



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 215 OF 2012

TOTAL FEDHA SERVICES STATIONPLAINTIFF/RESPONDENT

VERSUS

NAIROBI WATER CONSERVATION &

PIPELINE CORPERATION..... DEFENDANT

RULING

Striking out suit

[1] I am faced with the Defendant's Motion dated 18th July, 2012 which is seeking that this suit and another, NBI HCCC NO 178 OF 2012 be struck out. The reasons given are that the suits are the same; the subject matter is the same; and the parties are the same. It is, therefore an abuse of court process and both should be struck out. According to the Defendant, the state of things herein fit the description as to what amounts to abuse of process in the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR** that:

“.....the applicant knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.”

[2] The Defendant argued that the Plaintiff is trying to make out the difference between the two suits which attempt the Defendant thinks futile and *de minimis* in nature. To the Defendant, the suits are essentially the same and the principles of Res judicata and subjudice will apply here. It referred the court to the dictum in the case of **Kamunye and others Vs Pioneer General Assurance Society Ltd (1971) EA page 263.**

[3] To reinforce its position herein, the Defendant filed submissions and a supporting affidavit with the relevant annexures.

[4] The Plaintiff on the other hand argued that the two suits are different; the cause of action is different despite the parties being the same. It has filed a replying affidavit with the necessary documents. The affidavit has been attacked by the Defendant as having been filed one year later

and without the leave of the court. That could be true, but the I will allow the affidavit since it relates to relevant matters and speaks to a situation which may as well drive the Plaintiff from the seat of judgment. In any event, the Defendant will not suffer any prejudice as the affidavit is just but a response to the Defendant's draconian application of striking out the suit.

[5] My work is made simple: only look at and compare both suits to discern whether they are the same or not. I will be guided by section 6 of the Civil Procedure Act:-

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, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

[6] No doubt the parties are the same in both cases but that in itself is not the source of infringement of the law and particularly section 6 and 7 of the Civil Procedure Act, as same party may have different cases between themselves. What would infringe the law is the fact that the cause of action is the same in both cases and is between same parties or parties under whom they are litigating under same title. Or to use the exact words of the Act... ***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.*** After perusing both files, I find that the documents which have been filed in court in support of the each claim are different and relate to different transactions, albeit the transactions are for hiring of vehicles during the period of 2007-2008. The vehicles are the same but from the said documents by the Plaintiff; they were hired at different times. The details of the cause of action clearly show the cases are different; they do not portend a case of inflated trivial issues or *de minimis* as claimed by the Defendant. Except, I should express a concern; that both suits are capable of being conveniently handled in a single suit. But that is in the province of consolidation of suit rather that striking the suit. For those reasons, I am not able to find any reason to strike out any of the suits. The application dated 18th July, 2012 is dismissed with costs to the Plaintiff. The application dated 22.6.2012 was allowed by consent of the parties on 19.5.2014 and parties should follow through on the orders thereto.

Dated, signed and delivered in open court at Nairobi the 30th July, 2014

F. GIKONYO

JUDGE