



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 2328 of 2007**

**MONICAH NDUTA NJENGA .....PLAINTIFF**

**=VERSUS=**

**SULDANA HABAT GERAD.....DEFENDANT**

**RULING.**

The Plaintiff herein **Monicah Nduta Njenga** filed a **Notice of Motion** dated 26/3/2013 for orders that:-

- (a) The Defendant herein be committed to jail for disobedience of the Court Order for a period not exceeding six 6 months and her assets be sequestrated and auctioned.
- (b) For such other or further Orders the Court may deem fit to grant in the circumstances.
- (c) Aggravated costs of this application.

The application was supported by the grounds on the face of the application and on the Supporting Affidavit of **Monicah Nduta Njenga**. Among the grounds for the application is that the Defendant has started a construction on **Plot No. 413 Business Ole Kasasi Trading Centre** despite the fact that she had been served with a **Court Order** and she has arrogantly failed to obey the Court Order.

I have perused the Court file and noted that indeed on 20/12/2007, Justice Angawa issued an Injunction, restraining the Defendant herein, her Servants, Agent or licencees from trespassing into the plaintiff's Land parcel **No. 413 Business Ole- Kasasi Trading Centre** and doing any further construction or development until the hearing and determination of this suit. The said injunction was issued more than 5 years ago.

The Defendant herein filed a Notice of **Preliminary Objection** to the effect that the Court has no **Territorial Jurisdiction** over the issue and that there is no injunction in force.

The Plaintiff / Applicant averred that the Preliminary objection is misplaced and an abuse of the Court process. That the existence or non existence of injunction is a matter of fact and not law.

The parties argued the Preliminary Objection on 23/4/2013. Counsel for the Defendant argued that the Plaintiff filed an application dated 26/3/2013 in pursuit of orders issued on 21/12/2007. He further argued that there is no injunction in place by virtue of **Order 40 Rule 6** which states that :-

*“where a suit, in respect of which an interlocutory injunction has been granted, is not determined within a period of 12 months from the date of the grant, the injunction shall lapse unless for any sufficient*

reason the Court orders otherwise”.

The Counsel reiterated that the above rules apply to this suit by virtue of **Order 54 of the Civil Procedure Rules and Order 54** has a retrospective effect. It applies to all cases pending prior to 2010 . That the applicant herein has not moved the Court to conclude the matter since 2010 and so the injunction order lapsed after 12 Months after coming into force of new **Civil Procedure Rules 2010** .He therefore argued that the application dated 26/3/2010 is bad in Law and ought to be struck out.

The Plaintiff Counsel argued that Preliminary Objection is always anchored on the pleadings. That the Defendant has not filed her Defence and so the Preliminary Objection ought to be dismissed. The Counsel further submitted that the existence of an injunction is a matter of fact and not Law. That there is an injunction issued by the Court on 20/12/2007 and it has not been vacated or reviewed. It was argued that the suit now has a hearing date and non- conclusion of the matter is not sufficient to vacate the orders issued on 20/12/2007.

I have now considered the Preliminary objection raised by the Defence Counsel herein. The Applicant wishes the Court to cite the Defendant for contempt for non compliance of the Court Order dated 20/12/2007. **Order 54 Rule 2** provides that:-

“ *In all proceedings pending whether preparatory or incidental to or consequential upon any proceedings in Court at the time of coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done*”.

It is evident that the provisions of **Rules of Civil Procedure 2010** do apply to this proceedings. **Order 40 Rule 6** is one such rules. In the said rules where an order of injunction is granted and the matter is not determined within period of **12 months** then, the injunction shall **lapse** unless for any sufficient reason, the Court orders otherwise. That is a point of Law. The injunction herein was issued on 2007. The Civil procedure Rules herein came into force in 2010. The applicant did not set down the matters for determination within a period of 12 months after the Civil Procedure Rules 2010 come into force. The Court did not order otherwise. The said injunction therefore lapsed by operation of the law.

The applicant has brought an application for disobedience of the said court order. The same has not been extended by the Court. I will agree with the Defence Counsel that the same is *bad in Law and should be struck out*.

The Preliminary Objection herein is a point of law and not a point of fact. The Preliminary Objection herein has stemmed from the applicant’s application dated 26/3/2013. As was held in the case of **Quick Enterprises Ltd Vs. Kenya Railways Corporation, Kisumu High Court Civil Case No. 22 of 1999.** Preliminary points when raised should be capable of disposing the matter Preliminary without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. I also rely on the case of **Mukisa Biscuit Manufacturing Ltd Vs West End Distributors Ltd ( 1969) EA 697.**

The Preliminary Objection herein is a Point of Law , the same is capable of disposing of the instant application dated 26/3/2013.

The Court finds that there is indeed no injunction as the plaintiff did not move the Court to determine the matter within **12 months** after promulgation of the Civil Procedure Rules 2010 and the Court has not given any other orders to the contrary. I consequently, uphold the Defendant’s Preliminary Objection and finds that application dated 26/3/2013 is bad in law and I proceed to *strike it out* .Defendant has not yet filed her Defence, so no costs to her.

Dated, signed and delivered this 24<sup>th</sup> day of May 2013.

**L. N. GACHERU**  
**JUDGE**

**In the Presence of:-**

.....For the Plaintiffs  
.....For the Defendant  
.....Court Clerk

**L. N. GACHERU**  
**JUDGE**