



**Mohanson Food Distributors v Kenya Commercial Bank Limited (Civil Case E023 of 2020) [2023] KEHC 18805 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E023 OF 2020  
DKN MAGARE, J  
JUNE 19, 2023**

**BETWEEN**

**MOHANSON FOOD DISTRIBUTORS ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Defendant filed an application dated June 2, 2021 seeking the following prayers: -
  - a. That the suit filed by the plaintiff commenced by way of the Plaint dated November 12, 2020 and filed in Court on November 30, 2020 together with the ensuing proceedings be stayed or struck out on account of being an abuse of Court process and *sub judice* to Mombasa HCC Number 208 of 1999 – Mohansons Food Distributors Limited vs Kenya Commercial Bank Limited & Another as consolidated with Mombasa HCCC Number 207 of 1999 – rana Estates Limited & 2 Others vs Kenya Commercial Bank Limited.
  - b. That the suit filed by the Plaintiff commenced by way of Plaint dated November 12, 2020 and filed in Court on November 30, 2020 together with the ensuing proceedings be struck out on account of being res judicata to Mombasa HCCC Number 14 of 2003 – Mohansons Food Distributors Limited vs Kenya Commercial Bank Limited and another.
  - c. That the costs of this Application and of the suit be awarded to the Defendant.
2. The main grounds were that the issue of sale of the suit properly was litigated upon vide Mombasa HCCC 14 of 2003 – Mohansons Food Distributors Ltd vs KCB Ltd and Another where Judgment was entered on June 5, 2020.
3. It is the Defendant's views that there is are suits, Rana Estates Ltd. and 2 Others =vs= KCB, being Mombasa HCCC 207 of 1999 and HCC 208 of 1999.



4. It is the Defendant's contention that the issue of accounts have been dealt within the former suit; where in a later suit, the suit was dismissed for want of prosecution. Submissions are so detailed and were argued. But they are a basis for what evidence.

#### **Plaintiffs' submissions**

5. The plaintiff stated that and replied on the documents in the plaintiff's bundle. The plaintiff in its submissions invited me to read the Plaintiff's bundle of documents.
6. There is no references whatsoever to the support affidavit. The matter are sad to be res judicata.
7. The plaintiff contends that the issue that the file having been lost cannot be basifies for filing a fresh suit. The plaintiffs in the matter annexed as NMK- 1.
8. The Application is supported by the annexed affidavit of Paul Munyao, Advocate. The parties have filed elaborate submissions on the issue. The Replying affidavit of Sandeep Singh Kandhavi denies the allegations in the Notice of Motion dated June 2, 2021.

#### **Defendants' submissions**

9. Despite all my efforts, I could not trace the Defendants submissions.

#### **Analysis**

10. The issue of striking out the suit, pleading is not to be taken lightly. In *DT Dobie & Company (Kenya) Limited vs Muchina* [1982] KLR, Madan, JA stated:  

“...the power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

  - ii. The court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”
11. The affidavits in support is sworn by the advocate for the parties. It does not have any other annexure tan the plaint in this suit. I do not know how the Applicant expected me to proceed with this matter. The Applicant simply did not do its homework. Application of this nature are supported by affidavit and annexures showing res judicata.
12. The court is not supposed to go on a fishing expedition to find documents hidden inside some hideous places. There is no interpretation to be given to those documents. The parties wishing to rely on affidavits. Then they must identify documents and must have the documents firmly affixed to the supporting affidavit and identified. It is not the duty of the court to peruse the document field in a matter. The court only considers affidavit evidence.
13. I am cognizance that the Defendant sought to have the Plaintiffs suit struck out. The main ground is that there are three other suits, that is: -
  - i. Mombasa HCCC 208 of 19999 – Mohansons Food Distributors Ltd vs KCB.
  - ii. Mombasa HCCC 207 of 12999 – Rana Estates Ltd & 2 Others vs KCB Ltd.



- iii. Mombasa HCCC 14 of 20003 =- Mohansons Foods Distributors Ltd vs KCB Ltd and another.
14. The Plaintiff invited me to peruse the plaintiff's bundle. I hereby decline. An application for striking out must be self-sufficient.
15. The Application to strike out is supported by the affidavit of the Defendant's advocate. It has only one annexure, that is, the plaint in this matter. How is the court supposed to know the contents of the other suits? In the case of *Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd* (2018) eKLR, the court cautions advocates against swearing affidavits on their clients' behalf:

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

16. In the case of *Barrack Ofulo Otieno vs Instarect Limited* (2015) eKLR, the Hon Justice A Mabeya observed as follows: -

“The learned authors of Halsbury's Laws of England, 3<sup>rd</sup> Edition, Paragraph 845 say as follows with regard to affidavit:-

"Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated...

However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the supporting affidavit."

17. In the case of *Regina Waitihira Mwangi Gitau Vs Boniface Nthenge* (2015) eKLR in which Hon Justice R E Aburili, stated: -

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In *Simon Isaac Ngugu Vs. Overseas Courier Services (K) Ltd* 1998 eKLR and *Kisya Investments Ltd & Others Vs Kenya Finance Corporation Ltd*, it was held that: -

"...it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit."



24. In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences."

18. In *CMC Aviation Ltd v Crusair Ltd* (No1) [1987] KLR 103, Madan JA, (as he then was) stated:

"The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

19. In *Michael Juma Otieno (Representative for Centre for Peace and Democracy (CEPAD) Board of Directors v Executive Director Non Governmental Organizations Co-ordination Board* [2016] eKLR, H K Chemitei had this to say,

"10. The court has the discretion to strike out pleadings and suits, however, that discretion should be applied sparingly and in the clearest of cases. The Court of appeal in the case of *The Co-Operative Merchant Bank Ltd vs George Fredrick Wekesa* Civil Appeal No 54 of 1999 stated in that regard that "...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact."

20. In *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* Civil Appeal No 35 of 2000 the court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved

21. I have said enough to show that there is very little room for the advocates to swear affidavits in contentious matters. In this particular matter, the application is based on hearsay. I therefore strike out all Paragraphs except the first and last. The net effect is that the application is bare without a supporting affidavit.

22. To make matters worse the depositions are not supported by pleadings and Judgment from the 3 cases. It serves absolutely no purpose to annex the plaint from the cause of suit. The Court has no scintilla of



evidence to work on the basis for striking out the plaintiff. The Plaintiff has no reason to add any evidence to strengthen the application. In this case, the Replying affidavit equally did not annex any documents to the Replying Affidavit.

23. The Court cannot use documents in the parties Bundle. They are not evidence. Evidence must be introduced either through affidavit or through testimony.
24. Even statements and affidavits which have not been tendered in evidence are not evidence. There must be cogent evidence to enable me to make a finding of *res judicata* or *res sub judice*.
25. In the end, I am not satisfied that the Defendant has made a case for striking out of the suit. Not that the facts do not prove *Res Judicata* or *sub Judice*. There was no evidence to support the application. I proceed to dismiss the entire application dated June 2, 2021 as the same lacks merit.

#### **Determination**

26. In the circumstances, I find no merit in the application dated June 2, 2021. The same is dismissed with costs of Kshs 30,000/= to the Plaintiff.
27. The matter be listed for directions forthwith.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19<sup>TH</sup> DAY OF JUNE, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

**Mr Sanjeev Khagram**

**Mr Henry Kariuki for the defendant**

**Court Assistant - Brian**

