REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 34 OF 2012

(An appeal from the ruling and orders by Hon. S. O. Temu, Resident Magistrate in Kakamega CMCC No. 450 of 2006 delivered on 12th March, 2007)

JOHNSTONE BARASA MAKOKHA …..... APPELLANT

VERSUS

DANIEL AKWALA ……..…….…..…..... RESPONDENT

JUDGMENT

This appeal arises from the decision of the lower court delivered on 12th March 2014, striking out the suit of the appellant with costs.

The appellant filed the Memorandum of Appeal on 26th March 2012. The grounds of appeal are as follows -

1. **The learned Resident Magistrate dismissed the appellant's suit on technicalities without giving the appellant a chance to be heard on merit.**
2. **The learned Resident Magistrate erred in law and fact by finding that the appellant's suit had no merits and dismissing the same with costs.**
3. **The learned Resident Magistrate erred in law and fact by giving an order without evaluating the issues raised in the plaint.**
4. **The learned Resident magistrate erred in law and fact by making an order without evaluating the issues raised by the appellant's supporting affidavit.**
5. **The learned Resident Magistrate erred in law and fact by holding that the appellant's suit was *res-judicata* and striking out the same.**
6. **The learned Resident Magistrate erred in law and fact by holding that the issues raised in the appellant's case had already been determined in Kakamega CMCC No. 521/2005.**
7. **The learned Resident Magistrate erred in fact and law in relying on a forged document in arriving at a decision of striking out the appellant's case.**
8. **The learned Resident Magistrate erred in law and fact in allowing an application which was defective and contrary to the provisions of the Civil Procedure Rules.**

At the hearing of the appeal, the appellant appeared in person. The respondent was represented by Mr. Munyendo advocate.

The appellant submitted that he was a party in Kakamega CMCC No. 521 of 2005 where he had filed a counter-claim. The court ruled that the counter-claim could only be brought under a different suit. Consequently he filed Kakamega CMCC No.450 of 2006 in order to pursue his counter-claim, as ordered by the court. Thereafter, Mr. Akwala filed an application seeking to strike out the suit on the ground that

the issues had already been settled in CMCC No. 521 of 2005. That application was allowed. In the appellant's view, the advocate misled the court. The appellant stated that in striking the suit, the magistrate had denied him his Constitutional rights to be heard.

Learned counsel for the respondent Mr. Munyendo, opposed the appeal. Counsel argued that issues raised by the appellant in the subsequent suit were *res-judicata*. Counsel submitted that the learned Magistrate was right in striking out the suit filed by the appellant as, the same issues had arisen in CMCC No. 521 of 2005. Counsel further argued that the magistrate who advised the appellant to file another case was wrong. In counsel's view, the appellant should have appealed from that decision of the magistrate, rather than file a fresh suit. Counsel also submitted that there was no evidence that the advocate had misled the lower court.

This is an appeal from a decision to an application filed on 14/8/2006 by the defendant Daniel Akwala. The prayers in that application were as follows -

a. This suit (CMCC 540 of 2006) be struck out with costs for being incompetent, scandalous, vexatious, frivolous, an abuse of the court process, and failing to disclose any resemblance of a cause of action against the defendant/applicant.
b. Costs of the application be provided for.

After the application was argued, the learned magistrate delivered a ruling in which the court concluded as follows -

"The court having established that the cause of action herein had been addressed on the counter-claim filed in Civil Suit Kak/CMCC 521/2005 which suit has been settled, it is clear that this suit is an abuse of the court's process and the entire suit is struck out as it will be an exercise in futility to allow the same to fullness. Suit dismissed with costs to the defendant."

It is not disputed that the court in CMCC No. 521/2005 had directed that any counter-claim by the appellant be pursued through a separate suit. It is on that basis that the appellant filed CMCC No. 540 of 2006.

It has been argued by Mr. Munyendo for the respondent, that the trial magistrate was wrong in advising the appellant to file a fresh suit. In counsel's view, the appellant should have filed an appeal against that decision, instead of filing a fresh suit.

In my view, when a court makes a decision, parties have an option either to appeal or challenge that decision, or comply with the same. The appellant decided to comply with the court's order. Compliance with a court order cannot be said to be a mistake on the part of the litigant. I dismiss the contention of counsel.

Though counsel for the respondent has argued that the matter was *res-judicata*, the ruling of the learned magistrate did not refer to the matter having been *res-judicata*. Infact, the application to strike out, did not suggest that the matter was *res-judicata*.

The application of the legal principle of *res-judicata* in civil cases, is grounded on the provisions of Section 7 of the Civil Procedure Act (Cap. 21). It is provided therein as follows -

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly or 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 subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The learned magistrate decided that a counter-claim of the appellant in CMCC 521/2005 could not be pursued except through a separate suit. It follows that the issue of the counter-claim was not finally heard

and determined by the magistrate. It as therefore not *res-judicata*.

The learned magistrate struck out the suit. This means that he struck out all the pleadings of the appellant in CMCC 540 of 2006. Courts have held that striking out pleadings or a suit is a draconian step. It should be done in the most obvious cases. See the case of ***D.T. Dobie & Co. vs Muchina [1982] KLR 1***. I am duly guided and agree by this position.

Since the learned trial magistrate decided that the counter-claim should be heard separately through an independent suit, it cannot be said that the suit filed following that order was frivolous or vexatious or without a legal basis. It should be remembered that a counter-claim is an independent claim itself. It is only brought in existing proceedings to avoid bringing many suits to court. Technically, a counter claim can stand and be pursued on its own.

In my view, the learned magistrate erred in striking out the suit of the appellant on technicalities. The proper course should have been to let the parties file their pleadings and responses thereto, and the issues of fact and law between them be determined after hearing.

To conclude, I find merits in the appeal. I allow the appeal, set aside the ruling of the learned magistrate. I reinstate the civil suit CMCC No. 450 of 2006 filed by the appellant in the subordinate court and order that it proceeds to hearing in the normal manner, before a magistrate with jurisdiction other that Mr. Temu who delivered the ruling. The appellant is awarded the costs of this appeal.

Dated and delivered at Kakamega this 5th day of June, 2014

George Dulu

J U D G E