

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

Civil Case 1180 of 2002

UNIVERSAL BANK LIMITED.....
PLAINTIFF

VERSUS

PARMINDER SINGH VIRDI AND ANOTHER.....
DEFENDANTS

RULING

Before the commencement of the hearing of the Plaintiff's application dated 24.3.2006 a preliminary objection was taken in respect of the application by Mr. Simani Learned Counsel for the Defendants. Before dealing with the preliminary objection, let me set out the background of the same.

On 7.6.2005 the Plaintiff's suit was dismissed for non-attendance under the provisions of Order 1XB Rule 4 of the Civil Procedure Rules. By its application dated and lodged on 16.6.2005 the Plaintiff sought, inter alia, to set aside the said order of dismissal but referred to the order as "***the judgment entered on 9.6.2005.***" The record does not show what became of that application.

On 13.7.2005, the Plaintiff lodged an application seeking an order that the order of dismissal given on 7.6.2005 be set aside and the suit be reinstated. When that application came up on 13.2.2006 for hearing before Hon. Waweru J, there was no appearance for the Plaintiff and the application was dismissed with costs.

On 24.3.06, the Plaintiff lodged the application at hand. It is this application to which the defendants object. The application was amended on 28.3.2006. The primary ground of objection is that the Plaintiff was not entitled to file another application to set aside the order dismissing the suit after its first application for the same relief was dismissed. According to counsel for the defendants such a cause is barred by the provisions of Order 1XB Rule 7 (2) of the Civil Procedure Rules. In counsel's view, the Plaintiff should have sought to set aside or vary the order dismissing the first application to reinstate the suit.

The response of counsel for the Plaintiff to the said objection is that the Plaintiff's applications should not be treated as suits to which Order 1XB Rule 7(2) applies. In counsel's view, as the Plaintiff's previous application was dismissed for non-attendance the Plaintiff was entitled to file a fresh application without first seeking to reinstate the dismissed application.

I have carefully considered the preliminary objection and the submissions of counsel on the same. Having done so, I take the following view of the matter. Under Section 2 of the Civil Procedure Act "***Suit***" means all civil proceedings commenced in any manner prescribed. This definition would seem to suggest that a suit refers to institution, commencement or origination of proceedings. In this event I would not describe the Plaintiff's applications as suits as the same do not originate proceedings but are applications within proceedings already instituted or commenced. Despite this view, was the Plaintiff entitled to bring afresh application after its first application was dismissed for non-attendance? I think not. In my view, an applicant who seeks to set aside an order obtained without hearing on merits and who fails to prosecute the application is not entitled to bring a fresh application seeking the same relief. To hold otherwise would be to legitimize abuse of the process of the court. There would be no end to filing applications that are not prosecuted. Such a state of affairs would offend against the maxim that litigation should come to an end. There is evidence of such abuse in this case. The Plaintiff's application dated

and filed on 16.6.2005 remains undetermined. The subsequent application dated 12.7.2005 and lodged on 13.7.2005 was dismissed for non-attendance. The Plaintiff undaunted has lodged the present application without seeking any orders in respect of the previous applications. I cannot resist the conclusion that the Plaintiff is abusing the process of the court.

The upshot of my consideration of the preliminary objection is that the same is allowed with the result that the Plaintiff's application dated 24.3.2006 and amended on 28.3.2006 is incompetent and is struck out with costs to the defendants.

Orders accordingly.

DATED AT NAIROBI THIS 16TH DAY OF MAY, 2006.

F. AZANGALALA

JUDGE

16.5.2006

DATED AND DELIVERED THIS 16TH DAY OF MAY, 2006.

M. KASANGO

JUDGE

16.5.2006

Read in the presence of:-