



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 190 OF 2009

BETH WANJA NJOROGE.....PLAINTIFF

VERSUS

SIMON MWANGI NJOROGE.....1ST DEFENDANT

WANJIRU NJOROGE.....2ND DEFENDANT

RULING

The Plaintiff filed an application dated 11th December 2013 seeking for orders that the Order made on **9th October 2013** be stayed and the suit together with the application dated **9th August 2012** be reinstated. In opposing the application, the Defendants filed a Notice of Preliminary Objection dated **14th April 2014**. The grounds for the objection are:-

1. ***The application is incurably defective, incompetent, misconceived, frivolous, vexatious and therefore an abuse of the court process.***
2. ***There is no existing suit upon which the Applicant's application dated 11th December 2013 can be predicted.***
3. ***The court lacks jurisdiction to entertain and determine the application dated 11th December 2013 since there is no suit pending between the parties herein.***

The application was canvassed by way of written submissions. Nyachoti & Company Advocates for the Defendants filed submissions dated 11th July 2014. Counsel submitted that an application must be filed within the context of a valid and existing suit and therefore that the suit herein having been withdrawn by the Plaintiff, there was no foundation upon which to base the application. It was submitted that an application for reinstatement of a suit which was withdrawn is not envisaged and/or contemplated under the provisions of Order 25 of the Civil Procedure Rules unlike suits that are dismissed. It was counsel's submission that Order 25 Rule 1 is couched in a manner that once a suit has been withdrawn, one can only institute a fresh suit but cannot make an application for reinstatement. Learned counsel also submitted that the Court lacked jurisdiction to entertain the instant application since by entering the order for withdrawal of the suit on 9th October 2013, the court became *functus officio*. Counsel urged the Court to dismiss the application.

Nyoro Njogu & Company Advocates for the Plaintiff filed submissions dated 3rd October 2014. It was

submitted for the Plaintiff that the Preliminary Objection does not meet the requirements set out in **Mukisa Biscuit Manufacturing Company Ltd v West End Distribution Ltd (1969) EA** on grounds that points of law relied upon have been pleaded; and that no point of law capable of disposing of the applications after argument has been identified. Counsel submitted that the preliminary objection would pre-empt the arguing of the application on its merits. Counsel submitted further that the court was not *functus officio* since the order had not been perfected, costs had not been agreed upon, taxed or paid. Therefore, that the court was still seized of the matter and could still review, vary, alter or set aside the said order.

Learned counsel submitted that the application was necessitated by miscommunication since the instructions given to the Advocate was to “withdraw the suit with no order as to costs.” Therefore, counsel submitted, that the mistake of counsel should not be visited upon the litigant. It was further submitted that the Preliminary Objection is founded on technicalities that will hinder the overriding objective in this matter contrary to the provisions of **Section 1A and 1B of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution**. Counsel urged the Court to dismiss the objection submitting that the rules of natural justice demand that a party should not be judged unheard.

The Court has now considered the argument for and against the preliminary order and the Court finds that:-the Plaintiff seeks that the suit be reinstated and the order marking the suit as withdrawn with costs to the Defendant on 9th October 2013 be set aside. The application is premised on the ground that upon withdrawal of the suit, the instructions were that there should be no order as to costs. However, that the Court ordered that costs shall be in favour of the Defendants, which as submitted by Counsel for the Plaintiff, a miscommunication on his part. Thus, that the Plaintiff has been greatly prejudiced by the said order. It was also submitted for the Plaintiff that the objections raised in the Defendants’ Preliminary Objection do not meet the requirements set out in the **Mukisa Biscuit case**. The Defendants have objected to the application on the basis that there is no existing suit upon which the application can be founded and secondly, that once a suit has been withdrawn, there is no room for re-instatement.

From the foregoing, the first question is whether the contents of the objection have met the requirements set out in the **Mukisa Biscuit Case**. Where the Court held that:-

“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”

The Plaintiff contends that the preliminary objection would pre-empt the arguing of the application on its merits. Indeed, “*the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.*” see Nyamweya J. in the case of **James Ngata Kimondo v Marsden Madoka & another ELC Civil Suit No. 1145 OF 2014 [2015] eKLR**. The very nature of the preliminary objection is that the court down its tools, for instance where it finds that it lacks jurisdiction to adjudicate over a matter. In this instance, the objections, in my view, are pure points of law that befit a Preliminary Objection that is capable of disposing the application.

Order 25 of the Civil Procedure Rules makes provision for withdrawal, discontinuance and adjustment of suits. Order 25 Rule 2(2) gives this court discretion to grant a Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs. It states:

Where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

As correctly pointed out by Counsel for the Defendant, Order 25 does not make provision for reinstatement of a suit. However, this court has inherent powers under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Nevertheless, this inherent power must be invoked judicially. The sole purpose for reinstatement of the suit is to deal with the issues of costs of the suit. It was submitted for the Plaintiff that

the application for withdrawal of the suit with no order as to costs was meant to be recorded as consent but since the Counsel for the Defendants declined one part of the order, the same ought to have been recorded as an order of the court.

I have revisited the court record on 9th October 2013, and below is what transpired:

Njogu: I have instructions to withdraw the whole suit and hereby ask to be allowed to withdraw it with no order as to costs.

Odawa: No objection. Just costs to the Defendant.

Court: The whole suit is hereby withdrawn with costs to the Defendants.

Contrary to the submissions made by the Plaintiff's counsel, there was no consent recorded on the said date. An application was made, which was responded to and the Court exercised its judicial mind that the Defendants shall have the costs of the suit. The issue of costs having been considered by the court in allowing the Plaintiff's application, I decline to exercise the inherent power of the Court given under Section 3A of the Civil Procedure Rules.

The upshot of the foregoing is that the Defendant's preliminary objection is hereby allowed and upheld. For the avoidance of doubt the costs herein shall be borne by the Plaintiff.

Dated, Signed and Delivered this **18th** day of **May,2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Nyauchi holding brief for Mr Njogu for the Plaintiff/Applicant

None attendance for the 1st and 2nd Defendants

Hilda: Court Clerk

L. GACHERU

JUDGE

18/5/2015