



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC E.L.C. 4 OF 2015**

**EDITH MUTHANJE.....APPLICANT**

**VERSUS**

**MARIKO NDWIGA WAITHAKA.....RESPONDENT**

**RULING**

**Introduction**

Mrs Edith Muthanje has by her notice of motion dated 26<sup>th</sup> January, 2015 sought the following orders from this court:

1. That the Honourable court be pleased to certify this application as urgent and be heard ex-parte in the first place.
2. This Honourable court be pleased to order/direct the land registrar Embu to remove or vacate the restriction filed against land parcel No. LR Kyeni/Kigumo/2885 and Kyeni/Kigumo/2886.
3. That cost of this application be provided for. Mr Mariko Ndwiga Waithaka has opposed the application in respect of which he has annexed a replying affidavit.

**The Case for the Applicant**

The applicant through her counsel has brought this notice of motion under **Section 3 of the Civil Procedure Act and Section 80(1) of the Land Registration Act**. She has annexed a supporting affidavit in support of her application. According to her, her father died and left the suit land. As a result, there was a succession cause in the court of the District Magistrate III at Runyenjes, which ordered the suit land be divided equally between her and the respondent.

She has also stated that the respondent's father by the name Mbuko Kibuguo challenged the succession cause in the court of the Resident Magistrate at Embu sitting an an appeal court in an appeal that originated from the court of the district magistrate class III , which dismissed his appeal. A further appeal to the High Court in Meru was similarly dismissed. The applicant further states that the respondent applied for a review of his late father's dismissed appeal, which was similarly dismissed by the High Court in Meru, being Civil Appeal Number 11 of 1985 between Mbuko Kibugua and Edith Muthanji. Following the dismissal of the appeal by the High Court in Meru, the suit land was transferred to her. According to her, the respondent applied for extension of time to enable him appeal to the Court of Appeal, which application was rejected by that court.

It is also her evidence that the respondent in abuse of the court process filed a case in the court of the

Chief Magistrate at Meru being case number 642 of 1995, in which the defendants were Mbuko Kabugua and Edith Muthanji in respect of land parcel number Kyeni/Kigumo/393, in which he sought, amongst other prayers, an injunction to stop the defendants from interfering with the suit parcel of land.

The court of the Chief Magistrate granted a temporary injunction. In her view this **“was an abuse of the court process as Chief Magistrate cannot reverse the order of the High Court and as such, the said application is res-judicata and a nullity”**. (See paragraph 19 of the supporting affidavit).

Finally, she states that the two parcels of the suit lands have been transferred into her name and that is why she is seeking the order of this court to direct the land registrar to remove the illegal restrictions and orders lodged against the suit parcels of land.

### **The Case for the Respondent**

As I have already mentioned, the respondent has filed a replying affidavit in opposition to the application. He states that he was not a party to the proceedings in Runyenjes court of the District Magistrate III in succession cause number 86 of 1997. He also states that he was not a party to the Embu High Court Civil Appeal number 10 of 1983 and he was also not a party to the High Court at Meru in Civil Appeal number 11 of 1995.

According to the respondent, the applicant is concealing the facts from this court. He says that the parties to the proceedings in the foregoing case were the applicant and his late father, Mbuko Kabugua.

Furthermore, the respondent states that he filed a Civil Suit in the Court of Chief Magistrate at Meru, being civil case number 642 of 1985, against the applicant. The applicant sought to challenge the order made by the Chief Magistrate in that case on the basis that the matter was **res-judicata**. That application was heard and determined on the merits and the chief magistrate at court at Meru ruled that the suit of the respondent was not barred by **res-judicata**. The applicant then appealed to the High Court at Nairobi in Civil Appeal number 405 of 1999, which is still pending for hearing.

Furthermore, the respondent successfully applied for orders of inhibition against two parcels of land numbers Kyeni/Kigumo/2885 and 2886 which were granted by the Chief Magistrate in Meru. According to the respondent, the applicant has not appealed against the orders of inhibition and also has not sought to have them reviewed.

Finally, he states that the applicant has refused or failed to prosecute the main suit which is still pending in the Chief Magistrate court at Meru. She has also refused to prosecute Civil Appeal number 405 of 1999 between the applicant as appellant and Mbugo Kabugua together with Mariko Ndwiga Waithaka as the respondents.

Counsel for the respondent has submitted that the procedure of applying through a notice of motion to set aside an order of the subordinate court granted after the hearing of the application on the merits is an abuse of the process of court. According to counsel, the applicant's appeal to the High Court under **Section 65 of the Civil Procedure Act** has not been prosecuted.

The outcome of that pending appeal would determine whether the plea of **res-judicata** is open to applicant or not. Counsel also further submitted that the procedure used by the applicant is an abuse of the court process. It was open to the applicant to move the High Court through the procedure of judicial review under **Order 53 of the 2010 Civil Procedure Rules**.

Finally, he submits that it was also open to the applicant to move the High Court **under Article 165(6) and (7) of the 2010 Constitution** so that the magisterial ruling that the plea of **res judicata** was not open to the applicant could be revised and set aside.

Furthermore, counsel for the respondent has submitted that the ruling issued by the court of the Chief Magistrate which ruled that the action was not covered by **res-judicata** is not illegal. Instead, he states

that the order complained of, was granted to preserve the status quo. He also states that Order 40 applies to injunctions and does not apply to an order of inhibition. According to him, an order of inhibition is lodged against property pending the hearing and determination of the suit.

### **The Applicable Law:**

In the light of the affidavit evidence and the submissions of both counsel, the law that applies to this application is found in **Order 45 of the 2010 Civil Procedure Rules**. It is also found in **Order 53** of the same rules as read with **sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya**.

The provisions of Order 45 of the Civil Procedure Rules were judicially approved in the case **Nakabugo v. The Attorney General of Uganda (1967)EA 60**, which is a Ugandan High Court decision. In that case, it was pointed out to the court that the order which the court was required to review was alleged to be **ultra vires**. That court pointed out that after the order made by the High Court therein was **ultra vires**, the proper procedure was to appeal to the Court of Appeal. The reason given was that a court is not allowed to sit in judgement on its own order and decree. That court went further to state as follows:

***“ It is also doubtful whether the provisions of O. 42, r. 1 were ever intended to deal with a matter where a court had made an order which is ultra vires its power.***

***It seems to me that the provisions of the order aforesaid would apply only where there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time when the order or decree complained of was made;***

***a. or on account of some mistake or error of fact apparent on the face of the record.***

***The application is not brought because of an error apparent on the face of the record. There is no such error. If even there was such an error, the application itself is misconceived for non-compliance with O. 42, r. 8 of the Rules of this Court. The application, not having been brought by motion on notice, is therefore incompetent, and I hold that it is not properly before this court.”***

Furthermore, where a tribunal or a subordinate court is alleged to have acted in excess of its powers, it is open to the aggrieved party to apply for a judicial review order of certiorari to quash the decision complained of. This principle of law was approved in the case **DE Souza v. Tanga Town Council (1961) E.A 377**. In that case, the Court of Appeal granted an order of certiorari to bring up and quash the decision of the finance committee of the respondent council and the decision of the council which had dismissed the appellant. Certiorari was issued on the basis that the rules of natural justice had not been followed by the respondent council in dismissing the appellant.

The court went further to issue an order of mandamus addressed to the chairman and members of the respondent council directing them to hear and determine the complaint against the appellant in accordance with the provisions of the staff regulations and principles of natural justice.

### **Issues for Determination:**

In the light of the affidavit evidence, submissions of both counsel and the applicable law, I find the following to be the issues for determination:

1. Whether or not an order of a subordinate court can be set aside by the High Court through the procedure of a notice of motion expressed as having been brought under **sections 3 Civil Procedure Act and section 80 (1) of the Land Registration Act**.
2. Whether or not this court has jurisdiction to direct the Land Registrar Embu to set aside a restriction entered against the two parcels of land when there is a pending appeal in the High Court.

3. Who should pay for the costs of this suit.

**Evaluation of the Affidavit Evidence, Findings and the Law:**

I have considered the affidavit evidence, the submissions of both counsel and the applicable law. I find that the civil suit namely Meru Chief Magistrate's Civil suit number 642 of 1995 is still pending in that court. It is that court which issued an order of inhibition which was expressed to be in the following terms:

***“UPON READING the Notice of Motion dated 03.06.10 brought to court under Section 63, 3 and 3A Civil Procedure Rules, Order L Rule 1 Civil Procedure Rules and Section 128 Registered Land Act, AND UPON HEARING the submissions of the counsel for both the Applicant and the Respondent, AND UPON consideration of the supporting affidavit and the replying affidavit and the law.***

**IT IS HEREBY ORDERED:**

1. ***That an order of inhibition be and is hereby issued against L.R. NO KIENI/KIGUMO/2885 and KIENI/KIGUMO/2886 being subdivisions of the original L.R. NO KIENI/KIGUMO/396 pending the hearing and determination of this suit.***
2. ***The respondent shall pay the costs of this application”.***

The parties to that suit are the appellant as the second defendant and one Mbuko Kabugua as the first defendant and the respondent as the plaintiff. That suit is awaiting prosecution until it is concluded. Furthermore, the applicant filed an appeal against the above order in Nairobi High Court being civil appeal number 405 of 1999 with the applicant being the appellant and the respondent being Mbuko Kabugua as the first respondent and Marko Ndwiga Waithaka being the second respondent. That appeal too is still pending in the High Court. It is the duty of the applicant herein to prosecute that pending appeal. It is not clear from the affidavit evidence why the applicant has not prosecuted that appeal to conclusion.

Counsel for the applicant submitted that the court of the Chief Magistrate did not have the authority of the law to issue an order of inhibition. In his view, it was an illegal order. The reason he gave was that the dispute between the applicant and the respondent was *res-judicata*, which submission was rejected by the magisterial court. This submission is without merit. First, there is the applicant's appeal which is still pending and the applicant has failed to prosecute it to its conclusion. It is therefore strange for counsel to submit that the magisterial order of inhibition is illegal when its illegality is under challenge in the pending appeal

An order of the court once issued remains lawful until it is set aside or modified by the court which granted that order or by a superior court through the appeals or review process.

According to the case of *Nakabugo v. Attorney general Uganda, supra*, an aggrieved party has an option of challenging an order or decree by way of ***Order 45 of the 2010 Civil Procedure Rules*** through the review procedure. The aggrieved party has a right of appeal against the order or decree that he considers illegal or *ultra vires*. It is not upon the party to declare an order of a court issued upon the hearing of an application on the merit as illegal. If this was the position in law, it could lead to chaos and disorder.

Furthermore, it is also open to the aggrieved party to challenge the illegality of the order through the process of ***Order 53 Judicial Review*** by invoking the supervisory powers of the High Court. This is exactly what happened in the case of *DE Souza v. Tanga Town Council, supra*. In the circumstances of this case, I find that the procedure invoked by the applicant is clearly inapplicable and should not have been used. Instead, the applicant should prosecute the pending appeal expeditiously.

**Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. The applicant's application is hereby refused.
2. Costs are awarded to the respondent with interest at court rates.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this..... **23<sup>rd</sup>** ... day of **FEBRUARY,..2015**

In the presence of Mr P.N. Mugo for the applicant and Ms Muriuki holding brief for Mr Mwenda for the respondent.

Court clerk Mr Muriithi

**J.M. BWONWONGA**

**JUDGE**