



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 216 OF 1999**

JAIRO ANGOTE OKONDAAPPELLANT

VERSUS

ANDE COMPANY LTD.RESPONDENT

**(An appeal from the Ruling and Order of the High Court of
Kenya at Nairobi (Hon. Lady Jeanne W. Gacheche The -
Commissioner of Assize) dated 24th day of August, 1999**

in

H.C.C.C. NO. 859 OF 1999)

JUDGMENT OF THE COURT

This is an appeal by the plaintiff, now the appellant, from the decision of the superior court (Miss Gacheche, Commissioner of Assize) given on 24 August, 1999.

The facts are few and brief. The plaintiff's suit was based on the same facts and issues as filed by him against the defendant on 16 December, 1996 which was dismissed by the superior court on 1 July, 1999 upon a preliminary objection that the suit had abated. This objection was upheld with the result that the suit was dismissed with costs. The plaintiff filed a second suit on the same facts which was again dismissed.

The plaintiff now appeals to this Court. Mr. Buti, counsel for the plaintiff, submits that the learned Commissioner for Assize erred in dismissing the suit and relies on some English authorities. He conceded that the English cases he referred to were cases which had been dismissed for want of prosecution but fresh suits were filed within the period of limitation, as one well might, because of the English rules making provision for the same. In our jurisdiction, we also have **Order XVI Rule 6** of the Civil Procedure Rules which provides as follows:

"6. In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit".

The instant case, however, was not a dismissal of a suit for want of prosecution. The suit had abated because summons had not been served within the prescribed time nor renewed. In these circumstances, it appears clear to us that a fresh suit cannot be filed on the same facts between the same parties. In our view, we do not think that this is a case which should occupy a great deal of consideration as it is clearly covered by authority. In the case of **MBURU KINYUA VS. GACHINI TUTI 1978 KAR 69**, it was held by this Court, dismissing the appeal (Madan, J.A. dissenting) that the second application was res judicata

since the facts on which it was based were known to the appellant at the time when he made his first application. Law, J.A. at page 81 expressed himself thus:-

"To sum up my views of this aspect of the case he can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened here. The position otherwise would be intolerable. A decree - holder could be deprived of the benefits of his judgment by a succession of applications to set aside the judgment, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madan J A's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view....."

With respect, we fully agree with the majority decision in the above case. For the reasons above stated, this appeal is

dismissed with costs.

Dated and delivered at Nairobi this 7th day of July, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL A.A. LAKHA

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JUDGE OF APPEAL

I certify that this
is a true copy of the original.

DEPUTY REGISTRAR