



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Case 81 of 2006

NICODEMUS KEBASO:.....PLAINTIFF

VERSUS

THE CHAIRMAN OF THE BOARD

OF GOVERNERS MATONGO LUTHERAN: DEFENDANT

THEOLOGICAL COLLAGE

RULING

The Plaintiff herein NICODEMUS KEBASO filed suit on 31st July 2006 praying for general damages for breach of contract, malicious falsehood, loss of earnings for a period of 26 years, aggravated and exemplary damages costs of the suit, interest and such further or other relief as the court may deem fit and proper to grant. The Defendant filed defence on 1st December 2006 denying the averments in the plaint and stating that the suit was statute barred and incurably defective and gave notice of Preliminary Objection that at the hearing of the suit the Defendant would crave leave of the court to argue those points as preliminary points of law and hence filed such Notice of Preliminary Objection on 3rd March 2009 and raised the points that the suit is fatally defective and bad in law and that the same was res judicata.

At the hearing learned counsel for the Defendant Mr. Gumbo submitted that the suit was time barred the cause of action having arisen between 1994 and 1997 and the suit having been filed in 1996. He further added that the cause of action being contract and suit having been filed outside six years the same could not stand. There was submission that the suit was in any event res judicata as the matters now in issue ought to have been brought in HC.CC.NO.28/1998 and indeed what is now in paragraph 7 of the plaint was brought in the said case and that there should be no litigation by instalments. The suit was said to be bad in law as the verifying affidavit was sworn on 17/07/2006 and the plaint is dated 26th July 2006.

The Preliminary Objection was opposed and described as vague as the same did not state in what sense the suit was defective or frivolous. As for the claim being time barred learned counsel for the Plaintiff contended that the cause of action in the present suit arose long after the case 28/1998 was finalized and

acts of tort fraud and breaches of contract continued to be committed even while the suit was in court and hence there can be no question of limitation. He concluded that nothing now in issue is shown to have been in issue in any other case now fully determined concluding that this is the sort of Preliminary Objection that should be discouraged. Counsel prayed that the Preliminary Objection be dismissed and the suit be set down for hearing.

I have given this Preliminary Objection due consideration. On the ground that the suit now present before court is res judicata I find that no material was placed before court to enable the court to come to that conclusion or otherwise. It cannot be denied that it is the onus of him that alleges to prove and I find that in this case that has not been done. The least the Defendant would have done is to attach to its application the plaint and judgment of the case no.28/1998 said to make this one res judicata. In so far as that was not done then the Preliminary Objection on that ground must fail. The court cannot operate on a vacuum.

The next point for consideration is whether the claim is time barred. The plaint dated 26th July 2006 prays for breach of contract and General Damages for malicious falsehoods and loss of earnings for a period of over 26 years. The duration of that period is not specified in the plaint so as for one to ascertain with certainty when time started to run. That would require adducing evidence as the suit has not been sought to be dismissed for being unclear on time of the cause of action. Indeed in the submissions of counsel for the Defendant he did say that the cause of action arose during 1994-1997. However the Plaintiff's case is that breaches continued to be committed long after that period and into the time of the subsistence of this case. As found above, that would require evidence to establish that fact and consequently takes the issue out of the realm of a proper Preliminary Objection and I so find and hold.

There is the final issue of the verifying affidavit having been sworn before the plaint was drawn. The plaint is dated 26th July 2006. Both the plaint and the verifying affidavit were filed in court on 31/07/2006 but of course the verifying affidavit was sworn earlier on 17th July 2006. Yes the plaint was accompanied by a Verifying Affidavit but that affidavit was sworn earlier. That is irregular and the affidavit is valueless – see **Halsbury's Laws of England 3rd Edition at page 393 paragraph 632** and I quote

“An affidavit sworn before action is valueless, even though filed after issue of the writ, but the court sometimes makes an order on such affidavit, the applicant undertaking to have it resworn and refilled.”

Order VII (2) of the Civil Procedure Rules reads:

“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.”

In this case the plaint was accompanied by an affidavit but as already seen above that affidavit was sworn before the plaint though filed on the same date. Empowered by section 3A of the Civil Procedure Acts and bearing in mind that striking out pleadings is draconian and should be done in the clearest of cases and so that the matters in controversy between the parties herein may be determined on their merits, I strike out the verifying affidavit with leave to the Plaintiff to file a properly sworn affidavit within seven (7) days of the date of this Ruling in default of which the suit shall stand struck out on that ground.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 18th DAY OF NOVEMBER 2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF:

Mr. Gumbo for Defendant/Applicant

Miss. Watima for Plaintiff/Respondent

Court clerk - Paul Ekitela