

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

Civil Case 1390 of 2004

ALAN OKAL AYIEKO1ST
PLAINTIFF

MARY ADHIAMBO OSODO OKAL BOTH T/A MINMEY ENTERPRISES.....2ND
PLAINTIFF

VERSUS

EQUATOR BOTTLERS LIMITED
DEFENDANT

R U L I N G

In the Chamber Summons application dated the 10th March 2005 and filed on the 11th March 2005 and brought under Order 6 rule 13(1) (b) and (d) of the Civil Procedure Rules, Equator Bottlers Ltd., the Defendant, seeks an order that the suit be struck out on the ground that it is an abuse of the process of the court. The Application is supported by the affidavit of Mr. James Abala Oketch, the Legal Assistant of the Defendant, made on the 10th March 2005. The Plaintiffs opposed the Application, relying on the Replying Affidavit of Allan Okal Ayieko, the First Plaintiff, sworn on the 14th April 2005.

Since the Defendant relies on the fact that the averment in paragraph 19 of the Plaint dated the 21st December 2004 — that there is no other suit pending in court nor have there been previous proceedings between the Plaintiffs and the Defendant on the subject matter herein — is false, I prefer to determine the Application under the provisions of Order 7 rule 1 (2) and (3) of the Civil Procedure Rules which states —

“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

The verifying affidavit in this case was sworn by Allan Okal Ayieko, the First Plaintiff, on the 22nd December 2005. In paragraph 2 thereof, he deponed —

“2. THAT I have read the content of the Plaint filed herewith and verify the correctness thereto.”

One of the averments Mr. Ayieko verified as correct is to be found in paragraph 19 of the Plaint, which states —

“19. There is no other suit pending in court nor have there been previous proceedings between the Plaintiffs and the Defendant on the subject matter herein.”

The subject matter in this case is a Distributor Agreement dated the 8th May 2000. The same Distributor Agreement is also the subject matter in Kisumu Chief Magistrate’s Court Civil Case No. 130 of 2003, between the same parties.

The Plaintiff in this suit does not comply with the mandatory provisions to which I have already referred and Order 7 rule 1 (3) of the Civil Procedure Rules confers upon the court the power to strike out such a Plaintiff. By filing the present suit in Nairobi well knowing that there is another suit pending in the Kisumu Chief Magistrate's Court on the same subject matter and failing to disclose this fact in the present suit, this suit is clearly an abuse of the process of this court.

Accordingly, I grant the application and order the Plaintiff dated the 21st December 2004 and filed on the 22nd December 2004 in this suit be and is hereby struck out with costs to the Defendant. The Defendant will also have the costs of the application dated the 10th March 2005 and it is so ordered.

Dated and delivered at Nairobi this Tenth day of March 2006.

P. Kihara Kariuki

Judge