



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Case 28 of 2005**

BERNARD BAYA MWARO.....PLAINTIFF

VERSUS

ORNATO ORAZIO & MAINGI MWARO NGOKA.....DEFENDANTS

RULING

By a plaint dated 30th March, 2005, the plaintiff is seeking orders of injunction against the Defendant restraining the defendant or his agents and/or servants from dealing with or developing suit premises known as Chembe/Kibambamshe/318. The plaintiff further seeks that the Court issues orders of mandatory injunction compelling the defendant to demolish and clear away any development from the said suit premises. He prays for vacant possession as well as cost of the suit. On the same day (30th March, 2005) the plaintiff filed Amended Chamber summons seeking orders of injunction in the same terms as those sought in the plaint. The Chamber summons is grounded on the premise that the plaintiff is the registered owner of the suit premises, upon which the defendant has trespassed and erected thereon certain developments. The defendant has, through his counsel, Khaminwa & Khaminwa Advocates, raised objection dated 19th April, 2005. The objection is to the effect that the present suit is a gross abuse of the Court process as there is already a pending suit before the Court involving the same subject matter, being Malindi HCCC No. 5 of 2004.

The notice of preliminary objection was opposed by Counsel for the plaintiff who argued that Malindi HCCC. No. 5 of 2004 has never been served on the plaintiff and that the summons must have expired.

Citing the case of **Mukisa Biscuits Manufacturing Co. Ltd. V West End Distributors Ltd** (1969) EA 696, Counsel contended that the notice of Preliminary objection did not comply with the test set out in that case. According to counsel for the plaintiff the current suit has nothing in common with Malindi HCCC No. 5 of 2004.

I have considered these submissions. I have also looked at a copy of the plaint in Malindi HCCC. No. 5 of 2004 in which the 1st defendant in the present case is the plaintiff and the plaintiff herein is the defendant. It is argued that the plaintiff ought not to have filed this suit during the pendency of Malindi HCCC No. 5 of 2004.

Mukisa case provides the perimeters for raising Preliminary objection. It establishes that for an objection on a preliminary point to be maintain, the point raised must be purely a point of law, which has been pleaded or which can be implied from the pleadings. It must be such a point which if argued as a preliminary point may dispose of the suit.

The point raised in this preliminary objection is that this Court cannot entertain this suit when there is a suit based on the same facts and involving the same party pending.

I find as a fact that parties to this suit are the same as those in Malindi HCCC No. 5 of 2004. That suit as in this, the subject matter is Chembe/Kibambamshe/318. The reliefs sought are more or less the same.

I also find that the defendant herein, has raised this matter in the statement of defence dated 22nd April, 2005, satisfying the first condition in **Mukisa** case that the point being raised must have been pleaded.

The point raised in the objection strictly speaking is a point with regard to the Court's jurisdiction. It is a point which falls within the provisions of Section 6 of the Civil Procedure Act, which stipulates:-

“6. No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant relief claimed.”

It was argued for the plaintiff that the suit in Malindi HCCC No. 5 of 2004 was never served on them and therefore it was not a bar for them from bringing the present suit. The Court is satisfied that indeed Malindi HCCC No. 5 of 2004 is pending in this Court and that it would highly be irregular to have two suits dealing with the same subject matter and involving the same parties running concurrently. In my view it is immaterial that the plaintiff was not served with Malindi HCCC 5 of 2004, so long as it is shown that that suit is pending. This Court is, therefore, precluded from trying this suit on account of duplication.

The objection is sustained. This suit HCCC No. 28 of 2005 is hereby dismissed with costs. The parties herein may wish to ventilate their respective points in Malindi HCCC. No. 5 of 2004.

Orders accordingly.

Dated and delivered at Malindi this 19th day of May 2005.

W.OUKO

JUDGE

19.5.2005

Delivered in the presence of

Mr.Sifuna – applicant.

Mr.Mwadilo – present.

W. OUKO

JUDGE

Mr.Sifuna

I apply for copies of the proceedings to ruling. We also apply to be served with No. 5 of 2004.

W.OUKO

JUDGE

COURT

Certified copies of the proceedings and this ruling to be supplied to the applicant or payment of requisite fees. HCCC No. 5 of 2004 to be served with 14 days from today.

W.OUKO

JUDGE