



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 106 OF 2009

MOSES NDUNGU MUNGAI PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD. 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

RULING ON PRELIMINARY OBJECTION

On 20/3/2009 first and 2nd defendants filed a notice of preliminary objection which the parties agreed to argue first on 27/3/2009.

The preliminary objection is in regard to plaintiff's objection filed 5/3/2009:

- 1. That the plaintiff's earlier injunction filed on 20/2/2009 was dismissed by this court on 24/2/09 for non attendance of the plaintiff's counsel and cannot therefore file a similar application which the said similar dismissal order is still in force.***
- 2. That the plaintiff's present injunction application is intended to circumvent and/or defeat the said dismissal order of this court made on 24/2/2009.***

The facts on which the objection is made are not disputed. Several Authorities are cited:

1. **Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors Ltd.** – where the Court of Appeal held that preliminary objection is that point that raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.
2. **Theluji Dry Cleaners Ltd. vs. Muchiri & 3 others** - HCC decision where the party filed suit in High Court and before notice of withdrawal was endorsed by Deputy Registrar, the party filed another suit and application in the Magistrate's Court. The High Court held that the subsequent suit in the Chief Magistrate's court was an abuse of judicial authority of the superior court.
3. Decision of Court of Appeal at Kisumu – **Civil Appeal No.104 of 2001 – Billy Nyonga vs. Khan &**

Associates – in this case the appeal was dismissed because counsel failed to appear in court on the scheduled day. Also the second application was filed because the first one had been misplaced. The Court of Appeal stated that the filing of a second application was an abuse of court.

4. Decision in **HCC No.1180/2002 – Universal Bank Ltd. vs. Paraminder Singh Viridi & another [2006] e KLR** – the court held that an applicant who seeks to set aside an order obtained without hearing on merits and who fails to prosecute the application is not entitled to bring a fresh application seeking the same relief. The application was dismissed.

5. The decision in **HCC No.673/03 – Credit Bank Ltd. vs. Grandways Venture Ltd. & another** – the applicant had a similar application which was dismissed. The applicant later filed another similar application before first seeking to reinstate the dismissed one. The court held that filing the second application is gross abuse of the process of the court.

Then there is **Succession Cause No.3 of 1999** at High Court, Nyeri in

which case the petitioner instead of filing application to set dismissal of an application proceeded to file a fresh application seeking same prayers. The court held that action to be an abuse of the court process.

Upon perusing all the above authorities and considerations of arguments of the parties, it is my finding that the applicant in filing application dated 5/3/2009 was acting in abuse of court process.

I uphold the preliminary objection and consequently, the application dated 5/3/09 as hereby dismissed with costs to the 2 defendants.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 4th day of May 2009.

JOYCE N. KHAMINWA

JUDGE