



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 189 OF 2017**

**PROPHETIC CHURCH MINISTRIES OF EAST AFRICA**

*(Suing through its registered Chairman)*

**PETER LEMMO AMUGUNE.....PLAINTIFF**

**VERSUS**

**AFRICA KENYA SABCRYNNSK OF SOI**

*(Being sued through its registered Chairman)*

**ABRAHAM SHIKUKU.....1<sup>ST</sup> DEFENDANT**

**AFRICA KENYA SABCRYNNSK OF SOI**

**PRAYING & HEALING *(Being sued Thro' its registered Chairman)***

**RONALD AMBULWA.....2<sup>ND</sup> DEFENDANT**

**GREEN YELLOW CROSS CHURCH**

*Being sued through its registered Chairman)*

**JARED AMUSAVA.....3<sup>RD</sup> DEFENDANT**

**AFRICAN KENYA WHITE STAR**

**SABCDCRY OF SOI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a preliminary objection filed by the 2<sup>nd</sup> defendant dated 24<sup>th</sup> October 2018. The notice of preliminary objection as filed indicates that it challenges the legal validity of an amended petition dated 27<sup>th</sup> September 2017 on grounds that;

*i. The matter is res judicata.*

*ii. That the court lacks jurisdiction to handle the matter in view of Sections 43, 51, 52 and 53 of the Trade Marks Act cap 505 of the Laws of Kenya.*

*iii. That the suit was hopelessly misconceived, frivolous, devoid of merit and malafides.*

*iv. That as a consequence of grounds (i), (ii) and (iii), the Petition was an abuse of the court process.*

2. The preliminary objection was argued orally before me on 15<sup>th</sup> October 2019. In his submissions, learned counsel for the 2<sup>nd</sup> defendant Mr. Ojienda contended that the suit was incompetent as in his view, it was *res judicata*; that the subject matter of the suit had been previously heard and conclusively determined by the Trade Marks Dispute Tribunal (hereinafter the tribunal); that following the tribunals

decision, the plaintiff filed a related suit in the Milimani Commercial Courts which was dismissed under *Sections 52 and 53* of the *Trademarks Act*; that it was after the suit was dismissed then the Plaintiff filed the present suit.

3. Counsel further submitted that instead of filing a fresh suit, the plaintiff should have approached the court by way of either an appeal, an application for judicial review or a constitutional petition.

4. *Mr. Mlanga*, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants associated himself with the submissions made by *Mr. Ojienda* save for his claim that the suit filed in the subordinate court was struck out. He submitted that the suit was struck out and not dismissed as submitted by *Mr. Ojienda*. Counsel urged the court to allow the preliminary objection to prevent the plaintiff from re-litigating on the same issues.

5. On his part, learned counsel for the plaintiff *Mr. Imanyara* invited the court to dismiss the preliminary objection for lack of merit. He submitted that the claim in the instant suit was not *res judicata* as the suit filed in the magistrate's court was not heard on merit but was struck out by the trial court on account of lack of jurisdiction. In addition, counsel claimed that though the issue of the contested trademark was settled by the tribunal, the plaintiff's cause of action was premised on unfair competition which should be allowed to proceed to trial.

6. Before I address the substantive issues raised in the preliminary objection, I wish to observe that the preliminary objection as filed contests the competence of an alleged amended petition dated 27<sup>th</sup> September 2017. I have gone through the entire court record and I have not come across such a petition on record. I have only come across a plaint dated 3<sup>rd</sup> August 2017 which is the pleading through which the plaintiff instituted this suit. I would have easily struck out the preliminary objection on this ground alone but since it is clear from *Mr. Ojienda's* submissions that the target of the preliminary objection is the plaintiff's suit, in the interest of dispensing substantive justice, I will disregard the reference to an amended petition in the preliminary objection and proceed on the basis that what is challenged is the plaintiff's suit as pleaded in the plaint dated 3<sup>rd</sup> August 2017.

7. Having said that, I now turn to consider the issues raised in the preliminary objection. After considering the oral arguments made by learned counsel for the parties, I find that only two issues arise for my determination. These are:

i. Whether the plaintiff's suit is *res judicata*.

ii. If the answer to issue No. 1 is in the negative, whether the court has jurisdiction to entertain the suit.

8. On the first issue, *Section 7* of the *Civil Procedure Act* defines the parameters within which the doctrine of *res judicata* should apply. *Section 7* states as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court....”***

9. In this case, though it is not disputed that the parties in this case were the same parties in the Trademarks Tribunal and in CMCC No. 6303 of 2016, the objector's claim that all the issues raised in this case were heard and finally determined in the tribunal and in the Chief Magistrates Court is contested. I have perused the ruling of the lower court dated 8<sup>th</sup> February 2017 and I have confirmed that indeed the suit filed in the lower court was not dismissed but was struck out since the trial court held that it lacked jurisdiction to hear the same. I therefore agree with *Mr. Imanyara's* submissions that the suit was not heard on merit. It cannot thus be validly said that the issues raised in that suit were heard and finally determined.

10. Though the plaintiff has admitted that the issue of the contested trademark was determined by the tribunal, it argued that its cause of action as pleaded in paragraph 13 of the plaint was based on unfair competition. This claim was not disputed by the defendants.

11. In view of the foregoing, I am satisfied that the doctrine of *res judicata* is not applicable in this case.

12. Regarding the claim that this court lacks jurisdiction to entertain the suit in view of *Sections 43, 51, 52 and 53* of the *Trade Marks Act* (the *Act*), I find that this ground of objection appears to have been abandoned as *Mr. Ojienda* did not make any submissions on the same. I have looked at the aforesaid provisions. I note that they provide for the powers and duties of the Registrar of Trademarks; the conduct of proceedings before the Registrar and appeals to this court against the decisions made by the Registrar.

13. There is nothing in all the aforesaid provisions that bars this court from entertaining a matter related to trademarks. In fact, *Section 53* of the *Act* gives aggrieved parties an option of either approaching this court for redress or the Registrar of Trademarks. In the premises, I have come to the conclusion that even if the Plaintiff's suit had been based on the contested trademark, barring any other circumstances, this court would have had jurisdiction to entertain the same.

14. For all the reasons stated above, it is my finding that the preliminary objection is devoid of merit and it is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Mlanga holding brief for Ms Njogu for the 1<sup>st</sup> & 3<sup>rd</sup> defendants

Ms Akello holding brief for Mr. Ojienda for the 2<sup>nd</sup> defendant

No appearance for the plaintiff

Mr. Salach: Court Assistant