



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 135 of 2009

MUTHURI ITHINJI RAARIA APPELLANT

VERSUS

KENNETH MWENDA KIMATHI 1ST RESPONDENT

FRANKLIN MUTUMA M'ARIMI 2ND RESPONDENT

PETER MBAYA MARETE 3RD RESPONDENT

RULING

The appellant has filed this appeal against the order of the lower court of 26th November 2009. In this appeal, he has filed a Notice of Motion dated 11th January 2010. The Notice of Motion is brought under Section 128 of the Registered Land Act. By that Notice of Motion, he seeks for the court to issue an order of inhibition restricting dealings on parcel No. *Nkuene/Ukuu/1061* until the appeal is heard and determined. In his affidavit in support of that application, he deponed that he had filed CMCC Meru 430 of 2009 and in that case had also sought for orders of inhibition by an interlocutory application. The application was dismissed by the magistrate court and hence the appeal before this court. In other words, the appeal is against the dismissal of the application for inhibition in respect of the suit property. Before the determination of the appeal, the appellant seeks an order of inhibition to be issued. The application before this court was met by a preliminary objection raised by the respondent dated 17th February 2010. The preliminary objection is in the following terms:-

1. ***That the application dated 11th January 2010 is res judicata the Notice of Motion dated 28th August 2009 filed in Meru CMCC No. 430 of 2009 and which Notice of Motion was dismissed on 26th November 2009, thereby precipitating this appeal.***
2. ***That the Notice of Motion dated 11th January 2010 is an abuse of the court process.***

Counsel for the respondent in support of the preliminary objection stated that to grant the orders sought by the appellant would essentially determine the appeal. The respondent relied on the case **Lucy Wairimu Mwaura Vs. Aswinchand Hirji Shah & Others** Civil Suit No. 1130 of 1996 where the court stated thus:-

“Section 7 of the Civil Procedure Act reads:-

7. **No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”**

It is well settled that res judicata plea applies to application in the same suit.

In my view the present application is clearly res judicata. The application is between the same parties. The relief sought in the earlier application dated 3.8.2005. The earlier application was heard on merits and dismissed.”

In the case **Kamau Tichu Vs. Director of Settlement Ministry of Lands and Housing** HCC Nrb Misc. application No. 347 of 1990, the court considered whether a matter heard summarily can be considered as having been finally delivered. The court in the case quoted above quoted from a book as follows:-

“I have found support in a passage in the Book A.I.R. Commentaries on the Code of Civil Procedure, 6th Ed. (1957) (Vol. 1) by V.V. Chitale and S. Appu Rao at P. 439. It reads “Where the former suit was tried according to the procedure then in force, the mere fact that such procedure was summary does not affect the finality of the decision.”

The appellant in response to the argument by the respondent stated that the application should be looked at as an analogy of stay application which on being refused by the lower court can be entertained by the High Court in an appeal file. I wish to be dissuade the appellant’s counsel in that line of argument. Order XLI Rule 4(1) clearly gives power to the court appealed to, to grant stay of execution whether or not the application had been entertained by the lower court. Order XLI does not give the same power to the court to entertain interim applications for inhibition such as the one before court. More particularly, the court would not have the power to entertain an application whose end result would determine the appeal. The application seeking the very same orders which were dismissed by the lower court and which are the subject of this appeal is in my view incompetent. I find that the preliminary objection was well taken and does succeed. The Notice of Motion dated 11th January 2010 is dismissed with costs to the respondent. The order of inhibition issued by this court over parcel no. *Nkuene/Ukuu/1061* is hereby vacated.

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

**MARY KASANGO
JUDGE**