



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 45 of 2005

GODFREY KILATYA KITUKU & 6 OTHERS.....PLAINTIFFS

VERSUS

MALINDI MUNICIPAL COUNCIL.....DEFENDANTS

RULING

On 9th May 2005 the applicants made an application and obtained interlocutory injunction against the respondent restraining it from interfering with the applicants' respective plots in the process of constructing a bus park. That application was set down for hearing *interpartes* on 23rd May, 2005.

From that date to 27th September, 2005 when the application was listed for hearing a number of things have happened which will explain the delay in disposing the application.

First the applicants brought an application to cite the respondents for contempt of Court. Before that application could be heard, the respondents raised an objection on a preliminary point.

The Notice of Preliminary objection was disposed of on 22nd August 2005 when the Court delivered a ruling. The hearing of the earlier application was stated for 27th September, 2005.

At 9.15 a.m. when the case was called out there was no appearance by the applicants or their counsel. The Court accordingly proceeded to dismiss with costs the application under Order 9 B rule 4 of the Civil Procedure Rules. On 28th September, 2005 the applicants brought chamber summons application seeking, among other reliefs, that the Court issues a temporary injunction to restrain the respondent, or its agents, servants or contractors from interfering with the applicants' plots by constructing a bus park until the hearing and determination of this application *interparte*.

The application also sought that the orders dismissing the applicants' application issued on 27th September, 2005 be set aside and the application to be reinstated to be heard and determined on merit.

The application was based on the grounds that the suit property is in real danger of being wasted or damaged. That pleadings had not been closed. That the case was dismissed shortly before counsel for the applicants arrived in Court. That counsel arrived late due to the fact that he had received a telephone call conveying news of the murder of his in-law. That the applicants were not to blame.

When this application came up for hearing, the learned counsel for the respondent and for the applicants agreed to argue a preliminary objection filed by the respondent. The objection raised was that the prayer for an injunction in the application contravened the provisions of Order 9B rule 7 (2) of the Civil Procedure Rules and Section 8 of the Act. The two provisions preclude a plaintiff whose action has

been dismissed from instituting a fresh suit in respect of the dismissed cause. That the application has combined the relief for reinstating the application and injunction.

The preliminary objection was opposed. On behalf of the applicant it was argued that the application is not seeking to bring a fresh suit, but is simply for reinstatement of the dismissed application. He cited the case of **Ngome V Plantex Co.Ltd.** (1984) KLR 791 for the proposition that the Court is duty –

bound to hear the party whose suit has been dismissed, and if good cause is shown, to set aside the order of dismissal.

I have given due consideration to the rival arguments and the authority cited.

Applying the principles in **Mukisa Biscuit Manufacturing Co.Ltd. V West End Distributors Ltd.** (1969) EA 696 does this application meet the requirement for raising a preliminary point of objection?

The first principle is that the objection must consist of a point of law which if argued as a preliminary objection is capable of disposing of the suit. A point of preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The point raised in the instant application is that the applicant cannot bring a fresh suit once his action was dismissed. This is a question of jurisdiction and is therefore within the first principle in the **Mukisa Biscuit** case. It is a point of law capable of disposing the application. However, the objection fails the last principle. It challenges the exercise of Court's discretionary power. Without going into the merits of the application, once a suit or application is dismissed under Order 9B rule 4 of Civil Procedure Rules, for non-attendance of the plaintiff, the latter can, under Rule 8, apply to the Court to set aside or vary the order of dismissal upon such terms as are just. The plaintiff is, however, barred from instituting fresh suit. The instant application is brought under Section 3A of the Civil Procedure Act as well as Order 9B rule 8 and Order 39 rules 1(a) and 2(i) of the Civil Procedure Rules. In the present application the applicants are seeking an order of injunction against the respondent to last upto the period of *inter partes* hearing of their application for setting aside dismissal orders. The application that was dismissed sought an order of injunction against the respondents pending the hearing of the application. Although both applications are seeking orders of injunction there is a slight difference in that the injunctions sought in each case are for different purposes and reasons. For that reason I find that the current application does not amount to fresh suit in terms of Order 9B rule 7(2) of the Civil Procedure Rules.

The application is clearly for the setting aside of the orders of the Court dismissing the applicant's application dated 9th May, 2005.

For these reasons, the objection is dismissed with costs.

Dated and delivered at Malindi this 12th day of October, 2005.

WILLIAM OUKO

JUDGE

12.10.2005

Coram

W.OUKO J

Mr.Mwadilo for Dr.Khaminwa.

Ruling delivered.

W.OUKO

JUDGE

Court: Hearing the application of 27.9.2005 set down for hearing on 14.11.2005.

W.OUKO

JUDGE

Mr.Angima: I apply for orders to be supplied with certified copies of the ruling.

W.OUKO

JUDGE

Court: Applicants, on payment of usual fees may be supplied with copies of the ruling.

W.OUKO

JUDGE