



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO. 148 OF 2012**

**ESUTACE GAKUI GITONGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**AFRICAN COMMUTERS SERVICES LTD.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**ESMAEL MOHAMED JIBRIL.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**KENYA CIVIL AVIATION AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 10<sup>th</sup> April, 2014 seeks orders that this Honourable Court do strike out the entire suit.

2. The application is premised on the grounds stated in the body of the application and is supported by the affidavit sworn by Esmail Mohamed Jibril. It is contended that the issues in the suit herein have been directly and substantially in issue in HCCC Nbi No.127/09 between the same parties. That HCCC Nbi 127/09 was heard and dismissed on merits by Hon. Khaminwa, J and the Plaintiff ordered to pay costs and therefore that the suit herein is *res judicata*. It is further stated that the agreement which forms the basis of the suit herein offends the provisions of Section 16 of the Government proceedings Act Cap 40 Laws of Kenya and Order 29 rule 2 Civil Procedure Rules.

3. The application is opposed. The Plaintiff/Respondent has filed a replying affidavit in opposition to the application. It is denied that the suit is *res judicata*. According to the Respondent HCCC Nbi 127/09 which was instituted against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought similar reliefs as the suit herein. That HCCC Nbi 129/09 was struck out on the basis of technicalities as the same was filed by an advocate who did not have a practicing certificate. That HCCC Nbi 127/09 was not determined on merits and that therefore there was no hearing or judgment although the court used the terms “dismissal” as opposed to “strike out”. It is further averred that the consultancy agreement between the Respondent and the 2<sup>nd</sup> Applicant is enforceable and is not an illegal contract. That in any event the alleged illegality of the contract is a triable issue. It is further stated that the suit does not offend Section 16 of the Government proceedings Act or Order 29 rule 2 Civil Procedure Act as the court can issue declaratory orders against

the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

4. The Application was canvassed by way of written submissions which I have duly considered together with the highlights made before me.

5. On the issue of *re judicata* Section 7 Civil Procedure Act provides 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.”**

6. It is conceded that HCCC Nbi 127/09 sought similar reliefs against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants. The issue is whether the said suit was heard on merits and judgment delivered dismissing the same. The Applicants side has exhibited the copy of the decree in HCCC 127/09 which shows that the suit was dismissed with costs. The Respondent has on the other hand exhibited a copy of the Plaintiff and the Notice of Motion filed by the Applicants in the said suit which sought orders for the suit to be struck out. It is abundantly clear from the said notice of motion that the application was based on the grounds that the Plaintiffs Advocates on record did not have a practicing certificate. No copy of the proceedings or judgment in HCCC Nbi 127/09 has been shown to this court. I am therefore in agreement with the Plaintiff’s argument that the dispute between the parties was not heard and determined on merits.

7. The use of the term “dismissal” instead of “struck out” must be looked at within the context of the application that was made before the court. In the circumstances of the case at hand, it is clear that in HCCC 127/09 the court interchangeably used the words dismissal instead of the words “struck out”. It does not therefore mean that the Plaintiff could not file a fresh suit. (See for example the case of **Enock Kirao Muhangi v Hamid Abdalla Mbarak [2013] eKLR**).

8. Turning to the issues of the unenforceability of the agreement due to the alleged illegalities, the details of the illegalities are not disclosed in the affidavit in support of the instant application. The agreement itself talks of consultancy services. At this stage of the case, it is not clear how the said contract undermines the administration of Justice or is contrary to public policy as argued by the Applicants side. Whether the contract is illegal or not is therefore a triable issue to be determined at a full hearing.

9. The issue whether the summons to enter appearance have expired has been the subject of the submissions herein. Although this issue was not covered by the pleadings herein, this court will nonetheless look into the same to satisfy itself that the suit is not an abuse of the court process.

10. Order 5 rule 2 Civil Procedure Rules states as follows:

**“(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.**

**(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.**

**(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.**

**(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.”**

11. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have entered appearance herein and also filed their statement of defence. They have also participated in the many applications filed herein. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have also filed witness statements and list of documents. The purpose of summons is to notify the Defendants of the suit against them. There was therefore no prejudice occasioned to the Applicants in respect of the manner in which summons were served.

12. In this regard I am persuaded by the reasoning in the case of **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR:**

**I agree with the approach adopted by Sergon, J. in the Hussein Mohamed Awadh Case (supra), that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless there it is demonstrated that the defendant suffered some prejudice occasioned by the invalidity of the summons....the Summons to Enter Appearance issued for the 2<sup>nd</sup> Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2<sup>nd</sup> Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2<sup>nd</sup> Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice.”**

13. The Applicants having had notice of the suit and having participated in the same, the issue of the validity of the summons is now moot. The court is also duty bound by Article 159(2)(d) of the Constitution to administer justice without undue regard to technicalities of procedure. Also considered by this court is the overriding objective of the civil procedure is to facilitate the just, expeditious, proportional and affordable resolution of disputes.

14. The Applicants have also submitted that under Section 16 of the Government Proceedings Act the suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant does not accord with the law as the court cannot issue an injunctive relief against the Government. However, it is noted that under the said provision the court can make declaratory orders. It is also noted that only one prayer out of seven prayers in the plaint seeks injunctive orders against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. This does not render the entire plaint incompetent.

15. As stated in the case of **D.T.Dobie &Company (Kenya)Limited v Joseph Mbaria Muchina & Another [1980] eKLR:**

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

16. With the foregoing, the application is dismissed with costs.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of March, 2017**

**B THURANIRA JADEN**

**JUDGE**