



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE 43A OF 2003

ALVIN MBAE 1ST PLAINTIFF

ALICE MBIRO 2ND PLAINTIFF

WILSON MBAABU 3RD PLAINTIFF

VERSUS

KINYUA MUKETHA 1ST DEFENDANT

MONICA K. MUGO 2ND DEFENDANT

ANDERSON NKONGE MUGO 3RD DEFENDANT

RULING

This ruling relates to the applicant's motion on notice for orders to dismiss the suit herein for being *res judicata* and vexatious. In the alternative the applicant seeks that the respondent be ordered to provide security for costs in the sum of not less than Kshs. 120,000/=.

Arguing the application, counsel for the applicant submitted that the respondent has brought one suit after another based on the same facts and involving the same parties and subject matter, which suits have been concluded.

Counsel, in particular, asked the court to call for and consider the suit in HCCC No. 204 of 2001. Counsel further submitted that this is the fourth suit to be brought by the respondent on the same matter hence the suit is vexatious and an abuse of the court process.

In the alternative, counsel stated that before the respondent is allowed to prosecute this suit he ought to be ordered to provide security for costs as he has failed to pay costs in HCCC No. 3 of 2001 and HCCC No. 204 of 2001. The application was opposed and counsel for the respondent argued that the application lacks merit. That there is no material for the court to find that the suit is *res judicata* as the particulars of the previous suits have not been provided.

It is submitted that HCCC No. 3 of 2001 was struck out on a technicality. That the issues raised in this suit were not raised in HCCC No. 204 of 2001 or HCCC No. 3 of 2001.

Regarding security for costs, it was argued that the respondent is a person of unsound mind without

funds. After all the court has a discretion in the matter, it was submitted. The case of **Shah V. Shah** (1982) KLR 95 was cited in support of this proposition. Also cited was the case of **Njoroge V. E.S.S. Builders** (1982) KLR 353 on the question of *res judicata*.

Arguments by applicant's counsel in reply are not matters for an application such as this but indeed for the trial and therefore they do not deserve any consideration here.

I have carefully considered the two sides and hold the following view on the matter. The application is brought under the provisions of Section 7 of the Civil Procedure Act, Order 6 Rule 13 (1) (b) and (d) and Order 24 Rules (1), (2) and (5) of the Civil Procedure Rules.

As a matter of fact, the application is seeking in the main the striking out of the suit under Order 6 Rule 13(1) (b) and (d) aforesaid. Under that rule, a suit will be struck out or amended at any stage of the proceedings on any one of the following four (4) grounds, namely,

- (a) where it discloses no reasonable cause of action or defence; or
- (b) where it is scandalous, frivolous or vexatious; or
- (c) where it may prejudice, embarrass or delay the fair trial of the action; or
- (d) where it is otherwise an abuse of the process of the court.

The application is based on (b) and (d) above. By dint of Order 6 Rule 13(b) of the Civil Procedure Rules an application for striking out pleadings must state concisely the grounds on which it is brought.

The relevant grounds are expressed thus in the instant application:-

- “1. That the Honourable Court be pleased to make an order to dismiss the suit for being res judicata***
- 2. That further the Honourable Court be pleased to make an order to dismiss this suit for being vexatious and an abuse of the process of the court.”***

The above two grounds are not in accordance with the provisions of Rule 13(1) (b) and (d) as they are jumbled up and combines (b) and (d) which really ought to be two distinct grounds.

The first ground (*res judicata*) ought to have been subsumed in ground (d), namely abuse of the process of the court. The need to state concisely the ground upon which the application for striking out is based cannot be overemphasized. It is intended to afford the other side an opportunity to know what he has been accused of so as to be able to prepare to rebut the accusation.

The famous case of **D.T. Dobie & Co. (K) Ltd V. Muchina** (1982) KLRI amply demonstrates this. In that case, it was held that the application which had sought the striking out of the suit was incompetent simply because it was premised on the ground that it “disclosed no cause of action” instead of “disclosed no reasonable cause of action.” The application was further found to be incompetent for failure to comply with the requirements of sub-rule (2) by not stating concisely the grounds upon which it was made. On that ground alone this application similarly fails.

However, in view of the ground based on Section 7 of the Civil Procedure Act, challenging the very jurisdiction of this court to entertain the suit on the ground of it being *res judicata*, I am bound to consider it. It is argued that the present suit is *res judicata* HCCC No. 3 of 2001 and HCCC No. 204 of 2001. For a matter to be struck out for being *res judicata*, it is trite that it must be shown that the subject matter in the two suits is the same; that the parties to the two suits are the same; that the previous suit was heard and determined on merit by a court of competent jurisdiction.

To prove this it is imperative for the party raising *res judicata* to avail the previous suit or suits alleged to

have been decided by a competent court between the parties and on the same subject matter. That burden is discharged by exhibiting either copies of the pleadings and judgment or ruling of the previous suit or suits or availing the relevant file or files.

Learned counsel for the applicant casually asked the court to call for the files and confirm for itself this question. That is not how proceedings are conducted. A party must lay his entire case together with supporting material before the court. The court is not and cannot be expected to descend into the parties' discourse by being involved in looking for material to support one party's case.

Courts sometimes on their own may call for a file to clarify a fact. That is not the same as calling for a file in order to obtain the very basis of a contentious matter. In this application, there are two rulings extracted from HCCC No. 3 of 2001 and HCCC No. 204 of 2001. In the first case the application was struck out on the ground that the affidavit in support thereof was sworn by counsel. In the second case, the court found that HCCC No. 204 of 2001 was *res judicata* HCCC No. 106 of 1969.

I have already observed that there are no details of the three suits – HCCC No. 3 of 2001, HCCC No. 204 of 2001 and HCCC No. 106 of 1969 so that I am unable to say whether the parties and the cause of action are the same as those in the instant suit, or that the issues raised in this suit were finally determined in the previous suits.

The power to strike out pleadings, I reiterate, should be exercised only after the court has considered all facts.

For all these reasons, this application fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Meru this 12thday of May..... 2008.

W. OUKO

JUDGE