



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL NO. 89 OF 2008**  
**JAMES KARIUKI KITHAKA.....APPELLANT/APPLICANT**  
**VERSUS**  
**TERESIA WANGARI WARUI.....RESPONDENT**  
*(Being an Application for Review and/or setting aside of an order*  
*by Hon. Mr. Ocharo D.A. On 8th August 2012)*

**R U L I N G**

This is the application dated 16/5/2014 seeking for the following orders:-

1. That the Honourable court be pleased to order the respondent by herself her agents and/or servants to forthwith vacate Rice Holding No. 2462.
2. That the Honourable court, in th alternative, be pleased to order that the respondent be forthwith evicted from Rice Holding No. 2462 together with her agents and/or her servants.
3. That the court bailiff be authorized by the Honourable court to effect the eviction.
4. That the costs of this application be provided for.

The applicant depones in his affidavit in support and his further affidavit that the respondent gained access of the rice holding No. 2462 on 8/8/2012 through an order of the Deputy Registrar to the effect that the rice holding be attached for five (5) seasons in satisfaction of a debt. The order was later set aside by the judge.

The respondent was required to vacate the rice field in pursuance of the orders of the High Court. The respondent instead continued to occupy the rice holding and despite demand, has refused to leave. The applicant's advocate Magee wa Magee dismisses the respondent's argument that he was given half of the rice holding by the tribunal who ordered sub-division. He argued that the order for sub-division was set aside. The applicant contends that the respondent ought to have vacated the field upon the Deputy Registrar's order being set aside.

The respondent argues that the Deputy Registrar's order of attachment only affected two acres. Upon vacation of the order, the respondent remained with two acres. However, the respondent argues that the application cannot be entertained in this appeal because it has already been determined. He contends that

the application is an abuse of the court process.

It was further argued that the order attached by the applicant for Wanguru Arbitration Case No. 28 of 2002 is not genuine since it does not relate to the plot in question.

The court will first deal with the question of jurisdiction which has been raised by the respondent. The background of this case is that the applicant filed an appeal against the judgment of the magistrate made on 12/8/2008 in Embu CMCC No. 178 of 2008. The appeal was heard and determined. The application before this court seeks for orders of eviction of the respondent from rice holding No. 2426 which premises the applicant alleges is trespassing. The applicant also seeks the involvement of a court bailiff in evicting the respondent.

It is my considered opinion that once the appeal was determined other issues that were not subject of the appeal cannot be dragged into the already determined matter. The issue of ownership of rice holding No. 2462 was not an issue in the appeal. This application was filed on 16/5/2014 long after the appeal was determined. It would be wrong for this court to entertain issues relating to eviction from land or from a rice field out of nowhere.

The applicant ought to have filed a suit in a court of competent jurisdiction for determination of the issues he has raised. Filing this application in this file after the appeal has been determined is an abuse of the court process. The applicant represented by an advocate who ought to have advised him as to how and where he should file his claim. This court is now "*functus officio*" after the appeal and all issues related thereto were determined.

It is my finding that this application is not properly before the court and it is hereby dismissed with costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 9TH DAY OF DECEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ameyo for Respondent**

**Mr. Abubakar for Applicant**

**F. MUCHEMI**

**JUDGE**