

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

Civil Case 1038 of 2002

1. AFTAB AHMED

2. RUBINA AHMED.....PLAINTIFFS

V E R S U S

1. SALIM DHANJI (T/A SALIM DHANJI & COMPANY ADVOCATE

2. PHILIPA LAKIN

3. SAVINGS AND LOAN (K) LIMITED.....DEFENDANTS

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

On 24th September 2004 the court (Njagi, J) ordered as follows, *inter alia*:-

“

The plaintiff is accordingly granted 21 days with effect from the date the new diary (of the court) is opened to take necessary steps to set down (this) suit for hearing. In the event of failure to comply, the suit will stand dismissed with costs ...”.

It is common ground that the Plaintiffs failed to comply (there are two plaintiffs, not one), and the suit stood dismissed with costs.

The Plaintiffs have now come back to court with an application by notice of motion dated 16th August 2005. They seek the main orders that the order of 24th (formally issued on 29th) September 2004 be set aside; and that the time within which the Plaintiffs were to set down the suit for hearing be extended to the 29th November, 2004 or to any other date the court may deem convenient in the interests of justice.

When the application came up for hearing on 24th May 2006 the 1st and 3rd Defendants raised a preliminary objection against the same as per their notices dated 12th October, 2005. The point taken is that there is no existing suit upon which the application can be predicated, and no order for reinstatement of the dismissed suit has been sought in the application. The suit as against the 2nd Defendant had been earlier withdrawn.

The Plaintiffs’ answer to the preliminary objection is that since an order to set aside the order of 24th

September 2004 has been sought in the application, if granted it would have the effect of reinstating the suit.

I have considered the submissions of the learned counsels appearing. No cases were cited. To begin with, orders sought in prayers 1 and 2 of the application are contradictory and mutually exclusive. How can an order sought to be set aside be at the same time varied? Secondly, the application as framed presupposes that there is a suit in existence. There is not as it was dismissed. There ought to be, therefore, a specific prayer for reinstatement of the suit. It ought to be the first prayer in the application. The issue of reinstatement of a dismissed suit should not be left to inference; it ought to be specifically sought up-front.

I must therefore uphold the preliminary objection. The application as currently framed is incompetent for lack of a specific prayer for reinstatement of the suit which no longer exists, the same having been dismissed. The application by notice of motion dated 16th August, 2005 is therefore struck out with costs to the 1st and 3rd Defendants. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7TH DAY OF SEPTEMBER, 2007