, it would still not be sustainable.

In the premises I find that the defendant's preliminary objection dated 26th August 2013 is merited and it

is hereby upheld. Accordingly, the plaintiff's suit is struck out with costs.

Signed, dated and delivered in open court on 10th April, 2014

Ngaah Jairus

JUDGE