



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT  
MILIMANI COMMERCIAL COURT, NAIROBI  
HCCC 396 OF 2004**

**SOLOMON KIRAGU THANDE.....PLAINTIFF**

**V E R S U S**

**SIMON NGATUNYI CHABI.....DEFENDANT**

**R U L I N G**

On 8th April, 2005, the defendant in this matter filed a chamber summons application of the same date, seeking both mandatory and interlocutory reliefs against the plaintiff. The court ordered that the said application be heard inter-partes on 21st April, 2005.

On 19th April, 2005, the plaintiff's advocates filed a Notice of Preliminary Objection, intimating that at the hearing of the above application, the plaintiff would raise objection on the following grounds-

1. That the plaintiff's suit in which the application has been filed was withdrawn and/or discontinued under O.XXV rule 1 of the Civil Procedure Rules and the notice of the withdrawal and/or discontinuance was served upon the defendant/applicant who has annexed it to his affidavit and marked it as "SNC-11".
2. The provisions of O.XXXIX under which the application has been made are only available to the plaintiff and not to the defendant who has neither filed a defence nor a counterclaim to the suit, and as at the time withdrawal of the suit the summons to enter appearance had not been issued.
3. An application for a mandatory injunction cannot issue in an application brought to court by way of a chamber summons.

It was this preliminary objection which was argued before the court on 21st April, 2005.

At the hearing of the application, Mr. Kwengu appeared for the plaintiff/applicant in the preliminary objection while Mr. Nderitu appeared for the defendant/respondent. Mr. Kwengu submitted that the court has no jurisdiction to entertain this matter because the suit has been withdrawn and no application can be filed where a suit has been withdrawn under O.XXIV rule 1. Secondly, he submitted that the application was brought under O.XXXIX rule 1 (2) which is non-existent, and that applications under O.XXXIX rule 1 are available only to plaintiffs and not to defendants.

They can be available to a defendant only when he files a counterclaim because he thereby becomes a plaintiff in respect of the counterclaim. There being no suit by the defendant, he cannot seek an injunction because he would be filing an action by way of an application. Mr. Kwengu then referred to **MORRIS & CO. LTD., v. KENYA COMMERCIAL BANK LTD., & ORS.**[2003] E.A. 605 and submitted that the application was incompetent and should be struck out.

On his part, Mr. Nderitu contended that after the filing of the suit, the plaintiff brought an application seeking certain injunctive orders against the defendant. The application was dismissed with costs on 30th September, 2004. That being the case, counsel submitted that the suit falls under the provisions of O.XXIV rule 2. Under that rule, where a suit is set down for hearing, it can only be discontinued by an order of the court.

Furthermore, he further argued, under O.IV rule 3(5), it is mandatory that a party who brings a suit must accompany the plaint with the summons for appearance, which was not done in this case. He also referred to O.VI rule 12 and submitted that a party cannot take a technical objection to pleadings, and that even if the application were defective, the court cannot strike it out. He then referred to **GRACE WAMBUI WACHIRA v. KENYA POWER & LIGHTING CO. LTD.** HCCC No. 186 OF 2004. Mr. Nderitu also argued that our Civil Procedure Rules don't contain a provision for mandatory injunctions, and that a party seeking such a remedy can come to court under S.3A, which the defendant had done. Finally, Counsel argued that the court's ruling of 30th September, 2004, found that the plaintiff had no proprietary right over the suit property and that finding had neither been stayed, set aside, nor appealed from. When the plaintiff purports to distress the defendant's goods to recover "rent", the same is illegal. He asked the court to dismiss the preliminary objection with costs to the defendants.

In his reply, Mr. Kwengu submitted that Mr. Nderitu had not addressed the fact that the defendants have no suit or counterclaim. Even though the court has inherent power to protect the ends of justice, one should move the court under O.L. since it is true that the summons were not served, and the suit was not set down for hearing, the defendant only needs notice of the withdrawal of the suit. If notice is disputed, then the defendants should file an application for the notice of withdrawal to be expunged from the record, which they have not done. He thereupon urged the court to dismiss the application as incompetent, frivolous, vexatious and an abuse of process.

After hearing both counsel, it seems to me that the main issue for determination is whether the suit in this matter has been effectively withdrawn and, if so, whether the application is properly before the court. This suit was filed in court on 16th July, 2004 by a chamber summons of the same date and filed with the plaint. The plaintiff sought from the court some interlocutory orders of an injunctive nature. The application was heard on 23rd August, 2004, and a ruling given on 30th September, 2004 dismissing the application with costs. On 16th March, 2005, the plaintiff filed a notice dated the same day, notifying that he had withdrawn and discontinued his suit against the defendant.

On 12th April, 2005, the defendant filed, by an amended certificate of urgency, an amended chamber summons application which is the subject of this preliminary objection. O.XXIV of the Civil Procedure Rules makes provision for the withdrawal, discontinuance and adjustment of suits. Rule 1 thereof, so far as is relevant, states-

**“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim...”**

If I understood Mr. Nderitu correctly, his argument was that since the application dated 27th July, 2004 was heard and determined, the suit is governed by O.XXIV rule 2, by virtue of which it can only be discontinued by an order of the court. Rule 2 of O.XXIV reads-

**“(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.**

**(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”**

The distinction between rules 1 and 2 of O.XXIV is that rule 1 applies where the suit has not been set down for hearing, while rule 2 applies where a suit has been set down for hearing. It is common practice

for interlocutory applications seeking temporary injunctive orders to be filed along with the plaint commencing an action. The reason for this is that such injunctions can only be granted where certain facts are proved "in any suit". The presence of a suit is therefore a condition precedent to the granting of such orders. The hearing and determination of such an application normally leaves the suit intact except, perhaps, in suits where the only remedy sought is a mandatory injunction. But that is neither here nor there. The hearing and determination of the application dated and filed herein on 16th July, 2004, did not, in my view, affect the suit in any way. The summons to enter appearance have not been served and it cannot be held by any stretch that the suit has been set down for hearing. That bridge is still very far. To hold otherwise would amount to straining the otherwise very clear words of O.XXIV rules 1 and 2. I therefore find that the suit has not been set down for hearing, and that until then, it was in order for the plaintiff to withdraw the suit under O.XXIV rule 1 and that is what the plaintiff did.

Being of that conviction, and considering that the defendant's application is brought in a suit which has already been withdrawn, I don't think that such an application is properly before the court. The matters complained of by the applicant constitute a fresh cause of action, and it is imperative that in the absence of this suit, the applicant should find a more conducive way of coming to court. The other issues raised in the arguments by counsel do not add any value to the preliminary objection as they go to the merits of the application.

By reason of the foregoing, the defendant's application by the amended chamber summons dated 12th April, 2005 is hereby struck out with costs to the respondent. Each party will bear its costs of the preliminary objection. It is so ordered.

Dated and delivered at Nairobi this 12th day of May 2005

**L. NJAGI**

**JUDGE**