



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 729 of 2008

JOHN KAMAU SAMSON KARIUKIPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.1ST DEFENDANT

JOSEPH MUNGAI GIKONYO *t/a*

GARAM INVESTMENTS2ND DEFENDANT

R U L I N G

There is a Preliminary Objection raised by defendants and dated 11/12/08 on the ground that the suit is an abuse of court process **Order 7 Rule 1 Civil Procedure Code**. There is another suit pending being **Milimani HCC No. 577 of 2006 (OS) – John Kamau vs. Barclays Bank of Kenya** which is still pending. The court should strike out this suit with costs.

I have perused the record in file **577 of 2006 (OS)** in the matter dated 23rd April 2008 is a Notice of Motion by defendant. That application was heard by Hon. Warsame, J. and struck out on 28/5/08. The suit was not struck off and it is proceeding. To swear that:-

“there was HCC No.577/2006 between the plaintiff and the first defendant but the same was struck out on a technicality without the same being heard on merit.”

is careless talk. Since the affidavit was drawn by an advocate the correct information should have been given correctly, that it was the application which was struck off not the Originating Summons. Nevertheless, the suit was not heard and the same is still pending.

The defendants rely on the provisions of **Order 7 Rule 1 of Civil Procedure Rules (1), (2) and (3)** which provides that the plaint shall be accompanied by a verifying affidavit and the court may on its motion or on application of the defendant order to be struck out any plaint which does not comply with **7 (1) (2)**.

In this matter it is clear that the affidavit is not truthful. Case law on this issue is to be found in the case of **Nakuru HCC No. 201 of 2005 – Shirika La Kusaidia Watoto Wa Kenya Fund vs. Rhoda Rop & 4 others**. The plaintiff had failed to disclose that the previous suit had been struck out. The court held that an affidavit being evidence cannot be amended and swearing a false verifying affidavit was a

breach of rules. The plaint was struck out.

The case of **Abdi Duale vs. National Bank of Kenya & others – Nakuru HCC No. 239 of 2004**, the plaintiff failed to disclose that there were 3 other previous suits. The suit was struck off.

The case of **Majani Mingi Sisal Estates vs. Kenya Commercial Bank Ltd. & 2 others – Nakuru HCC No.11/2006**. The previous suit was still subsisting. Plaint was struck out.

Also in the case of **Andrew Ouko vs. Kenya Commercial Bank Ltd. & 3 others** the suit was struck out for non disclosure of material facts. A perusal of the plaint paragraph 18, it is clear the plaintiff intends the court to see that **HCC No.577/2006 OS** was struck out without hearing on merit. This is not true, the suit is still pending and by Chamber Summons dated 27/1/2009, the plaintiff seeks to consolidate this suit with that suit (**577 of 2006 OS**). Issues raised in the Originating Summons are substantially similar to the prayers in this suit. They relate to the charge registered under plot Land Reference Lari/Kirenga/520.

Therefore, in addition to objections raised by the defendant the matter is caught up under **Section 7** of the **Civil Procedure Act**.

I uphold the Preliminary Objection raised by the defendants and I order the suit be and is hereby struck out with costs in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2009.

JOYCE N. KHAMINWA

JUDGE