



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1246 OF 2004

ABUBAKAR AHMED ABDULRAHMAN.....PLAINTIFF

VERSUS

MUZAHIM SALIM MOHAMED

BAJABER.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. The Attorney General, the 2nd Defendant herein, took out the motion dated 9th October 2014 seeking for the following orders:
 1. ***THAT this application be certified urgent and be heard ex-parte in the first instance.***
 2. ***THAT this Honourable Court be pleased to set aside the interlocutory judgment entered against the 2nd Defendant on 30th March 2006 and all other consequential orders.***
 3. ***THAT this Honourable Court be pleased to grant a stay of execution of the interlocutory judgement dated 30th March 2006 and the preliminary decree dated 30th March 2006 pending the hearing of this application inter-parties.***
 4. ***THAT this Honourable Court be pleased to grant a stay of execution of the interlocutory judgment dated 30th March 2006 and the preliminary decree dated 30th March 2006 pending the hearing and determination of the suit.***
 5. ***THAT the Defence filed on 15th December 2005 be deemed as properly on record.***
 6. ***THAT upon the grant of prayer 2 above, the Honourable Court be pleased to order that the matter be set down for hearing.***
 7. ***THAT costs of this application be provided for.***
2. The aforesaid motion is supported by the affidavit of Martin Muriuki Munene, learned litigation counsel. When served the Plaintiff filed the replying affidavit of his advocate, Guandaru Thuita and a notice of preliminary objection to oppose the motion.
3. When the motion came up for interpartes hearing, the preliminary objection had to be disposed of first. Mr. Martin Muriuki Munene also filed a replying affidavit he swore to answer the preliminary objection. Learned counsels appearing in the matter were invited to present oral submissions. It is the submissions of Mr. Mwangi, Learned advocate for the Plaintiff that the

motion is res-judicata. It is argued that the 2nd Defendant had previously filed two applications with similar or near similar prayers. The first application is said to be the motion dated 14th May 2007 which application was heard and dismissed on 7th July 2008 for want of prosecution. The 2nd Defendant is said to have also filed the notice of motion dated 21.7.2008 to set aside the orders dismissing the notice of motion dated 14.5.2007 made on 7th July 2008. This court was urged to find that the present motion amounts to an abuse of the court process hence it should be dismissed.

4. Mr. Munene, learned litigation counsel, urged this court to dismiss the preliminary objection because the motion dated 9.10.2014 is not res-judicata since it is premised on the inherent power of the court. He argued that the orders sought are not similar to those sought in the previous applications. It is said that the first application did not raise the ground of illegality as opposed to the current motion. Mr. Mwangi urged this court to find that the 2nd Defendant acted with malice because the motion was filed after an application for mandamus had been filed and served.
5. After considering the grounds set out on the face of the motion together with the affidavit filed in support and against the motion plus the rival submissions, it is not denied that the 2nd Defendant's two previous applications were dismissed. The question which has to be answered is whether or not the 2nd Defendant's current motion is resjudicata. To answer this question, the court has to comb through the court record, peruse the pleadings and the various orders issued. The precondition before raising a preliminary objection given in the case of **Mukisa Biscuits Manufacturing co. Ltd = vs = West End Distributors Ltd 1969 E.A 696**, is to the effect that a preliminary objection cannot be raised if any fact has to be ascertained. The basis of the objection will heavily rely on factual matters which can only be brought to the attention of this court through affidavit evidence. Those issues in my humble view can only be ascertained by considering the grounds stated on the face of the application and by looking at the facts deponed in the affidavits filed for and against it.
6. In the end I find that the preliminary objection was improperly raised. It is ordered struck out. In the circumstances of this suit the issues raised in the preliminary objection can still be canvassed when the motion dated 9.10.2014 comes up for interpartes hearing. Costs shall abide the outcome of the motion.

Dated and delivered in open court this 19th day of June, 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant