



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 465 OF 2013**

**PACIS INSURANCE COMPANY LTD.....PLAINTIFF**

**VERSUS**

**GABRIEL MUTHAMA KITHIKA.....DEFENDANT**

**RULING**

1. Before me is the defendant's Preliminary Objection dated 14<sup>th</sup> March, 2014. The objection is on the basis that this suit contravenes the mandatory provisions of Order 4 Rule 10(f) of the Civil Procedure Rules; that this suit is a duplicity since there already exists a suit to wit, **CMCC No. 5745 of 2013** between the same parties on the same issues and therefore this suit should be struck out.
2. The defendant's submission was that the plaintiff's verifying affidavit is based on falsehood by declaring that there is no other suit pending before any other court with regard to the same subject matters. He relied on **Crush Security Guards Private Investigators Ltd -v- Kenya Power & Lighting Co. Ltd, Eldoret HCCC No. 108 of 2007**.
3. The Plaintiff on the other hand argued that the Defendant's preliminary objection does not meet the threshold of what constitutes a preliminary objection since it calls for factual materials to be placed before the court by way of evidence. It submitted that the present suit is different from the alleged **CMCC No.5745 of 2013**. Having considered the parties written submissions and oral highlights of learned counsel, my view of the matter is as follows:-
4. A Preliminary Objection is what used to be demurrer. The points raised in the Defendant's submissions do not meet the scope of preliminary objection. The threshold of a preliminary objection was set out in **Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd (1969) E.A. 696** where it was stated:-

***“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newbold stated in the same judgment that:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

5. It is alleged that there exists another suit, being **Milimani CMCC No. 5745/2013**, that the issues

as well as parties in that suit are similar to the present suit. To my mind, that is a fact that requires evidence. The Pleadings in that suit should have been produced by way of Affidavit evidence and not as strangely as Counsel for the Defendant purport ted to produce it as an annexure to written submissions.

6. For the foregoing reasons, I decline to make any determination on the issues raised in the Preliminary Objection so as not to prejudice the positions of the respective parties.
7. In the circumstances, I strike out the Preliminary Objection with costs to the Plaintiff.

It is so ordered.

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**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of December 2014

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**D. ONYANCHA**

**JUDGE**