



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 33 of 2006

INVESCO ASSURANCE CO. LTD.....1ST PLAINTIFF

FREDRICK MOMANYI.....2ND PLAINTIFF

VERSUS

RODAH OKASIBA & 16 OTHERS.....DEFENDANTS

RULING

By a notice of motion dated 13th of February 2006 and purportedly made under **Order XXI rule 22, Order V rule 17** of the **Civil Procedure Rules, Sections 3A, 18, 63(e) and 80** of the **Civil Procedure Act**, The plaintiffs have sought to stay proceedings and execution in respect of seventeen suits which were filed by the defendants against the 2nd plaintiff in the subordinate court at Nakuru pending the hearing and determination of this suit. The grounds in support of the application as stated on the face of the application are that the said seventeen suits which were filed against the 2nd defendant were tainted with fraud as the evidence offered by the defendants were materially, fundamentally and intentionally adduced to misled the said court into awarding the defendants damages on false allegations that the defendants were injured when motor vehicle registration number KAN 173G was involved in an accident. The plaintiffs stated that the defendants falsely alleged that they were passengers in the said motor vehicle when it was involved in the accident. The plaintiffs contend that they had conducted investigations and established that all the defendants were false claimants and therefore the proceedings against the plaintiffs in the said suits in the subordinate court should be stayed and where the suits had been concluded, there be a stay of execution pending the hearing and determination of this suit. The application is supported by the annexed affidavit of Paul Gichuhi, the claims manager of the 1st plaintiff.

The application is opposed. The defendants filed grounds in opposition to the application. They further filed replying affidavits in answer to the averments made by the plaintiffs in their application. The substance of the reply by the defendants is that they all denied that they were false claimants. They stated that they were passengers in the said motor vehicle when it was involved in the accident. They further contended that the plaintiffs had abused the due process of the court by filing an independent suit to challenge proceedings before the competent subordinate court. They contended that if the plaintiffs had discovered new evidence which established that the defendants were false claimants, they were at liberty to apply for review of the decree before the subordinate courts that issued them. They urged this court to disallow the application. The 1st – 12th defendants and the 14th -17th defendants raised a preliminary objection to the entire suit filed by the plaintiffs on the grounds that this court lacked jurisdiction to grant the orders sought.

At the hearing of application, this court allowed the said defendants to raise the preliminary objection. Mr. Gatumu who was acting for all the defendants submitted that the suit filed herein was *res judicata* because the issues which the plaintiffs were seeking to canvass before this court had been dealt with and concluded by the subordinate courts which heard and determined the said suits. He further submitted that if the plaintiffs intended to challenge the decisions of the said subordinate courts on the grounds that they had discovered new and important evidence, they were at liberty to apply to review the said decisions under the provisions of **Order XLIV** of the **Civil Procedure Rules** and not by filing an independent suit. He submitted that this court lacked jurisdiction to entertain the matters which the plaintiffs have brought before it because the plaintiffs had not filed an appeal against the decisions of the subordinate court to enable this court have jurisdiction. He submitted that the suits against the 13th and the 16th defendant were still pending before the subordinate court and therefore this court could not purport to hear another suit over the same subject matter between the same parties. Mr. Gatumu urged this court to strike out the entire suit filed by the plaintiffs against the defendants.

Mrs Thangei, learned counsel for the plaintiffs submitted that the preliminary objection was not merited. She submitted that this court had jurisdiction to deal with the matters in issue under the provisions of **Order XXI rule 22** of the **Civil Procedure Rules**. She submitted that a party who is aggrieved by a decision of a subordinate court could move to a court which has appellate jurisdiction to ventilate any issues that relates to the decree or execution which has been ordered by a subordinate court of first instance. She submitted that this court had jurisdiction under the provisions of **Section 3A** of the **Civil Procedure Act** to deal with the issues raised by the plaintiffs. She further submitted that the 1st plaintiff who was aggrieved by the said decisions of the subordinate court, was not a party in the said suits hence its decision to file this suit. She however conceded that the plaintiffs ought not to have brought this suit against the 13th and the 16th defendants. She therefore withdrew the application against the said two defendants. She however urged this court to disallow the preliminary objection raised.

I have considered the rival arguments which were made before me by learned counsel for the plaintiffs and by learned counsel for the defendants. I have also read the pleadings which were filed by the parties in support of their respective positions in this suit. The issue for determination by this court is whether the preliminary objection raised by the defendants has merit. A preliminary objection should be raised on the assumption that the facts pleaded by the parties are not contested. A preliminary objection should only be raised if it would determine the matters in dispute. As was held in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] E.A. 696** at page 701 by Sir Charles Newbold P:

“A preliminary objection is in the nature of what use to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if the fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.”

In this case the facts pleaded by the parties to this suit are not disputed. The defendants filed suits against the 2nd plaintiff who was insured by the 1st plaintiff seeking to be paid damages for the injuries which they claimed to have sustained when motor vehicle registration number KAN 173G Nissan Matatu was involved in an accident.

The defendants suits against the 2nd plaintiff, save for the 13th and the 16th defendants, have been heard and concluded by the Chief Magistrate’s Court, Nakuru. Judgments have been entered in favour of the plaintiff against the 2nd defendant. When the 1st plaintiff, as the insurer of the 2nd plaintiff, was informed of the said judgments, it filed this suit seeking to have the execution of the said judgments stayed pending the hearing and determination of this suit. The plaintiffs claim that the defendants are false claimants and therefore should not be allowed to perpetrate fraud against them. The plaintiffs averred that they had conducted investigations which had established that the defendants had made false claims against the plaintiffs. They stated that the defendants were neither passengers in the said motor vehicle nor were they injured when the said motor vehicle was involved in the accident. The plaintiffs therefore want this court

to address the issues raised against the defendants in this suit. The plaintiffs instead of applying to review the judgments entered against the 2nd plaintiff in the suits which were separately filed by the defendants, filed this suit in the High Court.

The defendants have taken issue with the fact that the plaintiffs filed this suit instead of seeking appropriate remedies before the subordinate court in the suits filed by the defendants. The defendants submitted that this suit is therefore *res judicata* because the issues raised in this suit have substantially been dealt with by the subordinate courts which are courts of competent jurisdiction. The defendants submitted that if the plaintiffs had discovered new evidence which would make the subordinate court reach a different decision, then the plaintiffs were at liberty to apply to the said subordinate court to review the judgments and have them set aside. The plaintiffs on their part insist that they had properly brought this suit before this court. They urged this court to disallow the preliminary objection.

I have considered all the matters in issue in this case. I agree with the defendants that the plaintiffs ought to have applied to review the judgments of the subordinate court if their investigations established new evidence that would result in the said judgments being set aside. The procedure for making application for review is provided for under **Section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules**. The procedure allows for a party who has discovered new and important evidence to impeach a judgment which has been entered against such a party.

Furthermore **Section 34 of the Civil Procedure Act** prohibits a party who has had judgment entered against him from filing an independent suit to challenge the said judgment. The **said section** provides that:

“(1) All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not in a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this section, be determined by the court.”

In this case the plaintiffs should have raised the issues concerning the said judgments before the subordinate court and not file an independent suit. In the circumstances of this case therefore the preliminary objection raised by the defendants has merit.

The suit herein filed by the plaintiffs against the defendants is incompetent and was filed in abuse of the due procedure of the court. It is consequently struck out with costs to the defendants.

DATED at NAKURU this 31st day of March, 2006.

L. KIMARU

JUDGE