



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Case 15 of 2006

JESCA CIAMBAKA MBAKA.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT

RULING

The application at bar is the one dated 24/3/2009. The defendant/ Applicant has moved the court under Order VI Rule 13(d) of the Civil Procedure Rules for an order that the plaint herein be struck out with costs for being an abuse of the court process. The ground on which the application is premised is that there existed another suit being Meru HCCC No. 13 of 2003 over the same cause of action. The said suit is said to have been filed by the plaintiff's husband who passed on sometime in 2002 before the suit could be determined. That suit abated 1 year thereafter as the plaintiff herein did not apply to be substituted as the plaintiff therein.

The fact that the said suit abated is not disputed by the parties herein and I will not therefore delve into the details.

Instead of pursuing that matter, the Plaintiff/Respondent filed this suit afresh on 16/2/2006. According to counsel for the applicant, the 2 suits are the same and the parties are basically the same as the plaintiff herein is suing on behalf of her late husband's estate, and the cause of action is basically the same. These averments are contained in the affidavit in support of the said application sworn by one Geoffrey Kimaita on 24/3/2009.

In her replying affidavit dated 1st July 2009, the Respondent avers that the cause of action herein is different from that in the previous suit. She states that one of the issues raised in this suit which could not have been raised in the earlier suit was whether or not the Insurance Company repaid the Loan balance upon the death of her husband. She has annexed annexure marked JM2 which is a copy of a letter to her late husband from the defendant's Insurance officer dated 20/3/1997. There was an issue raised by counsel for the applicant that the court should disregard the said annexure and expunge it from the record along with the letters dated, 1/10/2003 and 31/10/2003 on grounds that they are not properly marked.

I am in agreement with counsel for the applicant that as long as a document is not a continuation of another, and is quite distinct from the other, it becomes a separate document and it should be distinctly and properly marked as an annexure. In the larger interests of substantive justice however, I will not expunge the said documents and I will proceed to consider their contents.

The issue of whether the Insurance Company was supposed to offset the entire balance on the loan is an issue that did not exist before the plaintiff's husband died. This is therefore an issue that could not have been raised in the abated suit. I have gone through the

ruling by my sister **Judge Khaminwa** given in respect of the interlocutory application for injunction. She appears to have addressed the same issue raised in this application. At page 3 of her ruling, she made the following finding:-

“ It is my view that this suit is not based on the same grounds like the other suits and therefore the plaintiff should be allowed to pursue the same.

.....it is my finding that the issues now between the parties is in the interpretation of the mortgage Insurance contract entered into by the deceased and the defendant. As it is we have only the interpretation of the Applicant that the policy should have covered all outstanding debt on death of her husband. She has a case to be tried.”

I am in total agreement with my sister Judge on that point. Let this matter go for hearing so that the said issue can be fully canvassed.

My finding therefore is that the said suit is not frivolous. The application to strike out the suit therefore fails. The same is hereby dismissed with costs to the Respondent.

W. KARANJA
JUDGE

Delivered, signed and dated and Embu this 2nd day of March 2010.

In presence of:-