



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

**Civil Case 612 of 2004**

**DAVID SCOTT ONGOSI ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD. .... DEFENDANT**

**R U L I N G**

The 5<sup>th</sup> defendant has lodged this application under Order VI Rule 13 (1) (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an Order to strike out the plaintiffs suit or alternatively stay the same on the ground that the suit is an abuse of the process of the court. The main ground for the application is that the plaintiff has previously filed or been party to two suits namely HCCC No.944 of 2004 (Central Registry) and HCCC No.558 of 2004 in respect of the same cause of action as in the present suit and by dint of the provisions of Order 6 Rule 13(1) (d) of the Civil Procedure Rules, the suit should be struck out.

The application is opposed and the plaintiff has filed a replying affidavit in which he states that the only suits now pending determination are the present suit and HCCC No.558 of 2004. He has deponed that the parties involved are different and in fact the 3<sup>rd</sup> defendant in this suit is now deceased. Further HCCC No.944 of 2004 was withdrawn by a notice dated 9.3.2004. In the premises the plaintiff contends that rather than this suit being struck out, it should be stayed by dint of the provisions of Section 6 of the Civil Procedure Act.

I have perused the further amended plaint in HCCC No.558 of 2004. The suit is by the plaintiff and one Andrew Ouko against the 1<sup>st</sup> and 5<sup>th</sup> defendants herein. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are not parties in that suit. The subject matter is the same property namely L.R. No. 11877 Langata – Nairobi. The reliefs sought with respect to the property are similar save for a claim for injunction made in the earlier suit which is not made in this suit.

Should I strike out this suit on the basis that it is an abuse of the process of the court? I think that would be draconian. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are not involved in the earlier suit. No injunction is sought in this suit. If I strike out this suit what would be the fate of the plaintiff's claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants for whatever it is worth? The result would be a determination of that claim without a trial and on the basis of a complaint not raised by those defendants. It has been observed time and again that the power of striking out pleadings is a draconian one which should only be exercised in plain and obvious cases. This in my view is not such a case. Besides, under the provisions of Section 6 of the Civil Procedure Act, I have a discretion to stay this suit pending the hearing and determination of HCCC No.558 of 2004. That is the order that commends itself to me. On the determination of that suit the plaintiff will elect the cause of action to take in this suit. This result does not in any way bar any party from moving the court to have the suit struck out or otherwise dismissed on any other basis. Accordingly this suit is stayed pending the hearing and determination of HCCC No.558 of 2004. I make no order as to costs.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 9<sup>TH</sup> day of OCTOBER, 2006.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-