

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 213 OF 2016

W.E. TILLEY (M) LIMITEDAPPELLANT

VERSUS

PETER NJUGUNA MWANGIRESPONDENT

(Being an appeal from the ruling of Hon. M. Wachira (SPM) in Milimani CMCC No.3077 of 2015 delivered on 1st April 2016)

JUDGMENT

The respondent herein filed a suit against the appellant in the lower court claiming damages for injuries sustained while he was in the employment of the appellant. The appellant denied the respondent's claim. Following the close of pleadings the appellant filed an application by way of Notice of Motion dated 29th October and filed on 5th November, 2015 seeking to strike out the plaintiff's suit with costs.

The grounds upon which that order was sought were that the plaint had been verified by a false affidavit, and was therefore scandalous, frivolous and vexatious. It was alleged that this was an abuse of the court process.

The application was opposed and there was a replying affidavit sworn by the respondent. In a ruling delivered on 1st April, 2016 the appellant's application was dismissed and the court declined to strike out the plaint. The appellant was aggrieved by that ruling and lodged this appeal.

Both parties have made submissions herein which I have noted. The only reason the appellant moved the court for the striking out of the appellant's suit was that there was a previous suit No. CMCC 1701 of 2010 which had been struck out by the court because it was filed out of time. However, when the second suit was filed the respondent did not disclose this in his pleadings. Instead he stated in paragraph 8 of the plaint that there was no other pending suit nor any other previous proceedings between the plaintiff and the defendant relating to that cause of action.

The respondent conceded there was a previous suit which however had been struck out. It is not in dispute that the previous suit had been struck out before a hearing. It was not struck out after the parties had adduced any evidence. There is a difference between striking out a suit and dismissing the suit. A suit may be struck out for lack of jurisdiction, or on the basis of *res judicata* under Section 7 of the Civil Procedure Act or under the Limitation of Actions Act among other grounds. Invariably in all such cases, this step is taken before any evidence is adduced in the prosecution of the case. On the other hand, dismissal of a case follows the calling of evidence which may not be sufficient to prove the case.

That being the case, what was required to be amended was the paragraph 8 of the plaint and not the affidavit as such. Further, the appellant has not disclosed what prejudice if any, shall be visited upon it if the present suit is heard on merit. The respondent sought and obtained leave to file the second suit.

The declaration in a plaint whether or not there has been previous proceedings relating to the same cause of action, and between the same parties, is intended to avoid double jeopardy which is not the case in the present suit. I am fortified in that observation by the fact that the appellant in its defence clearly stated the jurisdiction of the court was not disputed. It is ironic therefore, to turn around and state that the suit is bad in law.

Going by the provisions of law cited and the authorities relied upon by the parties, I do not see any merit in this appeal. I order that the same should be, and is hereby dismissed with costs to the respondent. The lower court file shall be returned to the Chief Magistrate's court for hearing and determination.

Dated, signed and delivered at Nairobi this 4th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE