

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 48 OF 2001

ALBERTO CANALE PLAINTIFF

VERSUS

GIOVANNI GRMMO 1ST DEFENDANT

RABA INVESTMENTS 2ND DEFENDANT

RULING

Notice of Motion dated 21.10.2002 was scheduled for hearing on 25.2.2003. Before it could be heard the Respondent moved the court to hear a preliminary objection, a notice of which was dated 19th February 2003 and filed on 21st February 2003. The preliminary objection was heard and this ruling is on the preliminary objection. The preliminary objection was taken on three points. These are as follows:

“1. The Defendants’ application is in breach of the provisions of Section 6 of the Civil Procedure Code for there is a related case; Mombasa HCCC No.138 of 2000 which is pending for hearing and determination before this court.

2. Defendants’ application is in further breach of the provisions of Section 7 of the Civil Procedure Code, the Defendant having made a similar application dated the 20th February 2002 that was heard and determined by this court.

3. The Defendants’ application is an abuse of the court process.”

There was HCCC No.138 of 2000. That case was filed on 21.3.2000. On 3rd May 2000, a consent decision was entered in that case as follows:

“By consent the case be marked as settled with no order as to costs.”

Later the Respondents filed this case on 19.9.2000, and thereafter in January 2003, the Respondents filed an application in HCCC No.138 of 2000 seeking to have the consent judgment in that case reviewed or set aside. That application has not been heard. This application in this case was filed as I have stated on 21.10.2002. In those circumstances, can one say HCCC No.138 of 2000 is still pending before this court? It was clearly finalised, but now efforts are being made to revive it and application is pending for that purpose in court. Can one say the proceedings in that case are finalised?

Again, the application dated 21.10.2002 is clearly seeking what was sought in another application I heard and dismissed. That was Notice of Motion dated 20-2-2002. The Applicant is saying that, that earlier application was dismissed on account that the court was not satisfied that HCCC No.138 of 2000 had been finally decided by the court. Now there is evidence that the suit had actually been finally decided and so the Applicant contends that they are rightly before the court. I do entertain same feelings and I would be addressed as to whether on the discovery of new facts, the proper procedure should not have been by way of Order 44 i.e. by way of application for review.

I do not want to express definite opinion as yet on the Preliminary points that were raised because as will appear herein above, there is clearly need to address the court fully on both points and I will therefore leave them to be fully canvassed during the full hearing of the Notice of Motion dated 21.10.2002. I will decide on both points and depending upon that decision, I will conclude on the third point on whether or not this application is an abuse of the court process.

Hearing of the Notice of Motion to proceed. No order as to costs.

Orders accordingly.

Dated this 27th Day March 2003.

J.W. ONYANGO OTIENO

JUDGE