REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 57 OF 2010

SS DHILLON TRANSPOTERS ……..……APPELLANT

VERSUS

MARY DAUDI KATU AND JOHN MWASHEGU

(Legal representatives for the estate of

ROSE MWASHEGU - DECEASED …….……..……..…RESPONDENT

Coram: Mwera, J.

Gor for appellant

Ngugi for respondent

JUDGMENT

This appeal arose from the lower court ruling dated 11th March, 2010 after hearing a notice of preliminary objection dated 15th May, 2009 in Voi PMCC No. 110 of 2008. The two points in that notice were:

i) that in the verifying affidavit sworn by the 2nd plaintiff on 3rd July, 2008 he did not disclose that the 1st plaintiff Mary Daudi Katu had previously instituted Voi PMCC No. 89 of 2006 which related to the same cause of action as well as parties as in this suit, acordingly it should be struck out;

ii) that the plaintiff in Voi PMCC No. 89 of 2006 had wholly discontinued that suit but had not paid costs to the defendant before instituting the present one, which should be stayed on that account in terms of OXXIV r.4 Civil Procedure Rules (now 0 25 r. 4 Civil Procedure Rules).

After the parties were heard, the trial magistrate appreciated the provision of law in prayer (ii) and concluded that under it, costs were not barred. She believed that the costs in the discontinued No. 89 of 2006 would eventually be paid. She added:

"The matter here is part-heard. The defendant can tax their (sic) bill if any in the civil case No. 89

of 2006 and then withhold the same in this case. I see no justifiable reason why this suit should either be stayed or struck out".

And with that, the learned trial magistrate was poised to proceed with the hearing. That decision provoked this appeal which contained five grounds basically contending that the learned trial magistrate should have upheld the preliminary objection and granted the prayers. It was added that the lower court failed to adequately consider the defendant/applicant's submissions and that it was an irrelevant issue to find/hold that the appellant would recover costs for the withdrawn civil case No. 89 of 2006 from the current suit. A short submission was couched on the same lines.

The plaintiff/respondents held the view that the preliminary objection raised in the lower court was not truly one as enunciated in the case of **Mukisa Biscuits Manufacturing Limited vs West End Distributor Ltd [1969] EA 696** because it was not based on a pure point of law which if proved could dispose of the suit. And that to fail to disclose in the verifying affidavit that there had earlier been instituted civil case 89 of 2006, that was fatal to the current case.

To begin with this court is minded to find that the notice of preliminary objection before the lower court was based on points of law. The point and prayer to strike out the plaint for failure to state in the verfying affidavit that there had been previous proceedings as per the current Order 4 rule 1 (i), (f) Civil Procedure Rules:

1. (1) The plaint shall contain the following particulars-

(a) ……..(e)

(f)an averment that there is no other suit pending, and that there have been no previous proceedings, in any court, between the plaintiff an the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint."

And that:

"(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1 (i) (f) above".

Accordingly raising a point as to the validity or lack of it of the verifying affidavit was a point of law. And of course the point to stay proceedings because civil case No. 89 of 2006 had been withdrawn and a similar case instituted before costs in the withdrawn case were paid, was rooted in the old OXXIV r. 4 (now O25 r. 4) of Civil Procedure Rules i.e in law:

"4. If any subsequent suit shall be brought before payment of the costs of the discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until costs shall have been paid."[emphasis].

Considering all the above, the determination of this appeal is that the learned trial magistrate exercised her discretion under O25 r. 4 Civil Procedure Rules to continue with the hearing before her in the current suit. That provision of law allows the court to order a stay of subsequent suit until costs for the discontinued suit are paid. But the law here is permissive:

" …. the court may order a stay off such subsequent suit ….".

It is not mandatory to stay the subsequent suit. The law is permissive to the extent that where reasonable grounds obtain, the stay may not be ordered. And here the learned trial magistrate noted that the hearing was already under way and so she decided not to stay the suit but instead proceed. Her position on the costs of the discontinued suit was that the appellant could have the same taxed but held against the current suit in the event judgment went against it. That was her opinion but it did not bar the appellant from taking any other course to recover its costs from the discontinued suit. This court will interfere with the

learned trial magistrate's decision not to stay the suit.

However, as regards the striking out prayer this court has set out the law O4 r. 1 (i) (f) Civil Procedure Rules above. It is mandatory. The plaint shall contain an averment that there is no pending or previous suit in any court between the parties. Then that should be restated in the verifying affidavit as per O4 r 1 (2) Civil Procedure Rules. By such an affidavit the plaintiff is:

"…. verifying the correctness of the averments contained in rule 1 (i) (f) above".

In the plaint filed in court on 3rd July, 2008 it was pleaded that:

"10. The cause of action arose within the jurisdiction of this honourable court and there is no other suit pending and there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter".

And in the affidavit verifying that averment:

"3. That there have been no other suit pending and that there have been no previous proceedings in any court between me and the defendant herein over the same subject matter".

That affidavit was sworn by the two plaintiff/respondents, in the same manner or wording. But it has turned out that prior to the present suit the 1st plaintiff/respondent, Mary Daudi Katu, had instituted and later discontinued Voi PMCC No. 89 of 2006, relating to the same cause of action and involving same parties – herself and the appellant. Now that being so, can it be said that Mary Daudi Katu verified the **correctness** of the averment in the plaint that there had been no previous proceedings as stated above? Not at all. There had been this PMCC No. 59 of 2006 which had been discontinued before the present suit was brought. Mary Daudi Katu did not therefore verify a correct averment in the plaint. She should have deponed that earlier on she filed PMCC No. 89 of 2006 against the defendant which was withdrawn.

Misleading the court that there was never such a suit before while in fact there had been, was fatal to the present suit and the learned trial magistrate ought to have struck it out, as this court does now.

In sum the appeal is allowed with costs.

Delivered on 22nd May, 2012.

J. W. MWERA
JUDGE