



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 422 of 2009**

ABDUL RASUL SHEIKH APPELLANT

VERSUS

THE TRUSTEES OF NAIROBI GYMKHANA

1. KISHORILAL SAHNI

2. BALOO PATEL

3. MAHEDRA SHAH

4. SHANTILAL SHAH..... RESPONDENTS

R U L I N G

1. A preliminary objection has been raised to the appellant's Chamber Summons dated 13th October, 2009 on 8 grounds:

(i) This Honourable Court has no jurisdiction to grant the orders sought in the Chamber Summons dated 13th October, 2009 both under Order XXXIX and Order XLI Rule 4 of the Civil Procedure Rules.

(ii) The injunction application in the subordinate Court dated 19/6/09 in CMCC No. 3838 of 2009 dismissed on 15/7/09 against which this appeal was lodged had nothing to do with the current disciplinary proceedings sought to be injuncted/stayed rendering the present application a nullity in its entirety.

(iii) The current appeal purportedly in terms of the memorandum of appeal "ARS3" is a nullity and no application can lie therefrom under the Civil Procedure Act and Rules, Cap.21.

(iv) There is no jurisdiction to grant injunction pending appeal under Order XXXIX of the Civil Procedure Rules.

(v) There is no jurisdiction to stay an order of dismissal of application from the subordinate Court in

the High Court under Order XLI Rule 4 which is only limited to stay of execution or stay of further proceedings pending appeal.

(vi) In the alternative, even if the Court had jurisdiction to grant the prayers/orders sought in the application dated 13th October, 2009, the Court has not been properly moved through the correct procedure hence the Court cannot grant the orders sought.

(vii) The application is incompetent, incurably defective, and an abuse of the Court process and should be struck out with costs.

(viii) The application is *res judicata* a similar one dated 19th June 2009 having been dismissed by the subordinate Court on 15th July, 2009 and if allowed, nothing will be left for determination in the purported appeal.

2. In arguing the preliminary Objection, Mr. Kopere who appeared for the respondent, submitted on three main grounds. Firstly, that the Court had no jurisdiction to grant the orders of injunction in an appeal under Order XXXIX of the Civil Procedure Rules. Secondly that the jurisdiction of the Court to grant the order of injunction under Order XLI Rule 4(6) of the Civil Procedure Rules can only be invoked by way of a Notice of Motion and not by way of a Chamber Summons.

3. Thirdly, that the Court cannot grant the order of injunction as that was the order declined in the lower Court. It was maintained that the main prayer in the plaint in the lower Court being one for an injunction, there will be nothing left for trial if the Court grants an order of injunction at this stage. Relying on ***Mburu Kinyua vs. Gachinu Tuti [1979] KLR 69***, it was submitted that the issue of injunction was *res judicata*.

4. The Court was therefore urged to strike out the respondent's application, as being incompetent and also because the Court's jurisdiction had not been properly invoked. Further it was pointed out that there was no competent appeal before the Court as the memorandum of appeal which was filed related to the suit in the lower Court.

5. Mr. Nyaencha who appeared for the respondent submitted that the application was brought under XLI Rule 4(6) which gave an appellate Court powers to grant the orders of temporary injunction. Mr. Nyaencha pointed out that the appellant cited Order XXXIX in the application as it was the order that provides guidelines for granting injunctions. He further pointed that order XXXIX Rule 2 of the Civil Procedure Rules, provides powers to the Court to grant an order of temporary injunction before or after judgment. Relying on Order L Rule 12, Mr. Nyaencha submitted that a mistake in the heading of the application cannot be a ground for dismissing the application.

6. Mr. Nyaencha submitted that there was a proper appeal before the Court, and that the orders sought were only temporary orders. With regard to the issue of *res judicata*, Mr. Nyaencha maintained that the matter before the Court was different being a matter arising out of the appeal. Mr. Nyaencha pointed out that the previous issue dealt with by the disciplinary committee was denial of access to the Club and suspension which the appellant had ultimately served.

7. I have given due considerations to the preliminary objection. I do note that the objection focuses on the issue of jurisdiction and *res judicata* which are preliminary issues of law. The objection has therefore been properly brought as a preliminary issue.

8. With regard to the issue of jurisdiction, the appellant having amended the Chamber Summons and included Order XLI Rule 4(6) of the Civil Procedure Rules which gives this Court in its appellate jurisdiction powers to grant an order of temporary injunction pending appeal, this Court has jurisdiction to grant the order sought under that rule. Debate as to whether the Court has powers to grant the orders under Order XXXIX would, in my view, be an unnecessary academic exercise.

9. With regard to the issue of *res judicata*, it is evident that there is an appeal pending before this Court. Although the memorandum of appeal was initially wrongly typed to indicate that it was being filed in the lower Court file, that error was corrected. The memorandum of appeal was actually filed in this Court, and given an appeal number. There is therefore an appeal pending before this Court.

10. It is clear from the annexures to the appellant's supporting affidavit that the ruling subject of the appeal deals with a similar application for an interlocutory injunction which was dismissed by the lower Court. In my view, the issue of *res judicata* cannot arise as the appellant is challenging the ruling of the lower Court. In the interim period this Court has powers to consider whether it can grant temporary injunction. This Court is not therefore bound by whatever may have transpired in the lower Court.

11. It was also submitted that the application was incompetent it having been brought by way of Chamber Summons instead of a Notice of Motion. The application being substantively brought under Order XLI Rule 4(6) of the Civil Procedure Rules, it ought to have been brought under Order L Rule 1 of the Civil Procedure Rules, by way of a Notice of Motion. The respondent is therefore right that the application is improperly before this Court by way of Chamber Summons.

12. Section 1A of the Civil Procedure Act as amended by Act No. 6 of 2009 enjoins this Court in interpreting and applying the provisions of the Civil Procedure Act and Rules, to give effect to the overriding objectives which is to facilitate the just and expeditious and affordable resolution of civil disputes. That objective cannot be achieved by strict adherence to technicalities. The Court has to administer substantive justice. In this case no prejudice has been caused to the respondent. I would therefore overrule the objection in this regard.

13. The upshot of the above is that the preliminary objection is overruled. The application dated 13th October, 2009 should therefore be listed for hearing and determination on merit.

Dated and delivered this 11th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Nyaencha for the appellant

Mr. Kopere for the respondent

Eric, court clerk