



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

**AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO. 1508 OF 1999**

**MOEZ INVESTMENTS LIMITED ..... PLAINTIFF**

**VERSUS**

**GUARDIAN BANK LIMITED ..... 1ST DEFENDANT**

**FIRST NATIONAL FINANCE BANK LTD. .... 2ND DEFENDANT**

**RULING**

Both defendants are limited liability companies carrying on business as bankers in Kenya. The plaintiff is also a limited liability company incorporated in this country.

By an application dated 31.8.2000 (hereinafter referred to as the first application) and made pursuant to O. 6 rule 13(a) the plaintiff sought this court's orders to strike out the defendants' defence on the ground that it disclosed no reasonable defence. The application was opposed by the two defendants. After hearing counsel for both sides the application was dismissed on the ground that it had been brought under the wrong sub-rule and was therefore incompetent. More specifically the court found that the application could not be disposed of without calling evidence. As no evidence was permissible in an application under sub-rule 1(a), the application was dismissed.

Following the dismissal of the first application, the plaintiff brought a new application (the second application) under O. 6 rule 13(1) (b) (c) (d) which after consideration was granted in a ruling dated 27.10.2000. The 2nd application was decided on the basis of the evidence contained in the affidavit filed in support thereof.

The defendants now say that that 2nd application was res judicata and should not have been entertained or granted. They do so in an application dated 24.11.2000 under O. XLIV Rule 1 for the review of the order made pursuant to the 2nd application upon which review the defendants seek to have their defence (which was struck out) reinstated and the defendants granted leave to defend the suit.

Mr. Katiku who argued the application on behalf of the defendants submitted that since both applications dealt with the same subject matter, namely the striking out and dismissal of the defendants' defence and the first application had been decided on its merits, the plaintiff was not entitled to bring another application under the same order. In support of that contention, Mr. Katiku further submitted that the two applications were virtually similar, the only difference between the two applications being the grounds on which they were made. Citing the case of Uhuru Highway Development Limited V. Central Bank of Kenya & Others (Court of Appeal Civil Appeal No. 36 of 1996), Mr. Katiku argued that once an application has been brought seeking a particular order and has been deliberated upon by the court, it cannot be brought again to the same court. In the case referred to above, one of the judges who constituted the bench, Akiwumi J.A, cited with approval the passages in the judgment of Law J.A. in Mburu Kinyua V. Gachichi Tuti (1978) K.L.R. 69 where the learned judge stated:-

***“To sum up my views of this aspect of the case, an applicant whose application to set aside an ex parte judgment has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision, under section 80 of the Civil procedure Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res -***

*judicata.”*

In my view the situation which Akiwumi, J.A. was considering when he made the comments quoted above are totally different from the circumstances of the case before this court. An application under sub-rule (1)(a) of O. VI Rule 13 is very different from an application pursuant to subrule 1(b) (c) (d) of the same Rule. In the former, no evidence is permissible while in the latter the applicant can tender evidence in support of the application. The consequence of that distinction is that though the facts on which the 2nd application was based were obviously known to the applicant when it made the 1st application, it could not and did not tender that evidence because by virtue of sub-rule 2 of the same Rule, no evidence is admissible on an application under sub-rule (1) (a). Given that position, it becomes clear that no facts could be brought and none were tendered in the first application. Indeed the absence of facts in the 1st application was the reason why the application was in the first instance dismissed. Given those circumstances, to say that the application was decided on its merits is to miss the point. It would be more correct in my view to say that the rejection of the first application was based on a technicality namely the absence of facts in a matter, which obviously required facts to prove it. That defect having been cured in the second application by the provision of facts, the application was allowed.

The upshot of the matter is that in my opinion different considerations arise in applications made under sub-rule (1) (a) which are based on pure points of law and those under sub-rule (1) (b) (c) and (d) which are determined on the basis of facts and consequently the issue of res judicata cannot arise. For those reasons, the application for the review of the order made on 27.10.2000 allegedly because it was res judicata is clearly misconceived. The application is accordingly dismissed with costs.

Dated at Nairobi this 25th day of January, 2001.

**T. MBALUTO**

**JUDGE**