



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

**CIVIL DIVISION**

**CIVIL CASE NO. 37 OF 2009**

**PATRICK MWANGIKABURU.....PLAINTIFF**

**VERSUS**

**1 . SHREENJI ENTERPRISES LTD**

**2. EAST AFRICAN DEVELOPMENT BANK LTD.....DEFENDANTS**

**R U L I N G**

**1.** The Plaintiff's **notice of motion dated 6<sup>th</sup> February 2013** is brought under **sections 1A, 1B & 3A of the Civil Procedure Act** (the Act) and **Order 38** of the **Civil Procedure Rules** (the Rules) It seeks the main orders –

- i. That **Machakos CMCC No. 667 of 2008** be heard as a test suit to determine the issue of liability.
- ii. That pending hearing and determination of the said Machakos CMCC No. 667 of 2008, proceedings in this present suit be stayed.

**2.** The application is premised on the grounds that -

- i. The defendants are the same in this and in the Machakos case.
- ii. There have been previous attempts to bring the two cases together but none has been of the nature of the current application.

iii. This court has the judicial discretion and jurisdiction to grant the prayers sought.

The application is supported by the affidavit of **P.W. Kariuki** the Plaintiff's counsel sworn on **6<sup>th</sup> February 2013**.

**3.** The Defendants have opposed the application in their **grounds of opposition dated 15<sup>th</sup> March 2013**. The main point taken is that it would not be desirable for a lower court case to be a test case when the same issue is before the High Court.

**4.** I respectfully agree with the sentiments expressed by the Defendants in this application. If the

Machakos case which is pending before the lower court is selected as a test suit, the losing party in any judgment delivered by that court will have a right of appeal to this court. So, the issue of liability will have been thrown back to this court. In that event, where is the expediency? Would it not be more sensible and expedient that the present suit pending before this court be selected as the test suit?

5. It appears from the submissions of learned counsel for the Plaintiff that the present application was made merely because the Plaintiff anticipates some difficulties in prosecuting his case. That cannot be a proper basis for selecting a test suit.

5. This application is entirely without merit. It is dismissed with costs to the Defendants. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JUNE 2013**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JUNE 2013**