



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Case 200 of 2009

WAKF COMMISSIONERS OF KENYA ::::::::::::::: PLAINTIFF

VERSUS

1. **MAALIM OMAR**
2. **ADAN JUMAA**
3. **KHALIL A. KHALIL**
4. **FARID ALI**
5. **ABUBAKAR ALI**
6. **MOHAMED ISLAM ::::::::::::::: DEFENDANTS**

R U L I N G

The Defendants have by their Notice of Preliminary Objection filed on 29th June 2009, sought a dismissal of the plaintiffs suit filed on 19th June 2009 and application dated 19th June 2009 on the following main grounds:-

- (1) ***That the application and the suit are res judicata.***
- (2) ***That the plaintiff has appealed against the decision of the court in HCCC No. 16 of 2006 and cannot re agitate the matter in this suit.***
- (3) ***That this application and the suit are in the premises, vexatious, frivolous and an abuse of the process of the court.***

The preliminary objection was canvassed before me on 2nd July, 2009 by Mr. Asige Learned Counsel for the defendants and Mr. Aziz Learned counsel for the plaintiff. Mr Asige contended that the plaintiff had previously filed HCCC NO. 16 of 2006 against the defendants in which suit the plaintiff had lodged an identical application which had been determined on merits. The previous suit, according to Mr. Asige, was identical to the present suit and was dismissed because summons had not been served for over 3 years. The suit had therefore abated and could not be revived nor could a fresh suit be instituted on the

same facts. For that proposition Mr. Asige placed reliance upon the Court of Appeal decisions of **Jairo Angote Okonda –Vs- Kenya Commercial Finance Co Ltd [CA No. 216 of 1999] (UR)**, and **Mburu Kinyua –Vs- Gachiri Tuti [1976-80]I KLR**.

Lastly, Mr. Asige argued that the plaintiff had appealed against the dismissal of the previous suit and cannot at the same time bring this suit. In counsel's view, this suit and application amount to abuse of the process of the court.

Responding to the defendants' objections, Mr. Aziz contended that both the suit and application cannot be res judicata as they were not fully and completely determined in the previous proceedings. Counsel further argued that the suit had not abated and that the Preliminary Objection was not a proper preliminary objection within the language of **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Limited [1969] EA. 696**. Counsel admitted that the plaintiff had indeed lodged a Notice of Appeal against the dismissal of the previous suit but submitted that the filing of the said Notice is not a bar to the institution of this suit.

I have considered the suit, the application, the affidavits filed and the annexures thereto. I have further given due consideration to the submissions made to me by counsel. Having done so I take the following view of the matter. The plaintiff does not dispute that both the suit and application herein are identical to the suit and application lodged in HCCC No 16 of 2006. There is further no dispute that the said suit was on 28th May, 2009, dismissed with costs for want of service of summons to enter appearance. The plaintiff admits that a Notice of Appeal has been lodged against the said dismissal, which suggests that the plaintiff is still desirous of challenging the dismissal of its previous suit.

The previous suit may not have been determined on merit but on the authority of **Jairo Angote Okonda – Vs- KCF Co. Ltd** (supra), it would appear that it was not open to the plaintiff to bring a fresh suit based on the same facts. Their Lordships observed as follows, at page 2 of their judgment:-

“The instant case however, was not a dismissal of a suit for want of prosecution. The suit had abated because summons had not been served within the prescribed time nor renewed. In these circumstances it appears clear to us that a fresh suit cannot be filed on the same facts between the same parties.”

The plaintiff has done what was expressly prohibited by their Lordships. The previous suit was dismissed for want of service of summons to enter appearance. The parties are the same and so are the facts. It was in the premises not open to the plaintiff to merely commence these proceedings and seek the same relief's. The plaintiff seems to appreciate that position hence the filing of a Notice of Appeal against the order dismissing the previous suit. In my view the plaintiff cannot pursue its appeal and simultaneously commence fresh proceedings. To that extent, these proceedings amount to abuse of the process of the court. If the plaintiffs appeal succeeds and these proceedings are continued the plaintiff will thereby simultaneously maintain two suits in the same court. The plaintiff may also succeed in these proceedings if it is allowed to continue with the same. If the appeal is eventually dismissed, the resultant scenario would be undesirable since there would be two contradictory orders in favour of the same plaintiff on the same facts. The court cannot countenance that situation.

In the premises, I uphold the preliminary objection and strike out the plaintiff's suit and application for being incompetent. In the circumstances of this case, I make no order as to costs. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF AUGUST, 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Aziz for the plaintiff and Obura holding brief for Mwakireti for the Respondent.

F. AZANGALALA

JUDGE

26TH AUGUST, 2009