



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 76 OF 2002

MARIA EYER FELCHIN PLAINTIFF

- VERSUS -

1. ZBINDEN JOHN DAVID

2. BARANDUN VRENELI DEFENDANT

R U L I N G

The matter listed for hearing before me in the defendants' Chamber Summons dated 11th September, 2003 in which the defendants prayed interalia for following orders

- (i) Stay of execution of judgement pending the hearing and determination of this application
- (ii) An order to compel the plaintiff to present specimen signatures to the document examiner
- (iii) An order to compel the plaintiff to appear in court to be cross-examined in the authenticity of the signatures on affidavits
- (iv) An order to strike out the verification affidavit
- (v) An order to strike out the plaintiff's suit.

The application was supported by the affidavits of Barandun Vreneli sworn on 11th September, 2003.

When the summons was served upon the plaintiff, she filed a replying affidavit sworn by herself on 26th September, 2003 with a Notice of preliminary objection dated 1st October, 2003 to oppose the summons.

The preliminary objection had to be disposed of first before the substantive application could be considered. The gist of the plaintiff's preliminary objection is that this court is functus officio in view of the fact that there is a judgment on record entered on 13th May, 2003 which has not been disturbed to date.

The defendants opposed the preliminary objection and stated that this court is not yet functus officio because it is busy running the execution process hence it is seized with the matter. As far as I am concerned this was the main issue which was argued at the preliminary stage.

I have to consider first the definition of a preliminary objection which was given in the case of Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] E.A. 696 where Law J.A. said at page 700:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

What the plaintiff has raised touches on the jurisdiction of this court. In brief the plaintiff has pointed out that the suit has already been finalized and that there is a valid judgement which has not been disturbed. I am now being to strike out the plaintiff’s suit. In view of the material placed before me and in the light of the learned counsel’s submissions, I am convinced that the preliminary objection fall within the definition given the Mukisa Biscuit case.

The sum total of the defendant’s application is to have the plaintiff’s suit struck out. I have keenly examined the issue in dispute, and I have come to the conclusion that what is validly on record is a judgement and not a pending suit. The suit has already been concluded. The defendants are indirectly appealing against the exparte judgement. It is trite law that this court cannot sit on appeal on its judgment. The moment a judgement has been entered the court becomes functus officio save for the process of execution.

Consequently the preliminary objection is upheld. The chamber summons dated 11th September 2003, is ordered struck out with costs to the plaintiff.

Read this day of 2003.

J.K. SERGON

JUDGE



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