



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1400 OF 1994

PROFESSOR D.M. NDETI..... PLAINTIFF

VERSUS

ORBIT CHEMICAL INDUSTRIES LIMITED DEFENDANT

R U L I N G

Two applications came up for hearing yesterday. These were Chamber Summons dated 14th December 2001 and Notice of Motion dated 28th December 2001. The learned counsel for the Defendant raised a Preliminary objection to the hearing of the application dated 14th December 2001. The Preliminary objection was that on 8.11.95 the court (Hon. Justice Hayanga) had made an order which was to the effect that no interlocutory application shall be entertained in this suit and the case was to proceed to hearing. That order has not been set aside or varied and thus the present application is not proper as it is filed against that order.

The Plaintiff opposed the Preliminary point and stated that the Respondent has on its part made several applications after the same order so it has breached the order and has thus waived its right to rely on that order and is therefore estopped from raising the matter. Secondly, the Plaintiff contended that the same order cannot tie the hands of the court and would thus fly on the face of section 3A of the Civil Procedure Rules which gives the court inherent powers.

I was referred to handwritten page 25 of the proceedings where the order is allegedly entered. I have perused the same order and I find the order was really at page 26 and reads as follows:

“Order: The case seems to take unnecessary time and I think it would be advisable to abandon the interlocutory application arguments and set the main case down for full hearing. I suggest that this case be heard for 2 days in November 1995 and as Mr. Kamiti for Defendant wants time to consult his firm for a possible date. CM of this case will be on MONDAY 13.11.95 at 9.00 a.m.

On 13.11.95 the matter was mentioned and a further mention date was fixed for 17th November 1995. On 17th November 1995 the case was fixed for hearing by consent of both parties on 20th and 21st February 1996 but as is clear from the records the actual hearing never started till 29.11.99. During the intervening period of about four years several interlocutory applications were heard beginning with Chamber summons filed on 14.11.97 seeking leave to amend Defence which was before the same Hon. Judge. That particular application was partly heard and later withdrawn but another one was filed seeking similar orders which was heard and was allowed by consent of both parties. Later other applications were made before the hearing could start.

It is clear to me first that Hon. Justice Hayanga did not make an order that no further interlocutory applications be filed and/or be entertained in this matter any longer from the date of his orders. He expressed a feeling that as it was taking too long to hear that interlocutory application which was then before him, it was advisable to abandon it and proceed with the hearing of the main suit to avoid any more time wasting. That was an expression of an opinion. It was not an order to the effect that no more interlocutory applications be filed or be entertained by court. In fact the Hon. Judge himself did hear two applications after his order.

Secondly, even if one were to say it was an order of the court, it was only dealing with the situation as it was then and only dealing with the application which was then before him. He could not and did not in my humble opinion tie or make an attempt to tie the hands of the trial court or any court from dealing with the matter as the court found it fit in the circumstances prevailing before the court. The court's inherent powers are still there and if the Hon. Judge's opinions were to be taken as putting a stop to all interlocutory applications then it would interfere with the same. Reading the order. I feel certain in my mind that the Hon. Judge did not intend to and did not do so.

Thirdly, one has to look at the mischief that the order sought to stop. The mischief was the fact that the application before the court then was taking too long to hear at the expense of the main suit. It will be clear that the main suit is now being heard and the next hearing dates are in July 2002. That in effect means that these applications can be heard and finalised before the part hearing resumes. Thus no further mischief will exist.

I do feel that these applications should be heard. It is however noteworthy that according to records the application that was the subject of that order does not seem to have been effectively abandoned for all that the court did was to suggest that it be abandoned. The parties, I believe will address me on that and so I need not say anything further on it.

The Preliminary Objection is rejected. Let the hearing of the applications proceed on a date to be fixed by the parties in court or at the registry.

Dated this 31st day of January 2002.

ONYANGO OTIENO

JUDGE