



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 2817 OF 1998

SAMUEL KARIMI MUBEAPLAINTIFF

VERSUS

CENTRAL DRUG COMPANY LTD.

AND ANOTHERDEFENDANTS

RULING

This application dated and filed in court on 12th June 2000 seeks an order of this court to strike out the plaint dated and filed in court on 18th December 1999.

Grounds upon which the application is based are stated in the application and the supporting affidavit. These grounds and the affidavit raise the principle of res judicata in that though the claim subject to the present suit arose out of an accident which occurred on 2.1.96, when the plaintiff filed RMCC No. 592 of 1997 at Kiambu Resident Magistrates Court, he failed to include the claim now subject to the present suit, therein.

In court on 20th January 2001 counsel for the applicant repeated the same and referred the court to Section 7 of the Civil Procedure Act and Civil Appeal No. 80 of 1988 (court of appeal); amongst others.

Counsel for the respondent opposed the application and said while the claim in the Kiambu Case involved personal injuries to the respondent the present one involves damage his motor vehicle in the same accident and that the material damage claim could not have been claimed in the Kiambu Court for lack of jurisdiction.

The decision in Yat Tung Investment Co. Ltd. and Another [1975] AC 581 cited herein which persuaded our court of appeal to make its decision in Pop-in (Kenya) Limited & 3 others v Habib Bank A.G. ur ich (Civil Appeal No. 80 of 1988) was that:-

“it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.”

And in Herderson v Herderson (1843) HARE 100, 115 it was stated that:-

“where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case - - - - emphasis mine.

Comparing facts of the present case and those quoted, it is apparent they can be distinguished in that material claims made herein could not have been made the subject of litigation in the Resident

Magistrate's Court at Kiambu for lack of pecuniary jurisdiction.

Going the other way round, though the respondent would have combined the personal and material claims together to file the suit in the High Court, his failure to do so does not deprive him the right to file the material claim in the court with the requisite jurisdiction to entertain and dispose of the same.

Moreover, the deponent to the supporting affidavit to this application is a stranger to this litigation, and the application is as if not supported by an affidavit, hence fatally defective.

I dismiss this application with costs.

Delivered and dated this 9th day of January 2001.

D.K.S. AGANYANYA

JUDGE