



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

**AT MACHAKOS**  
**CIVIL CASE NO. 93 OF 2003**

**LILIAN MWIKALI MAINGI.....PLAINTIFF**

**VERSUS**

**DANIEL MAINGI KIMANI.....DEFENDANT**

**RULING**

The defendant has raised a preliminary objection to the plaintiffs suit. The preliminary objection is dated 9.3.2004. The contents of the objection are that the suit contravenes the provisions of Order VII rule 1 (1) (e) Civil Procedure Rules are both the suit and application dated 29.1.2004 are bad in law, abuse of court process and incompetent and they should be struck out.

The objection is based on the reason that there is another suit HCCC 166/01 still pending before the court with parties being the same and issues the same and relating to the same subject matter. A ruling of J. Nambuye dated 13.8.2003 'BMK 3' in HCCC 166/01 dismissed the plaintiffs originating summons but the plaintiff was given leave to file another suit as it was dismissed on a technicality. After the dismissal order, on 18.11.2003 the plaintiff filed an application seeking to set aside the order of 13.8.2003 dismissing the originating summons. The application is due for hearing on 10.5.2004. The same counsel Mr. Kisongoa who appeared in HCCC 166/01 is the same counsel in this case. He argues that HCCC 166/01 is not in existence which I do not agree with. An application is due for hearing on 10.5.2004. If the court allows that application and reinstates the suit 166/01 it will mean having 2 similar suits before this court. Plaintiffs should have elected to finalise that application in HCCC 166/01 before filing the present or should have withdrawn the application pending for hearing on 10.5.2004 in HCCC 166/01 and filed this case. This amounts to an abuse of court process. If the defendant did not have the same advocate they may never had known of the earlier suit. The court may issue conflicting order in the two suits which may cause embarrassment to the parties.

An incident like the present one is what was being averted when order V(i) Rule I (i) (e) was enacted. So that a plaintiff would swear a verifying affidavit confirming whether there was any other suit pending before court between the same parties or such a case had been finalised. In this case the plaintiff has sworn a verifying affidavit in which she has perjured the court at para 2 of the affidavit dated 10.11.2003 where she depones that there has never been any other case or proceedings between her and the defendant. As earlier noted Mr. Kisongoa was the same advocate in that case and is very much aware of it and he goes ahead to allow his client file an affidavit which is a falsehood in the court. I find that to be highly irregular S6 Civil Procedure Act provides that if two similar suits pending the newer one be stayed. Such a case would arise if one party was not aware of the other suit. However in this case the plaintiffs was very well aware of the suit that is pending and plaintiff went ahead to file a false affidavit in support of the suit. The court has no option but strike off the false affidavit and without the affidavit the suit can not stand and it is likewise struck off.

The plaintiff may proceed with pending application in HCCC 166/01 to its conclusion or withdraw that application and file a fresh suit with a proper affidavit. Costs of this suit to Defendant.

**Dated, read and delivered at Machakos this.....day of.....,2004.**

**R. WENDOH**

**JUDGE**