



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 528 of 1998

LAWI DUDA & OTHERS.....PLAINTIFFS

VERSUS

BAMBURI CEMENT LIMITED.....DEFENDANT

RULING

By its chamber summons dated the 5th April 2006 brought under Order 6 Rule 13 (1) (c) and (d) of the Civil Procedure Rules the defendant seeks the dismissal of this suit on the ground that it is an abuse of the process of this court. When the application came up for hearing before me on the 11th October 2006 Dr. Khaminwa, counsel for the plaintiffs, raised a preliminary objection written notice of which he had given. He argued that the matter is *res judicata* as the defendant brought a similar application in 2000 which was dismissed by Mrs. Tutui, the Commissioner of Assize on 22nd March 2002.

Mr. Kingi for the plaintiff, opposing the application, submitted that the matter is not *res judicata* as the 2000 application dated 22nd August 2000 was based on different grounds from those upon which the present one is based. That application was also not supported by an affidavit as this one is. More over, he further submitted, that application was not dismissed on its own merits.

I have looked at both the applications. The one of 22nd August 2000 sought the striking out of the suit on the grounds that:-

“(a) The cause of action is separate and distinct for each plaintiff.

(b) Each plaintiff’s (sic) have failed to comply with the provisions of the Judicature Act Cap 8 of the laws of Kenya.

(c) That the plaint disclosed no reasonable cause of action.”

The present application seeks the dismissal of this suit on the ground that, given the fact that the plaintiffs’ services were terminated as a result of the Defendant company’s re-organization and the plaintiffs were so informed and paid all their terminal benefits, this suit is an abuse of the process of court.

In my view these are more or less similar applications. I am therefore unable to agree with Mr. Kingi’s argument that the grounds in the earlier application were different. Even if they were I cannot still accept

the argument. To accept it would mean that a party will seek the striking out of a pleading on the ground that it does not disclose a reasonable cause of action or defence and if his application is dismissed he will refashion it on the ground of being an abuse of the process of court and get away with it. Parties are not allowed to litigate in instalments. They should plead their whole case at the first instance. If they fail to do that their later claims will be shut out. Explanation No. 4 to section 7 of the Civil Procedure Act makes that very clear.

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In the case of **Yat Tung Investment Company Limited – Vs – Dao Heng Bank Limited and Another [1975] AC 581** this is how the Privy Council dealt with a similar issue:-

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

The locus classicus of that aspect of *res judicata* is the Judgment of Wigram VC in *Henderson – Vs – Henderson (1843) Hare 100, 115*, where the Judge says:

‘Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belong to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.’

The ground being relied upon in the present application that the suit is an abuse of the process of court should have been raised in the earlier application. If that was the only issue in this application I would have struck it out as being *res judicata*.

In this case, however, having perused the ruling of the Commissioner of Assize I am satisfied that the matter is not *res judicata*. This is because the application was not decided on its merits. A matter is not *res judicata* if it has not been decided on its merits – **Kibogy – Vs – Chemweno [1981] KLR 35** and **Wangulu – Vs – Kania [1987] KLR 51**. In the case of **Anaj Warehousing Ltd – Vs – National Bank of Kenya Ltd & Another, Mombasa HCCC No. 311 of 2000** I said:-

“A matter is *res judicata* when it has been heard and finally decided. And a matter is ‘heard and finally decided’ when the court which has heard it has ‘exercised its Judicial mind on’ the matter in controversy after it has heard arguments, considered it and come to a decision on it.

See Vol. 1 Mulla on The Code of Procedure, 17th Edition At page 279.”

In this case as I have said the Commissioner of Assize did not dismiss the matter on its merits. She thought that the application was attacking the plaint as it stood before amendment. As the plaint had been amended she did not see the reason for striking it out and she dismissed the application. So she did not go into the merits of the application. In view of this I hold that the matter is not *res judicata* and I accordingly overrule the preliminary objection and order that the application be heard and determined on its own merits. Costs in cause.

DATED and delivered this 16th day of November 2006.

D. K. MARAGA

JUDGE