

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 1180 OF 2002

NZAMBA KITONGAPLAINTIFF

VERSUS

MBEVO NDAKADEFENDANT

RULING

The court records show that this suit was heard ex parte by Rimita, J on 5th February, 2003, and a judgment pronounced which directed the defendant to give vacant possession of the suit premises to the plaintiff, and also pay, **“unpaid arrears of rent and mesne profits at the rate of Kshs.30,000/= from 1.4.2001 until payment and vacant possession is obtained”**.

Thereafter several applications were filed for example, one by the plaintiff’s counsel seeking to correct the Land Reference Number in the Plaint, Judgment, Decree and Eviction Orders. Another application filed under Certificate of Urgency sought an order for stay of eviction, and the setting aside of the ex parte judgment, as well as unconditional leave to defend the suit.

That application seems to have been dismissed for non-appearance of the applicant. The order was made on 22nd September, 2003, by Rimita, J

The court record shows further that another application was filed once more seeking more or less the same orders – i.e. a stay of execution of the orders from the ex parte judgment, and the setting aside of the same orders and further, “that the suit be dismissed forthwith”. This application too was filed under a Certificate of Urgency on 2nd June, 2004. It was placed before Hon. Justice Kihara Kariuki, who ordered **“a temporary stay of execution order, conditional upon the applicant depositing into court by way of security Kshs.250,000/= on or before 15th June, 2004.....”**

Before the application could be heard inter partes on the 15th June, 2004, counsel for the plaintiff, Mr. E.K. Mutua filed a Notice of Preliminary Objection to the defendant’s application of 2.6.2004.

The Notice of Preliminary Objection is dated 10th June, 2004. It terms the defendant’s application **“res-judicata” as the defendant had on 2 previous occasions – i.e. 19.8.2003 and 21.8.2003, filed similar applications**”. He termed this **“an abuse of the process of court, and asked the court to dismiss the application”**.

It is the preliminary objection which was tabled before me for hearing. The advocates consented to make written submissions which I have read and considered carefully.

From this I have come to the conclusion that the points raised can be dealt with in the main application as they are disputed. I have not found a point of law to be argued on undisputed facts agreed upon by the parties.

I therefore direct that the issues in the preliminary objection be brought up and argued during the hearing of the main application filed on 2.6.2004, the application which was dealt with partially by Hon. Justice Kihara Kariuki on 3.6.2004.

The application should be placed before ANOTHER JUDGE in the CIVIL DIVISION of the High Court.

Dated at Nairobi this 5th day of May, 2005.

JOYCE ALUOCH

JUDGE