



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 137 of 2008

BETWEEN

ALFRED MURITHI IRERI.....APPELLANT/APPLICANT

AND

RUCHA NKONGE1ST RESPONDENT

MUCHEMI RUCHA2ND RESPONDENT

RULING

1. What is before this court is the Appellant's chamber summons application dated 25/05/2009 by which the Applicant seeks **ORDERS:-**
 1. **THAT** due to the nature of the urgency of the instant application the same be heard ex-parte, save for inter-parte hearing.
 2. **THAT** this Honourable Court be pleased to order stay of execution of the decree/orders issued on 14th May 2008, in Chuka Law Courts vide Chuka L.D.T. Case No. 22 of 2006, pending the hearing and final determination of NAIROBI CIVIL APPEAL NO. 137 OF 2008.
 3. **THAT** the Respondents, their agents, assigns and or any person(s) acting through them be restrained by way of court injunction from harvesting ballast on the disputed land parcels LR MUTHAMBI/GATU/447 and 2221, the subject of the appeal, pending the hearing and final determination of NAIROBI CIVIL APPEAL NO. 137 OF 2008.
 4. **THAT** NAIROBI Civil Appeal No. 137 of 2008, be transferred to Meru High Court for hearing and final disposal.
 5. **THAT** the cost of this application be provided for.
2. The application which is brought under Order 41 Rule 4 and Order 39 Rule 1 of the Civil Procedure Rules, Sections 3A and 18(1)(a) of the Civil Procedure Act and all other enabling provisions of the law is premised on the six (6) grounds set out on the face and by the sworn affidavit of the Applicant herein dated 25/05/2009. The Applicant says that unless the order of stay is granted the appeal, which he says has high chances of success shall be rendered nugatory. The Applicant also says that since the subject matter of the appeal lies in the larger old Meru District, it is only fair and just that this appeal be heard and determined by the High Court in Meru. The Applicants appeal is against the decision of the Provincial Lands Appeals Committee Embu delivered on 16/01/2008 in Appeal Case No. 120 of 2006. The Appellant brings his appeal under Section 8(9) of the Land Disputes Tribunal Act, No. 12 of 1990.
3. The Applicant's application is opposed. The Replying Affidavit is sworn by Michemi Rucha and is dated 20/07/2009. The Respondent's main contention is that the Applicant's application is res judicata. Secondly the Respondents say that the Applicant has come to court through the wrong procedure by applying directly to this court on appeal instead of coming to the High Court via Judicial Review Proceedings. On the issue of res judicata, the Respondents contend that it is admitted by the Applicant that he filed a similar application in the lower court, which application was dismissed on the 19/05/2009 and apparently a few days after the said dismissal, the Applicant filed the instant application. The deponent of the Replying Affidavit also says that LR No. MUTHAMBI/GATUA/447 belongs to the 1st Respondent while LR No. MUTHAMBI/GATUA/2221 solely belongs to the Applicant, and that the Respondents have no interest in the Applicant's parcel of land.

4. At the hearing of the application, Mr. Isaboke appeared for the Respondents while the Applicant appeared in person. Mr. Isaboke urged the court to dismiss the application first on grounds of resjudicata and secondly on grounds that the Applicant has come to this court through the wrong door.
5. Is the Applicant's application res judicata? At paragraph 15 of the Applicant's supporting affidavit the Applicant avers thus:-

“That I had filed a similar application in the lower court but was dismissed on the 19th May 2009 (Annexed find a copy of the said order and marked “AM 7”).

A copy of the court order dismissing the application is annexed to the Applicants supporting affidavit and marked “AM7”. The Applicant by his application dated 4/03/2008 sought orders (a) an order for stay of execution of the decree/order issued on 14/05/2009 pending hearing and determination of this appeal and (b) an order of injunction to restrain the Respondents from harvesting ballast in the disputed land pending hearing and final determination of this appeal.

6. For the plea of res judicata to apply, three basic conditions must be satisfied. The party relying on it must show:-
 - (a) *That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.*
 - (b) *The matter in issue in the latter suit must have been directly and substantially in issue in the former suit*
 - (c) *That a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in the former suit (see Willie –vs- Michuki & 2 Others [2004] 2 KLR 357.*
7. In the instant case, an application dated 4/03/2008, similar to the present case, involving the same parties over the same subject property was filed at the Chuka Law Courts. That application was heard by the SRM Chuka Law Courts on 18/03/2008 Mr. P.N. Gesora and a ruling thereto, dismissing the application was delivered on 19/03/2008. I am satisfied that the Respondents have established beyond doubt that this application is res judicata and on that ground alone it must fail. To allow this application would amount to allowing the Applicant to abuse the due process of the court at great expense and inconvenience to the Respondents herein.
8. Secondly, I do not need to belabour the point that the Applicant has also come to the court through the wrong procedure. If the matter was not res judicata, the Applicant should have come to this court by way of Judicial Review in accordance with the applicable rules. The court notes that there is a High Court in Meru and such an application would have been filed at the appropriate time. The law does not allow the Applicant to come directly on appeal to the High Court from a decision of the Provincial Appeals Committee,
9. For the reasons above given, I find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of February, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

In person (absent) for the Appellant/Applicant

Mr. Achila for Isaboke For the 1st Respondent

Mr. Achila for Isaboke For the 2nd Respondent

Weche – court clerk