



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 154 OF 2010

ABDUL RASUL

SHEIKH.....PLAINTIFF

VERSUS

THE TRUSTEES OF NAIROBI

GYMKHANA.....DEFENDANT

Coram: Mwera J

Nyaencha for plaintiffs

Kopere for defendants

Njoroge, court clerk

RULING

In a notice of preliminary objection dated 18/5/10 it was contended regarding a chamber summons dated 16.3.10 by the plaintiff that:

“ The entire suit and application offends the Mandatory Provisions of section 6 and 7 of the Civil Procedure Act – Cap 21 Laws of Kenya and should be stayed or struck out with costs as there is a pending suit by the same plaintiff against the same Defendants in Nairobi CMCC 3838 of 2009 which is also the subject of an Appeal in Nairobi HCCA 4224/2009 and in which an injunction application dated 19/06/09 was dismissed by the subordinate court on 14/07/09 and another Injunction Application in the High court dated 13/10/09 was dismissed by the Hon. Lady Justice Okwengu on 08/03/2010 hence the current proceedings amount to an abuse of the Court Process.”

The chamber summons dated 18.3.10 brought under the now repealed Order XXXIX rule 1, 2, 3, 7, 9 of the Civil Procedure Rules prayed, among others that:

“2. A temporary injunction do issue against the defendant by its servants or agents howsoever and however restraining it from proceeding with the proposed disciplinary action against the plaintiff set for 17th March 2010 pending the hearing and determination of the application here inter parties.”

When that application came up for hearing inter partes, then this preliminary objection was lodged. On 17.3.10 the plaintiff got interim orders sought.

Asked to submit the defendants' side holds the position that the applicant, a member of Nairobi Gymkhana Club, damaged property of that club on the nights of 5th & 7th June, 2009. Required to appear before the Club's Management Committee to explain that act, he filed Milimani CMCC 3838/09 on 19.6.09 for injunction against the Committee's move to proceed against him in a disciplinary process. That application was dismissed by Mrs Gichohi Principal Magistrate. The applicant then filed – Nairobi HCCA 42/09, and there filed an application again seeking an injunction against the Club's moves to discipline him. The committee had served him with due complaints. Okwengu J- dismissed the application on 8/3/10 and now he has brought these proceedings in HCCC 154/10, once again seeking injunction orders. The suit in the CM's court is still pending and the court can observe, quite probably also the appeal. In the light of that the defendants ask this court to invoke the powers donated by sections 6, 7 of the Civil procedure Act to stay this suit or strike it out because the same parties are all along litigating, the same issues. Both the Chief Magistrate's courts and the appeal files were placed before the court.

The plaintiff's stance is that after the lower court dismissal of his injunction application he served his "disbarment" of 90 days and resumed normal usage of the Club facilities. Then he got another notice on 11.3.10 for further disciplinary action. So he filed an appeal form CMCC 3838/09 and again sought injunction orders. But the appeal court was of the opinion that the fresh disciplinary action initiated by the letter of 11-3-10 was not related to CMCC 3838/09. The application was dismissed and so the applicant was compelled to bring this suit. He served his punishment for 90 days after his application was dismissed in CMCC 3838/09. Then Okwengu J found that the application for injunction before her did not relate to CMCC 3838/09. So with the fresh disciplinary action borne by the Club's letter of 11.3.10, the plaintiff states that that letter did not state the nature of the misconduct on his part that led the Club Committee to invite him this time round. It was not about the early breach for which 90 days were served. So res judicata did not apply. This is a separate and distinct cause of action. Accordingly may the plaintiff be accorded a venue to seek justice. Case law was cited.

Having considered matters placed before this court and particularly that the grievance that has led to the present suit is neither arising from CMCC 3838/09 nor the HCCA 422/09 where injunction applications featured, pitting the same parties against each other but from a fresh disciplinary action following the letter of 11.3.10, it will militate against the interests of justice to bar him from the seat of justice at this point. After all he served the 90 days punishment called "disbarment" after the lower court threw out his injunction application. The applicant may appear to be a vexatious litigant who by his suits may not endear himself to the Club Management Committee which has the mandate to maintain discipline of the members at the club. But that will not deny him opportunity to be heard before courts in circumstances like these. The applicant will do well to reconsider his relationship with the Club in a manner that will make him an acceptable member there. And so that he is not let to have suit in every other forum, the plaintiff will be well advised to withdraw the lower court case and the appeal he preferred, in the next 15 days before he proceeds with the application dated 16.3.10. Having served the punishment, those 2 suits are of no use.

In sum the preliminary objection is dismissed. Costs in the cause. The parties to fix for hearing the chamber summons dated 16.3.10.

Orders accordingly.

Delivered on 7.4.11.

J. W. MWERA

JUDGE