



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Miscellaneous Application 2 of 2010
JAMES MAINA MUCHAMI.....APPLICANT
VERSUS**

**ELIUD NJUGUNA KIMANI AND NANCY WANJIRU
(Suing as the Administrators of the Estate of the late
CYRUS KIMANI NJUGUNA).....RESPONDENT**

RULING

This ruling is in respect of the Notice of Preliminary Objection dated 4th March 2010 raised by **OCCIDENTAL INSURANCE COMPANY LIMITED**. The Notice sets out the grounds as follows:

1. ***THAT the said Applicant's Misc Application is contrary to the Civil Procedure Act Cap 21 Laws of Kenya and rules.***
2. ***THAT the said Applicant's Misc Application is contrary to Order VII Rule 2 of the civil Procedure Rules.***
3. ***THAT the said Applicant's Misc Application is Res Judicata same issues having been determined in Kigumo CMCC No. 63 of 2005.***
4. ***THAT the said applicant's Misc application is an abuse of the Court process.***

What provoked the filing of the aforesaid notice is the order issued by this court on 16th February 2010 in which James Maina Muchami, the applicant, was granted leave to issue a third party notice upon Occidental Insurance Company Limited. Upon being served with the third party notice, the Insurance Company took out the aforesaid Preliminary Objection.

It is the submission of Mr. Ojienda, learned advocate for Occidental Insurance Company Limited, that the Miscellaneous application is contrary to the provisions of *Order 1 rule 14* which only relates to suits as defined under *Section 2* of the Civil Procedure Act. In miscellaneous applications third party proceedings do not arise hence cannot be entertained. Mr. Ojienda further pointed out that the miscellaneous applications raised similar issues which had been argued before the subordinate court hence the application is *resjudicata*. It is also argued that the application offends the provisions of *Order II* and *VII* of the Civil Procedure Rules. Mr. Mbichile, learned advocate for the Respondents, was in agreement with the submissions of Mr. Ojienda that the miscellaneous application should be ordered struck out. It is said it is too late to bring third party proceedings when judgment has already been entered.

Miss Meenye, learned advocate for the Applicant, was of the view that the Preliminary Objection is a delaying tactic since the third party was required to enter appearance and to answer the questions raised in the third party Notice. It is her humble view that the court had the discretion to grant the orders under *Section 3A* of the Civil Procedure Act.

I have considered the rival submissions tendered by learned counsels. The question which has been ably posed to this court for determination is whether third party proceedings can be entertained after judgment has been pronounced or on appeal. There is no doubt that

the Applicant was granted leave to issue a third party notice on the basis of the Exparte Summons dated 8th December 2009 filed pursuant to the provisions of *Order I rule 14* of the Civil Procedure Rules. It would appear the substantive matter is the Notice of Motion dated 30th November 2009 in which Applicant is basically seeking for an order of temporary stay of execution of the decree dated 10th November 2009 of the Senior Principal Magistrate's Court vide Kigumo S.R.M.C.C.C. No. 63 of 2005. The Applicant does state that it has filed an appeal against the judgment of the subordinate court though he has annexed a copy of the Memorandum of Appeal to the supporting affidavit. In a nutshell the Applicant has not filed an appeal. He has based his application on an intended appeal. I am persuaded by the arguments of Mr. Ojienda that the third party notice was issued based on a miscellaneous application which is not recognized as a suit under *Section 2* of the Civil Procedure Act. This fact is not disputed by Miss Meenye, learned advocate for the Applicant. It is pointed out by Mr. Mbichile that he has now been served with a record of appeal hence the Miscellaneous Application appears to have been overtaken by events. The Provisions of *Order I rule 14* of the Civil Procedure Rules mandates defendants to take out third party proceedings in a suit. It would appear there is no similar provision on appeals so that even if the application was based on an appeal it would not have been issued. It is admitted that there is already a judgment and that an appeal has already been filed. In the end I am convinced that the third party notice was issued without a basis since no suit exists. The proceedings herein do not serve any useful purpose. The Preliminary Objection is upheld. The entire proceedings herein are hereby ordered struck out with costs to the Respondents and Occidental Insurance Company Limited.

Dated and delivered at Nyeri this 7th day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Miss Meenya holding brief Mr. Ojienda for 3rd Party. No appearance Mbichile and no appearance Wachakana.