



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE NO. 123 OF 2003**

**RULING**

In this application, the defendant has opposed the application dated 14th August, 2003 on the following grounds which he argued should be taken as preliminary points of law:

- (1) That there is still pending before Court Nakuru HCCC No. 18 of 1998 – **Judy Gathoni Gichuru Vs National Bank of Kenya Ltd.**
- (2) That the amendment to the Plaint and the application dated 14th August, 2003 was:
  - (i) incompetent.
  - (ii) Without leave of Court.
  - (iii) Not tenable in law.
- (3) That the said application is based on an amended affidavit which is unknown in law.
- (4) That the verifying affidavit is incompetent.
- (5) That the entire suit is an abuse of the process of the Court.
- (6) Affidavits or affidavits to be sworn in reply thereto.

It was the argument of Mr. Kiburi that the same issues in this case had been raised in Nakuru HCCC No. 18 of 1998. Though the plaintiff initially obtained an injunction, the application was later dismissed on 25th May, 2001. Besides the above, Mr. Kiburi also argued that they had raised the issue on 31st July, 2003 before Hon. Justice Lady Lesiit. Consequently, the Court had agreed with him that the issues were the same and had ordered that this suit be stayed till suit No. 18 of 1998 be disposed of. Subsequently, he submitted that Mr. Gai obtained interim orders from the same Honourable Judge without full disclosure. That apart, Mr. Kiburi also submitted that after the order of stay dated 31st July, 2003, the plaintiff moved ex-parte and amended her pleadings without the leave of the Court.

In his reply, Mr. Gai has opposed the preliminary objection on the ground that the causes of action are different in the two suits. He explained that whereas in HCCC No. 18 of 1998 the issue was about an overdraft of Kshs.125,000 – in this case the issue relates to a loan of Kshs.800,000. However, he conceded that the parties and security were the same. Mr. Gai further submitted that the two files raise

different issues and that it is not fair to pick on any particular issue. In addition to the above, Mr. Gai also explained that the application for injunction was dismissed for non-attendance.

This Court has carefully perused the detailed submissions by the Counsels. Besides the above, the Court has also had the benefit of perusing: [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke)

- proceedings of 31st July, 2003 and

- Civil Suit No. 18 of 1998.

Having said the above, it is crystal-clear that the same issues have already been canvassed before Hon. Justice Lesiit who made her ruling on 31st July, 2003. Consequently, Mr. Gai filed an amended plaint on 15th August, 2003 in which he complied with the above ruling by disclosing the existence of Civil Suit No. 18 of 1998.

This Court has carefully perused the amended plaint and finds that the same is fundamentally different from the one in Civil suit No. 18 of 1998.

Due to the above, the plaintiff has a duty to serve the same on the defendant within the next 7 days. As far as the amended affidavit is concerned, the same has no basis in law and hence the same is hereby expunged from the record. The plaintiff is at liberty to apply for leave to file a further affidavit.

In view of the above, the preliminary objection is hereby dismissed with costs.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Kiburi.

MUGA APONDI

JUDGE

27TH FEBRUARY, 2004