



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO.568 of 2000**

**RASHID SALIM MOHAMED.....PLAINTIFF**

**=V E R S U S=**

**KHADIJA ALI MOHAMED.....DEFENDANT**

**R U L I N G**

Application dated 9.5.2002 is seeking one main order and that is an order that a mandatory injunction be issued to compel the Plaintiff to reinstate the Defendant in the suit premises on Plot No.9771, House No.29, Fahari Estate, Bamburi pending the hearing and final determination of the suit. The Plaintiff/Respondent filed a Notice of Preliminary Objection against the same application.

In the same Notice of Preliminary Objection the Plaintiff/Respondent raises five points of objection. These were:-

- “1. That the said application is vexatious, and an abuse of the process of the Honourable Court.
2. That the said application is bad in law and is in contempt of the court order made on 20th March, 2002.
3. That the application for injunction is incompetent because there is no prayer for injunction in the Defendant’s written Statement of Defence and counterclaim dated 27th March, 2002.
4. That the said application dated 31st August, 2001, by its very nature should be heard and be disposed of first before any other application is dealt with.
5. That the said application is only meant to delay and frustrate the Plaintiff because there are 3 previous applications which are still pending, that is:-
  - (a) Chamber Summons dated 20th December, 2000.
  - (b) Chamber Summons dated 19.4.2001.
  - (c) Chamber Summons dated 31.8.2001 which has been listed for hearing by consent on 17.9.2002.”

The Plaintiff Rashid Salim Mohamed addressed me at length on the same Preliminary Objection ending his submissions by seeking dismissal of the entire application on the grounds listed hereinabove. The learned State Counsel for the Defendant/applicant opposed the Preliminary Objection and maintained

that the Preliminary Objection cannot stand as there was no injunction orders granted on 20.11.2000 which is alleged to have been disobeyed and he urged me to dismiss the Objection.

The law as regards what amounts to a Preliminary Objection in law is well spelt out in the celebrated case of MUKISA BISCUIT MANUFACTURING CO. LTD –vs- WEST END DISTRUBUTORS LTD (1969) EA 696. In that case it is stated at page 701 as follows:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

In this matter before me the first point of Preliminary Objection cannot be a point of preliminary objection at all as it is no more than a party’s opinion or view about the application dated 9.5.2002. On 20th March, 2002, I did express my feeling about the order in which the applications should be heard and I said that if there was an application for contempt it should be heard first and went ahead to fix that application of 31.8.2001 for hearing on 17.4.2002. On 17.4.2002, that matter came up for hearing before Hon. Justice Onyancha. It could not be reached and it was ordered to be fixed for hearing at the Registry. I did not make any order that if any other application came up for hearing it was in contempt of that application. That could not be so, and the application of 9.5.2002 cannot be dismissed simply because it was filed before the application of 31.8.2001 is heard. All that the applicant could have sought was the court’s direction as to which application could be heard first. My opinion of 20.3.2002 did not and could not stop any other application from being filed. This ground cannot stand.

The third point in preliminary objection Notice cannot stand either. Order 39 rule 1 is clear on that. But this application is for mandatory injunction which would be considered by the court under Section 3A of the Civil Procedure Act. The Applicant/Defendant is seeking the court to use its inherent powers to grant it mandatory injunction. If the court was to find that reasons exist for the same, the court could grant the same orders and the same orders needed not be pleaded in the counter-claim. As I have stated, that is a matter for the full hearing and no short circuit can be availed by way of a Preliminary Objection.

Fourth ground again as I have stated goes to the priority to be given in hearing the application. It is not a preliminary point that can be used to dispose of this application. This argument is also applicable to the fifth point.

All in all, no preliminary point has been raised on points of law meriting the dismissal of the application dated 9.5.2002. As I have stated, if the Defendant wants directions on the order of hearing all the applications in the file he should make the same application verbally and the court will give directions on the same.

I decline to sustain this preliminary objection. It is dismissed. Costs of the objection to the Defendant/Applicant in any event.

Dated at Mombasa this 8th day of July, 2002.

**J. W. ONYANGO OTIENO**

**J U D G E**