



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 9 OF 2003**

**MOSES KIMANI NGARI.....APPELLANT**

**Versus**

**PATRICK WAIHENYA .....RESPONDENT**

*(Appeal arising from the ruling of Hon. A. Okata Resident Magistrate in Kerugoya R.M.C.C.C. no. 150 of 2000. delivered on 8<sup>th</sup> May 2002)*

**JUDGMENT**

This judgment is the result of the appeal preferred against the ruling of Honourable A. Okata learned Resident Magistrate delivered on 8<sup>th</sup> May 2002 vide Kerugoya R.M.C.C.C. no. 150 of 2000. The suit before the subordinate court was filed by the appellant claiming damages for the injuries he suffered as a result of a traffic road accident involving the Respondent's motor vehicle registration no. KAJ 269F at Miringaini on 27<sup>th</sup> April 2000. The suit is expressed in a plaint dated 5<sup>th</sup> July 2000. The Respondent contended that the plaint was incurably defective in that it did not contain an averment that there was no suit pending. The trial magistrate agreed with the Respondent and proceeded to strike out the plaint. The appellant was aggrieved hence this appeal.

On appeal, the appellant listed the following ground in his petition:

1. ***That the learned Magistrate erred in law and fact by ruling that the plaint dated 5/07/2000 was incurably defective.***
  
0. ***That the learned Magistrate erred in law and fact by ruling that the plaint dated 5/07/2000 was not amendable.***
  
0. ***That the learned Magistrate erred in law and fact by dismissing the application dated 12/03/2002 on the grounds that the draft amended plaint annexed to the supporting affidavit thereof did not have an accompanying verifying affidavit.***
  
0. ***That the learned Magistrate erred in law and fact by unlawfully, irregularly and wrongly striking out the plaint dated 5/07/2000 allegedly under order 7,(3) of the civil procedure rules.***

**5. That the learned Magistrate erred in law and fact by unreasonably dismissing the application dated 12/03/2002.**

When the appeal came up for hearing, learned counsel appearing in the matter recorded a consent order to have the appeal determined by written submissions. I have carefully reconsidered the case that was before the trial court and the rival written submissions. In ground I it is alleged that the trial magistrate erred when he ruled that the plaint was incurably defective. A careful perusal of order VII rule 1(I)(e) of the old Civil Procedure Rules will reveal that it is a mandatory requirement for a plaint to contain an averment which was to the effect that there was no pending no previous proceedings between the parties over the same dispute. It is admitted by the appellant that the aforesaid averment was missing. The question is whether or not the magistrate should have struck out the defective plaint. I think the law did not intend that such plaints should be struck out. The court can still preserve the suit by giving the plaintiff a chance to amend in exercise of its inherent power to see to it that the case is determined on merits. If it later turns out that there were previous proceedings involving the same parties and cause of action then the provisions of section 6 and 7 of the Civil Procedure Act will come into play. My findings here has determined grounds 2 and 3 of the Appeal.

In ground 4, it is argued that the trial magistrate erred when he struck out the plaint on the basis of a non-existent civil procedure provision. It is alleged that the application was based on order 7(3). In my view the ground is elementary and simplistic. Typographical errors occur in our daily lives. It is always presumed that courts know this. Where obvious typographical errors manifest themselves like in this case, the court will overlook the same and proceed to deal with the issue in dispute by applying the relevant provisions of the law. I will on my part overlook the defect.

In the end and on the basis of the above reasons I am satisfied the appeal should be allowed. The order dismissing the summons dated 12<sup>th</sup> March 2002 is set aside and is substituted with an order allowing the summons. Consequently the order striking out the plaint is set aside. Costs of the appeal and the application are given to the Appellant.

Dated and delivered this 21<sup>st</sup> day of October 2011.

J.K. SERGON  
JUDGE

In open court in the presence of Mr. Mungai h/b for Karingithi for the Respondent and N/A FOR Magee for the Appellant.

J.K. SERGON  
JUDGE