



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 531 of 2004

JACKSON WAHOME NGATIA PLAINTIFF

VERSUS

AGRIDUTT (K) LTD 1ST DEFENDANT

SAMUEL WANJOHI 2ND DEFENDANT

KIRINGAYA CONSTRUCTION (K) LIMITED 3RD DEFENDANT

RULING

In the Notice of preliminary Objection dated 4th June, 2007, the Defendants, as Objectors are saying that the Amended Plaint contravenes Order VII Rule 1(e) of the Civil Procedure Rules and that the Plaint herein is “unattainable” in law and ought to be struck out with costs.

The Plaintiff herein had filed another suit in the High Court at Nakuru being HCCC No. 95 of 2004 against the Defendants in the instant suit and concerning the same subject matter. The instant suit was filed on 26th my, 2004. The Plaintiff in his Amended Plaint in this suit dated 30th June, 2004 and filed on 1st July, 2004 says that HCCC No. 95 of 2004 at Nakuru was withdrawn on 14th June, 2004 and the Defendants in their Amended joint defence dated 4th August, 2007 and filed on 6th august, 2004 acknowledge the fact of the filing of that suit as well as the fact of withdrawal of that suit.

The relevant court order about the withdrawal not yet brought to this court and Mr. Ndubi, counsel for the Defendants, submits it ought to have been exhibited while Mr. Kioko, the Plaintiff Advocate, does not agree. I must agree with Mr. Ndubi him because I know many a time parties in a suit will unanimously say in court that a suit is withdrawn when in fact the suit is not withdrawn. Such a situation usually arises where one party or both or all of them have written a letter to the court informing the court that they are withdrawing their suit and thereafter they do not care to follow up the matter to ensue that the court has acted upon their letter and recorded an order marking the case withdrawn Parties ought to realize that it is the court order marking the case withdrawn that effects the withdrawal of a case. Mere letters or request to have a case withdrawn without a subsequent relevant court order marking the case withdrawn is no withdrawal at all. So is the fact that one party or both or all parties claim, without the relevant court order being exhibited, that their case has been withdrawn. Where a party claims that a particular case was withdrawn therefore, it is necessary for that party to exhibit the relevant court order to confirm that claim. That has not been done in this case to confirm what Mr. Kioko is telling me with reference to paragraph 12 of the Amended Plaint and paragraph 12 of the Amended Defence especially since Mr. Ndubi is now appearing to renegade from his client’s statement in paragraph 12 of the Amended defence by demanding the relevant court order from the plaintiff.

Having said the above, I note there is no dispute this case was filed on 26th May, 2004 when the original Plaintiff dated also 26th May, 2004 was filed averring in paragraph 11 that there is no other suit pending nor have there been previous proceedings in any court between him and the Defendants over this cause of action. On 19th April, 2004 the Defendants filed their joint defence dated 16th April, 2004 saying nothing about any previous or pending suit between them and the plaintiff.

On 1st July, 2004 the Plaintiff filed his amended plaintiff dated 30th June, 2004 disclosing in paragraph 12 that there was another suit Nakuru HCCC No.95 of 2004 filed by Messrs Lucy Njiru and Company Advocates without the direct instruction and/or authority of the Plaintiff, but that the suit had been withdrawn on 14th June, 2004. On 6th August, 2004 the Defendants filed their joint defence dated 4th August, 2004 in which, at paragraph 12, they admitted that the Plaintiff had filed Nakuru HCCC No.95 of 2004 and the Defendants claimed that the Plaintiff had subsequently withdrawn that suit without the Defendant's consent or costs.

That is where we are to-day so that when this suit was instituted on 26th May, 2004, there is no dispute that Nakuru HCCC No.95 of 2004 was pending in the Nakuru Court. The dispute between the parties arises when Mr. Ndubi says that even if that Nakuru case was withdrawn on 14th June, 2004 that withdrawal did not remove the fact that this Nairobi HCCC NO.531 of 2004 was filed in contravention of the mandatory provisions of Order VII Rule 1 (e) as read with sub rule (3) of the Civil Procedure Rules and as a result Mr. Ndubi calls for the striking out of this Nairobi suit saying the suit is not tenable in law, it was in effective *abinitio* and therefore could not be amended.

Mr. Kioko on the other hand says that since the Nakuru case was withdrawn on 14th June, 2004 and subsequently the Plaintiff on 1st July, 2004, filed his Amended Plaintiff, there was no contravention of order VII Rule 1 (e) because all that the Plaintiff had done before those dates should be disregarded as they are taken to have been replaced on amendment, the Amended Plaintiff having, in paragraph 12 therein complied with order VII Rule 1(e) of the Civil Procedure Rules by disclosing that there was Nakuru HCCC No.95 of 2004 which had been lawfully withdrawn; a withdrawal which the Defendants acknowledged in their amended defence dated 4th August, 2004 and filed on 6th August, 2004.

Mr. Kioko goes on to say that even if there were no compliance, Order VII rule 1 (e) does not in itself prescribe the sanction of striking out called for in the Preliminary Objection herein. He submits that Order VII Rule 1 (e) of the Civil Procedure Rules should be read together with section 6 of the Civil Procedure Act which provides for the remedy of a stay of one of the suits until the other suit is heard and determined.

To my mind, it is not proper for Mr. Kioko to say that following the Plaintiff's amendment of the Plaintiff, all that which had been done before the amendment should be ignored when at the end of the suit, if his client is successful, he is going to claim interest on the decretal sum to include the date on which this suit was filed being 26th May, 2004. Moreover, could there have been the question of amendment on 1st July, 2004 if there had been no plaintiff to amend and can there be a plaintiff to amend if that plaintiff is ignored as not being in existence? The short answer is that this case was filed on 26th May, 2004 and that is the legal position from which its merits with regard to the issues under discussions must be reckoned.

From the above therefore, the final and important issue is what sanction does Order VII rule 1 (e) provide against its contravention? Apparently both learned counsel do not seem to notice that rule 1 (e) of Order VII does not exist. Strictly speaking therefore this whole preliminary objection about the contravention of Order VII rule 1 (e) is a non starter as the Plaintiff could not contravene a rule of the Civil Procedure Rules which does not exist. But assuming that the Preliminary Objection is about Order VII Rule 1 sub rule (1) (e), the relevant part states as follows:

“ I (1) The Plaintiff shall contain the following particulars:-

(a)

(b)

(c)

(d)

(e) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the defendant over the same subject matter.

That provision does not contain a sanction for the provision's contravention.

Mr. Ndubi talked about the sanction in sub rule (3) of Rule 1 of Order VII which says

“The court may of its own motion or on the application of the defendant. Order to be struck out any Plaint which does not comply with sub-rule (2) of this rule.”

The sub rule (2) of rule 1 referred to states as follows:

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

It has not been submitted before me that the Plaint in this suit was not accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Plaint. Sub rule (3) of rule 1 of Order VII clearly concerns something different from what the Preliminary Objection in this suit is about. That sub rule (3) concerns a verifying affidavit. The Preliminary Objection is about the contents of the Plaint as spelled out in rule 1 sub rule (1) (e) to which sub rule (3) does not apply. In any case, there is no dispute before me that the Plaint in this suit whether original or Amended has always been accompanied by a verifying affidavit.

Moreover from what I have said, the original Plaint contained an averment in compliance with Rule 1 sub rule (1) (e) to the effect that there was no other suit pending. That may not have been the truth but that is not what the Preliminary Objection is addressing. The Preliminary Objection is addressing the issue of non-compliance with rule 1 sub-rule (1) (e).

Further when the amended Plaint disclosed the existence of a pending suit which was said to have been subsequently withdrawn, Order VII rule 1 sub rule (1) (e) was thereby being complied with.

But when Nakuru HCCC No.95 of 2004 was pending at the time this suit was filed in this court on 26th May 2004 was that something which could cause this suit to be struck court? As Mr. Kioko pointed out, the solution is found in section 6 of the Civil Procedure Act which says:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, Litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The section says that “No court shall proceed with the trial” meaning that the trial in the subsequently instituted suit should be stayed as long as the previously instituted suit remains pending. If no longer pending, and that may be so because the suit is withdrawn, there will be nothing to prevent the subsequently instituted suit from proceeding to trial. In the circumstances therefore the question of striking out the subsequently instituted suit does not arise.

To conclude, I find that the suit was filed on 26th May, 2004 when the Nakuru suit was pending. The pending suit first not disclosed but latter disclosed by Plaintiff and acknowledged by the Defendants both sides saying it had been withdrawn although no court order effecting the alleged withdrawal has been

exhibited and therefore that case may still be pending in the court today and no party seems to be prejudiced.

I have said there was no contravention of Order VII Rule 1 (1) (e) because both the original Plaintiff and the Amended Plaintiff contained an averment as required by that rule only that the averment in the original Plaintiff was not the truth. I have pointed out that the Preliminary Objection before me is not about that truth and the Defendant's first written defence never questioned the truth concerning that issue. I have also pointed out that the real truth which came out through the Amended Plaintiff was acknowledged by the Defendants.

I have found that even assuming that Order VII Rule 1 (1) (e) was contravened, the Objectors have not succeeded in showing this court the correct and lawful sanction. On the whole therefore, the Preliminary Objection is hereby overruled.

But since it is possible that in the circumstances of this case the parties may be saying the Nakuru case has been withdrawn when there is no court order effecting such a withdrawal and therefore the case may be pending to –date, hearing of the main suit herein be and is hereby stayed until the Plaintiff satisfies this court, exhibiting the relevant court order, that Nakuru HCCC No. 95 of 2004 has indeed been withdrawn.

Costs of Preliminary Objection be costs in the cause.

Dated and delivered at Nairobi this 20th day of November 2007.

J.M. KHAMONI

JUDGE

Present:

Mr. Kioko for the Plaintiff

Mr. Maina for Mr. Ndubi for the Defendants