

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 101 of 2007

MAKAU KISWILI ::: PLAINTIFF

VERSUS

ATHI RIVER MINING LTD:::DEFENDANT

RULING

1. The Application dated 14.8.2008 is a Chamber Summons under section 6 of the Civil procedure Act and Order VI Rules 13(1) (b) and (d) of the Civil procedure Rules.
2. It is the Applicant's case that the Respondent who is also the Plaintiff is abusing the process of the court by instituting multiple suits in pursuit of his single claim for damages arising out of injuries allegedly sustained in an industrial accident on 4/10/2006. It prays therefore that;
 - "a. That there be a stay of proceedings herein pending the hearing and determination of this application and Civil Suit Number 8437 of 2007 filed at Milimani Commercial Court's Nairobi.
 - b. That further the suit be struck out with costs.
 - c. That costs of the application be provided for."
3. In the grounds in support, the Applicant notes as follows:-
 - "a. That the suit is frivolous and vexatious
 - b. That the suit is an abuse of the court process
- c. That the plaintiff has previously filed two suits involving the same parties and in respect of the same cause of action viz;
 - (1) The Chief Magistrate's Court at Milimani, Civil Suit Number 14328 of 2006
 - (2) The Chief Magistrate's Court at Milimani, Civil Suit Number 8437 of 2007.
- d. That the chief Magistrate's Court at Milimani, Civil Suit Number 8437 of 2007 is still pending for determination."
4. I have perused the Supporting Affidavit sworn on 14.8.2008 by Ismael Noorani, a Senior manager at Kenindia Assurance Company Limited and also the Replying Affidavit sworn on 13.10.2008 by Mr. Onyancha Bw'omote, learned advocate for the Respondent. I should also state from the outset that this otherwise run-off- the mill Application has caused me some trepidation in view of proceedings before me on 22.7.2008.
5. On that day, an Application dated 30.1.2008 word by word the same as the one before me had come for hearing. Mr. Mituga, Advocate for the Applicant stated that Mr. Bw'omote was improperly before the court because the Respondent had filed a Notice of Intention to Appear in Person. After hearing both advocates and the Respondent, it occurred to me that Mr. Mituga, his law firm and his client were acting in a manner that smacked of unprofessionalism and outright manipulation of the Respondent, desperate for recompense for his injuries. I made certain orders then, including a censure of Mr. Mituga Advocate. He then withdrew that Application but less than a month later, a similar Application was instituted and it is the one now before me.
6. Having now heard advocates for the parties, I cannot but agree with Mr. Bw'omote, that I should refuse to accede to the Application because the deponent to the Affidavit in support is a Manager at Insurance Company who says that he "is well versed with the facts of this

case” because of the Principal of Subrogation. That may well be so but subrogation arises upon a lawful judgment being entered against an insured and the Insurance Company then comes in to indemnify its insured. In fact and for avoidance of doubt, subrogation is defined as;

“The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”- Black’s Law Dictionary, 16th ed.

7. In the 15 paragraphs of his Supporting Affidavit, nowhere does Mr. Ishmael Noorani say anything about the basis for the alleged subrogation and his true function and that of Kenindia Assurance Company Limited with regard thereto. All the matters deponed to are matters that are in the special knowledge of either the Defendant or its advocates and nowhere does he say what the source of that knowledge or information is. Order XVIII Rule 3(1) of the Civil Procedure Rules provides as follows:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”

The Affidavit clearly falls foul of the above Rule.

8. Secondly, I have alluded above to the intrigues that I discovered in the matter which has led me to believe that the Application is brought in bad faith. I say so, with respect, because Mr. Mituga in submissions before me on 22.7.2008 stated that the Insurance Company was negotiating directly with the Plaintiff for compensation and it was on that basis that he withdrew the services of his lawyers in CMCC 14328/2006, and 8437/2007. It is now commonly agreed that in fact those negotiations have borne no fruit and the Plaintiff on oath stated that he had been tricked into signing the Notices of Intention to Appear in Person on the promise of payment to be made directly to him. No payment has in fact been made and his assertions have not been formally challenged.

9. Because of all the above happenings and my own findings on the issues in contention, the Application cannot meet this court’s favour and is dismissed.

10. Having so said, section 18 of the Civil procedure Act provides as follows:-

“(1) On the Application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage- [emphasis added]

(a) transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

b) withdraw any suit or other proceedings pending in any court subordinate to it , and thereafter

i. try or dispose of the same; or

ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

iii. retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special direction in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

11. Since this court can issue orders suo motu under that section to bring all the pending suits for determination in one court and since the cause of action arose within the administrative jurisdiction of this court, I shall order as follows:-

i. Application dated 14.8.2008 is dismissed with costs.

ii. CMCC 14328/2006 Milimani and CMCC 8437(Milimani are ordered to be transferred to this court for determination in consolidation with this suit.

iii. Mention on a date to be agreed for directions

12. Orders accordingly.

Dated and delivered at Machakos this 9th day of December 2008.

Isaac Lenaola

Judge

In the presence of: Mrs Nduva h/b for Mr. Bw'omote

Mr Mati h/b for Mr Ochoo for Defendant/Applicant

Isaac Lenaola

Judge