



REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 238 of 2010  
**JERUVASIO MITARU KANAMPIU**

***alias* BONIFACE KANAMPIU.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**EARNEST G. MUNYI.....DEFENDANT/RESPONDENT**

**RULING ON A PRELIMINARY OBJECTION**

The plaintiff's suit of **12<sup>th</sup> July, 2010** was accompanied by his application by Chamber Summons, brought under Order XXXIX, Rules 1, 2, 7 and 9 of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carried several prayers, the main ones being as follows:

- (i) THAT the Court be pleased to issue a temporary injunction restraining the defendant and/or his agents and/or his employees and/or his servants and/or relatives and/or any other person acting on his behalf from evicting the plaintiff/applicant from plot No. 641, Watamu and/or dealing with the suit property in any manner whatsoever, detrimental to the rights and interest of the plaintiff/applicant herein, pending the hearing and determination of this suit;
- (ii) THAT this Court be pleased to issue a stay of execution of the Orders issued on **22<sup>nd</sup> January, 2010** and warrants of execution issued on **18<sup>th</sup> January, 2010** in CMCC No. 741 of 1995 (Mombasa) pending the hearing and determination of this suit.
- (iii) THAT the Orders of eviction issued on **22<sup>nd</sup> January, 2010**, in CMCC No. 741 of 1995 (Mombasa) and/or consequential Orders therein be set aside and/or suspended pending the hearing and determination of this suit.

The first response of the defendant's was in the form of grounds of opposition dated **23<sup>rd</sup> July, 2010**, and the relevant objections are as follows:

- (i) *the prayers sought in the application are outside the scope of the suit which seeks merely declaratory Orders incapable of execution;*
- (ii) *the Orders of the Chief Magistrate of 28<sup>th</sup> June, 2010 would remain in force even if the plaintiff were to succeed in the suit, the plaintiff having failed to appeal: and so any Orders granted would be in vain;*
- (iii) *in any event, the issue brought before this Court is res judicata, having been finally decided by the Chief Magistrate on 28<sup>th</sup> June, 2010 in CMCC No. 741 of 1995 – a decision which has not been*

*appealed against.*

Subsequently, on **29<sup>th</sup> July, 2010** the defendant swore a *replying affidavit*. This, however, has no more than limited relevance in this Ruling which is essentially on *points of law* and is not concerned with *evidence*. This Court is more concerned with the defendant's *notice of preliminary objection* dated **9<sup>th</sup> August, 2010**. The objection is in respect of a specific *point of law*: "that this Honourable Court has no *jurisdiction* to decide the same."

Learned counsel, **Mr. Gathuku** who represented the defendant, urged that this Court has no jurisdiction to entertain the plaintiff's application by Chamber Summons of **12<sup>th</sup> July, 2010**. Counsel urged that the burden of the plaintiff's application is that Orders already made by the Chief Magistrate's Court were invalid for having been made *contrary to rules of limitation* in the Limitation of Actions Act (Cap.22, Laws of Kenya), s.4; and that a declaration be made that the said Orders shall not be executed. But, counsel submitted, the said Orders are still valid, as they were not subsequently set aside; and no appeal had been lodged against the same. The plaintiff cannot in these circumstances, counsel submitted, "*come to this Court by way of plaint, seeking reversal*"; "*the plaintiff has not invoked the appeal process which would give this Court jurisdiction to revisit the Orders made by a Subordinate Court.*" Hence, counsel urged, "*this Court lacks the powers to grant the Orders sought in the present suit*"; "*the plaintiff has instituted a fresh suit by plaint, and did not invoke appellate powers.*"

Learned counsel, **Mr. Kenga** for the plaintiff submitted that the suit herein had been filed "*seeking a declaratory Order that the Orders in CMCC No. 741 of 1995 issued in November, 1995 cannot, under the law, be executed.*" Counsel, in effect, vindicated the defence perception that "*the plaintiff's plaint was purely attacking the validity of a Judgment*"; he proceeded to contend that "*the Judgment cannot be executed whether through Orders re-issued on 22<sup>nd</sup> January, 2010...or any other Orders that may be issued in future....*"

As to whether a regular Judgment can be contested in the manner proposed, **Mr. Kenga** urged: "*This is the right forum to have that Judgment declared non-existent, under [the Limitation of Actions Act]....*"

Counsel, though citing a Court of Appeal decision, **M'Rinkanya & Another v. M'bijiwe** [2008] 1E.A. 200, laid no focus on any aspect of that decision, and did not show how a cardinal matter of procedure such as that of appeal or review, had in that case been resolved in a manner that would validate the fresh suit herein.

**Mr. Gathuku**, who obtained adjournment for the purpose of examining the foregoing authority (which was raised impromptu), later submitted that the case cited had no relevance to the instant matter: in the instant case the trial Court had issued Orders for eviction of the plaintiff from the suit premises; the Orders were duly executed by the defendant; the plaintiff was evicted from the suit premises; the plaintiff's application to set aside the Orders of eviction were refused. Such a scenario is different from that in the **M'bijiwe Case** where the trial Court's Orders had not been executed; and so in that case, the Court had the jurisdiction to make the Orders sought. In the instant case, final Orders are still in force; and a valid application by the plaintiff would only be one made within the framework of **an appeal**.

It is a fact that the plaintiff's gravamen was originally expressed before the learned Chief Magistrate, in CMCC No.741 of 1995. The trial Court heard the matter and, in the due exercise of its jurisdiction, disposal of it; indeed the absolute finality of that Judgment further expressed itself in the trial Court refusing interim relief applications made by the plaintiff. So, the matter was well and truly *res judicata* and, in the due conduct of Court process, was concluded. It is clear that the plaintiff herein, if he was aggrieved, had one and only one open window: to lodge an *appeal*. An appeal, moreover, would provide him with a fresh opportunity to ask for *interim reliefs*. But there was no appeal.

Such a case, by the recognized play of the judicial process, must rest where it lies, and the Judgment-creditor has every right to partake of the fruit of his Judgment. Any action in derogation from such a position will amount to an abuse of the process of the Court.

It is anomalous, however, that against such a background, the “plaintiff” filed the cause of **12<sup>th</sup> July, 2010** attacking a valid, concluded Judgment from which there was no appeal, and making the following prayers:

**“REASONS WHEREFORE** the plaintiff prays for Judgment against the defendant for –

*(a) a declaration and/or finding that the defendant cannot lawfully obtain vacant possession of plot No.641, Watamu and/or execute the Judgment of the lower Court in CMCC No.741 of 1995 (Mombasa);*

*(b) permanent injunction restraining the defendant by himself, servants and/or agents or any person or persons acting on his behalf from evicting the plaintiff from plot No.641, Watamu.”*

There has been no contest to the Chief Magistrate’s Court’s jurisdiction to hear and determine the original case; and so, the hearing proceeded according to law and was concluded, with a proper decree made. It is the responsibility of the High Court to safeguard and to sustain such due conduct of the jurisdiction of the Subordinate Courts, as a vital element in the discharge of the administration of justice. Apart from the *public-policy* aspect of this commitment on the part of the High Court, the rules of procedure for contesting final decisions of a Court are clearly laid out in the Civil Procedure Act (Cap.21, Laws of Kenya) and the Civil Procedure Rules. The plaintiff, in this case, has filed a suit and an application that constitute an affront to the integrity of the judicial process; and I will make Orders as follows:

***(1) The defendant’s notice of preliminary objection is upheld; and the plaintiff’s application by Chamber Summons of 12<sup>th</sup> July, 2010 is dismissed, with costs to the defendant.***

***(2) The plaintiff’s suit by plaint of 12<sup>th</sup> July, 2010 is dismissed, with costs to the defendant.***

***(3) The costs of the two matters are payable with interest at Court rates as from 12<sup>th</sup> July, 2010.***

**Orders accordingly.**

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 24<sup>th</sup> day of February, 2012.**

**MAUREEN ODERO  
JUDGE**