



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Case 44 of 2006**

**ROBERT WAMITHI .....PLAINTIFF**

**VERSUS**

**JUMA MASUDI OMARI .....RESPONDENT**

**R U L I N G**

By an application dated 16.10.2007, the plaintiff sought to have the amended defence and counterclaim dated 21<sup>st</sup> September 2007 to be struck out. When the aforesaid application came up for interpartes hearing, Mr. Kadima, learned advocate for the defendant, raised a preliminary point to the effect that the plaintiff had filed a similar application dated 7<sup>th</sup> March 2007 which application remains unprosecuted upto date. Mr. Kadima urged this court to strike out the summons dated 16.10.2007 for the reason that the same was filed in abuse of the court process.

Mr.M Ndegwa, learned advocate for the plaintiff urged this court to dismiss the preliminary objection on the basis that it has no merit but the same is geared towards delaying this matter. It is stated that the application dated 7.3.2007 was in respect of the defence dated 28.6.2006 while the application dated 16.10.2007 is against the amended defence dated 21.03.2007 which in any case was filed without leave of court.

I have considered the rival submissions made by learned counsels. I have also taken the liberty to peruse the two applications and the pleadings. It is clear that the Chamber Summons dated 7<sup>th</sup> March 2007 seek to have the defence dated 28.6.2006 to be struck out whereas the summons dated 16.10.2007 seeks to have the amended defence and the counter-claim dated 21<sup>st</sup> September 2007 to be struck out. In my view though the two applications seek for similar orders they are not res subjudice, because they relate to two separate defences. In any case an objection based on res subjudice principle must come within the provisions of Section 7 of the Civil Procedure Act and not by way of a preliminary objection. In the end I see no merit in the preliminary objection, it is dismissed with costs to the plaintiff. To prevent the further procrastination in the matter further, I direct that the two summonses be argued together.

**Dated and delivered at Mombasa this 28<sup>th</sup> Day of March 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Miss Kanaga h/b for Mr. Kadima for the Respondent and Mr. Ndegwa for the applicant.