



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

Misc Civ Appli 771 of 2004(OS)

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF NAIROBI C.M.C.C. NO. 2839 OF 2000

(JOSHUA OWINO ODANGA... VS...AGNES WAGANDA OKWAR)

BETWEEN

JOSHUA JAIRO OWINO ODANGA.....APPLICANT

AND

EZEKIEL ODUK (t/a ODUK & CO. ADVOCATES)....RESPONDENT

R U L I N G

In the originating summons dated 15th October, 2004 the Applicant herein sought the main orders, first, that the Respondent do render an account of all the money received by him for and on behalf of, and also from, the Applicant, and, two, that the Respondent do forthwith pay over to the Applicant the amount due to the Applicant upon delivery of the account. The originating summons is stated to be brought pursuant to Order 52, rule 4 (1) and (2) and rule 10 (1), of the Civil Procedure Rules. There is an affidavit sworn in support of the application by the Applicant. The Respondent does not appear to have filed any replying affidavit. But he filed a notice of preliminary objection on points of law dated 2nd June, 2005 which was argued on 2nd December, 2005.

The points of law raised in that preliminary objection are:

1. **That the present suit offends section 6 of the Civil Procedure Act, Cap. 21, in that there is a previous suit, being HC Miscellaneous Case No. 325 of 2004 between the same parties, and said to be pending ruling before this court.**
2. **That the present suit is an abuse of the process of the court.**
3. **That the suit constitutes vexatious litigation and should be struck out and dismissed.**

The Applicant has opposed the preliminary objection.

I have considered the submissions of the learned counsels appearing. As observed by Law, JA, in the East African Court of Appeal Case of **MUKISA BISCUIT COMPANY –vs- WEST END DISTRIBUTORS** (1969) EA 696,

“.....A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....”

In the same case Sir Charles Newbold, P stated,

“..... a preliminary objection is in the nature of what used 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 any 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. This improper practice should stop....”

In the present case the Respondent has not bothered to enter appearance or file a replying affidavit. The pleadings of HC MISC. Case No. 325 of 2004 said to be between the same parties and pending ruling before this court have not been produced before the court. It was mentioned by learned counsel for the Respondent that the said matter is a taxation of costs which is pending ruling before the taxing officer of the court. He wanted the present suit stayed under section 6 of the Civil Procedure Act pending determination of the alleged previous suit. Without the pleadings of that alleged previous case, this court is unable to know whether the matter in issue in the present suit is also directly and substantially in issue in the previous suit, or even whether the previous suit is between the same parties, or between parties under whom they or any of them claim. The court cannot be expected to make a ruling on the preliminary objection without those pleadings.

I think that the appropriate thing for the Respondent to do is to enter appearance, file a replying affidavit in answer to this originating summons, and then, if he so minded, file an appropriate formal application so that the pleadings of that other case can be exhibited. I must in the circumstances overrule the preliminary objection. It is hereby dismissed with costs to the Applicant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF MARCH, 2006.