

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1852 of 01

EDDAH WAIRIMU NJUGUNA

STEPHEN KARIUKI NJUGUNA
PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LTD

MARY WANJUKU KABIRA

SARAH AWINJA BABU
RESPONDENTS

JOHN KANYONGO KIARIE

RULING

By a notice of preliminary objection dated the 4th day of February 2002 the 1st respondent raised an objection on a preliminary point of law that: "There is duplicity of suits in that there is another suit pending between the 1st plaintiff/applicant and the defendant/respondent to wit, EDDAH WAIRIMU NJUGUNA -vs- K.C.B. LTD in NAIROBI (MILIMANI COMMERCIAL COURT) HIGH COURT Civil Case No. 1842 of 1999(O.S.) By an oral application by way of a preliminary objection the 4th respondent argued that the applicant's affidavit, dated 3rd December 2002, is incurably defective in that: i) It contravenes the provisions of Order XVIII rule 5, as it fails to refer to the deponent in the first singular. ii) It contravenes the provisions of Section 21 of Oaths and Statutory Declaration Act Cap 15 Laws of Kenya, and the schedule supporting section 8 of the said Act.

Equally by an oral application by way of a preliminary objection the 3rd respondent argued, that there is a gross misjoinder of parties and causes of action. That it is incumbent upon the plaintiff to bring three (3) separate suits. That, in any event, no leave of the court was sought and obtained to join separate causes of action in the suit, as enjoined by order 11 rule 3 of the Civil Procedure Rules. In respect of the first preliminary objection, on a point of law, it was submitted by Miss Kamau that apart from the present suit between the same parties, there is another pending suit being NAIROBI HCCC No. 1842/99(O.S.): EDDA WAIRIMU NJUGUNA - vs- KCB LTD. That the parties are the same, the causes of action same and the prayers in the suit are same. That it would be erroneous in law that one suit (original) is subsisting and, during the pendency of that subsisting suit, another suit is being filed. The subsisting suit was filed on 4th December, 2001 and the other suit which was purportedly withdrawn was filed on 5th February, 2002. That in the present plaint it is averred by the plaintiff "that there is no other suit pending, and there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter". In addition there is a verifying affidavit, by EDDA WAIRIMU NJUGUNA the first plaintiff/applicant, in which she has verified the averments in the plaint.

In respect of the second preliminary point of law, it was submitted by Mr. Agimba that the applicant's affidavits dated 3rd December, 2001, in support of the chamber summons dated 3/12/2002, is incurably defective in that:

1) It contravenes the provisions of order XVIII rule 5 as it failed to refer to the deponent in the first person singular.

2) That it contravenes the provisions of S.21 of the Oaths & Statutory Declaration Act Cap 15 Laws of Kenya.

For the respondent, it was argued that the affidavit does not contravene the aforesaid rule. Rule 5 of order XVIII does not say one cannot swear affidavit in the second person to wit. "we". In the circumstances there is nothing in the Civil Procedure or the Oaths and Statutory Declaration Act (Cap 15) Laws of Kenya which would invalidate the affidavit in issue. In respect of the third preliminary point of law it was submitted, by Mr. Wanjohi, that there is no misjoinder. The answer to Mr. Okundi's objection is to be found in order 1 rule 9 as read together with order 11 rule 2(1). The reliefs which he seeks to enforce are in the same cause of action. In the cause of counsels' submissions it became necessary to refer to HCCC 1842/99 (O.S.) EDDA WAIRIMU NJUGUNA -vswww. KCB LTD. It is my finding that the first prayer in the present application, is the same prayer as prayer No.2 in HCCC No. 1832/99 (O.S).

It was the respondent's position that order XXIV rule 2 provides that unless costs have been disposed of, then it cannot in law be said that the suit has been discontinued or withdrawn. The issue of costs presupposes that the suit is in existence. The suit is alive so long as the issue of costs remains outstanding. For the respondent it was argued that the prayers sought by the respondent in the previous suit, are different from the prayers sought against the defendant in the current suit. That the cause of action in the previous suit is entirely different from the cause of action in present suit. It was the respondent's further contention that by the time the suit was withdrawn it had not been set down for hearing. The suit was withdrawn under Order XXIV rule 1 and the said notice of withdrawal was endorsed by the Deputy Registrar and duly served. It was also the respondent's contention that the issue of costs can be sought after discontinuation of the originating summons in any event.

It was agreed by consent of the three counsels that I should consider the issue raised by way of preliminary objection herein vis-à-vis the (issues raised in HCCC No. 1842/99 (O.S.) In my view the first preliminary objection would be the one that merits consideration at the present stage. The other two should wait for a another day. It is true there is a notice of withdrawal, under order XXIV rule 1 of the Civil Procedure Rules, filed in court on 5th February 2002. However, upon scanning of the court record, it has come to light that the notice of withdrawal was filed and endorsed by the Deputy Registrar High Court of Kenya on 5th February 2002. In the foregoing circumstances the withdrawal became an order of the court. Hence only the issue of costs is still outstanding. In that event this suit ought to be stayed until the issue of costs is determined in accordance with the provision of Order XXIV rule 4 of the Civil Procedure Rules. It is so ordered.

DATED and DELIVERED at Nairobi this 18th day of April 2002.

N.R.O. OMBIJA

JUDGE