



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL APPEAL NO. 366 OF 2008**

**GLOBAL BEVERAGES LTD ..... APPELLANT/ ORIGINAL DEFENDANT**

**VERSUS**

**NAHASHON NAKUTI JAIRO ..... RESPONDENT/ ORIGINAL PLAINTIFF**

*(Being an appeal from the Judgment Hon. Kiarie W Kiarie Esq, Principal Magistrate of 12<sup>th</sup> March 1998 in CMCC No. 13744 of 2006 at Milimani Commercial Courts at Nairobi)*

**J U D G M E N T**

**I.        BACKGROUND**

1. This is an industrial accident case. The employee/original plaintiff stated in the case before the subordinate court that he was working, on the material day of 16<sup>th</sup> July 2005, as a machine operator. His case was to deal with plastic holders with a machine. He worked considerable long hours.
2. On the material day, the machine developed a defect. It crushed his left index finger and caused him a fracture to the distal phalanx, left second finger.
3. He then filed suit against his employer in damages.
4. The employer filed defence and stated that the suit was bad in law. All other allegations were denied.
5. It then transpired that an advocate known as M/s King'oo Njagi & co Advocate had filed suit CMCC 10149/06. Subsequently another advocate M/s Billy Amendi & Co Advocate filed another suit on 15<sup>th</sup> February 2007. It was this second suit CMCC 13744/06 that was being presented and to which the defence was raised that the suit was bad in law.
6. According to Order 7(e) of the Civil Procedure Rules there must be an averment in the plaint to state that there is no other suit that is pending the court.
7. The Hon. Magistrate informed the defendant that this would be curable by its withdrawal.

8. The Hon. Magistrate proceeded to pass award and as such found the employer (who called no witness) liable at 100% for the accident.
9. The quantum on injury was assessed for general damages at Ksh. 80,000/= and special damages at Ksh. 2,000/=
10. Being aggrieved, the employer appealed to this court on 10<sup>th</sup> July 2008 by the memorandum of appeal dated 8<sup>th</sup> July 2008. The appeal was admitted on 16<sup>th</sup> March 2009 and directions taken on 24<sup>th</sup> July 2009 (by Okwengu J.)

## **II APPEAL**

11. The memorandum of appeal being that the Hon. Magistrate erred in holding that the CMCC 13744/06 was a valid suit. It was in essence a nullity and ought to have been struck out.
12. The advocate asked this court to find likewise.

## **III OPINION**

13. Where these suits have been filed touching on the same subject matter, Section 6 of the Civil Procedure Act would come to play. The first is heard then the second suit is to be heard on the completion of the first.
14. Noting there were two different advocates who filed suit, it is difficult to tell that the plaintiff was aware of the two suit. The first suit signature of the respondent/original plaintiff differs from the suit by Billy Amendi & Co Advocates.
15. The court ought to have investigated the first suit as there appears not to have been genuine. This should not be visited upon the respondent/ original plaintiff.
16. If per chance, the first suit was in order, this court is of the view that the appeal herein was filed out of time. Namely, on 8<sup>th</sup> July 2008 when the decision was made on the 12<sup>th</sup> March 2008. If per chance it was filed on time (which this court has no proof of), the issue in question of the plaint being contrary to law should be seen and taken with words of stating subject to fraud and or misrepresentation by another party not know to the said plaintiff.
17. I would dismiss this suit as having been filed out of time. On the merits, I would not interfere with the liability and quantum of the court which in itself was not challenged.
18. The respondent was absent during these proceedings. There would no costs awarded to him in this appeal. There will be costs to the original plaintiff in the suit.

**DATED THIS 20<sup>TH</sup> DAY OF DECEMBER 2011 AT NAIROBI**

**M.A. ANG'AWA**  
**JUDGE**

*Advocates* :

ii) *C. Omulele instructed by M/s Omulele & Co Advocates for appellant/original defendant*

plaintiff ii) M/s Billy Amendi & Co Advocates for respondent/ original  
absent

**Editorial Summary**

1. Civil Appeal
2. Subject of Subordinate Court Case

**TORT/CONTRACT**

- 2.1 Work place injury
- 2.2 Employer/employee
- 2.3 Employee worked long hours as machine operator on 16<sup>th</sup> July 2005
- 2.4 Machine making plastic holders.
- 2.5 Machine defective.  
Caused injury to left second finger,  
fracture at distal phalax
- 2.6 Employee files suit CMCC 10149/06.  
M/s Kingoo Njagi & Co Advocates  
suit withdrawn 26<sup>th</sup> February 2008.
- 2.7 Employee files suit CMCC 13744/06  
M/s Billy Amendi & Co Advocates on  
15<sup>th</sup> February 2007.
- 2.8 defendant raises question on suit on grounds  
statement no other suit is pending.
- 2.9 Hon. Magistrate states same may be curable  
by withdrawal.
- 2.10 The magistrate finds employer liable.
- 2.11 Liability 100%  
Quantum  
Special damages  
Pain & Suffering Ksh. 80,000/=  
Special damages  
Medical report Ks. 2,000/=  
Decision 12<sup>th</sup> march 2008
- 2.12 Appeal by employer on 25<sup>th</sup> July 2008

3. Appeal filed 25<sup>th</sup> July 2008

i) Memorandum of appeal

*Two suits filed  
CMCC 13744/06  
CMCC 10149/06*

- ii) *The second suit CMCC 13744/06  
void abnatio*
- iii) *Erred in dealing judgment*

4. *No reply, no attendance  
by the respondent original plaintiff*

5. *Held:*

- i) *Appeal filed out of time – appeal dismissed.*
- ii) *Liability and quantum of Trial Magistrate not  
not interfered with.*

6. *Case Law:*

7. *Advocates :*

- i) *C. Omulele instructed by M/s Omulele & Co Advocates for appellant/original  
defendant*
- ii) *M/s Billy Amendi & Co Advocates for respondent/ original  
plaintiff  
absent*

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*plaintiff*

ii)

*M/s Billy Amendi & Co Advocates for respondent/ original*

*absent*