

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 93 OF 2000

JOSIAH KIOKO NGUMBI.....PLAINTIFF

VERSUS

CHARLES KYALO MAWILI.....DEFENDANT

R U L I N G

The defendant has raised a preliminary objection at para 10 of the defence that the plaint herein is defective and should be struck out. This matter had come up for hearing and counsel for plaintiff not being ready to proceed wanted the court to transfer it to the lower court but counsel for defendant decided to argue the preliminary objection at this point as he contends that the suit is incompetent and can not be transferred to another court. He cited Order 7 Rule 1 (1) (e) Civil Procedure Rules as the provision which the plaintiff has failed to comply with. In opposition to the objection the counsel for plaintiff contends that they have complied with the said provision of law as there is an affidavit filed with the plaint verifying the truthfulness of the contents of the plaint and that this objection is premature.

Order VII Rule 1 (1) Civil Procedure Rules provides that the plaint shall contain the following particulars:- The particulars are listed from a to e and (e) provides: ‘an averment that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter’. This provision has to be included in the plaint not in the verifying affidavit. The provisions under O VII Rule 1 (1) Civil Procedure Rules are mandatory for the word used is ‘shall’. The plaintiffs plaint filed herein on 10.5.2000 does not contain such an averment and the plaint therefore offends provisions of Order VII rule 1(1) (e) Civil Procedure Rules and the defendant’s objection is therefore upheld and the plaint is hereby struck out. The plaintiff may file the proper plaint in the proper court as provided by the law. Costs of this suit to Defendants

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

R. WENDOH

JUDGE