

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 111 of 1995

ISAAC NDUNGU MUCHEMI.....APPELLANT

VERSUS

MARULA ESTATES LTD.....DEFENDANT

RULING

By his notice of motion dated 21st July 2008, Isaack Ndungu Muchemi, the appellant herein seeks under Order 44 Rule 1 of the Civil Procedure Rules as well as Sections 3A and 63(e) of the Civil Procedure Rules a review of both Justice Kimaru's ruling delivered in this appeal on 30th May 2007 dismissing his application for injunction and the Deputy Registrar's dated 21st August 2007 on taxation.

The application is based on the ground that the two rulings were given without proper disclosure of all material facts. The non disclosure relates to the judgment of M. A. Odero, Chief Magistrate (as she then was) that she delivered on 17th April 2008 in Milimani Commercial Court CMCC No.8067 of 1996.

As the appellant is acting in person, some things are not quite clear from his application. I have therefore been forced to read the entire record in this appeal, and to put the matter in perspective I need to relate briefly its history.

Until 8th May 1999, the appellant was an employee of the Teachers Service Commission (TSC) posted to Marula Primary School in Naivasha. In December 1988 he was suspended for allegedly refusing to go on transfer. It could appear TSC took long to deal with his case and eventually dismissed him on 8th May 1999.

On or about 27th June 1994 Marula Estates Ltd filed Naivasha SRMCC No.116 of 1994 and sought his eviction from its pieces of land known as L.R. Nos. 421/1, 11313 and 11367 where it is alleged he had put up a mud structure and was conducting business therefrom. After hearing the case the Senior Resident Magistrate at Naivasha ordered his eviction provoking this appeal.

The appeal came up for hearing before the retired Justice Rimita on 6th June 2001. The appellant's counsel applied for adjournment and when it was refused he walked out. Justice Rimita thereupon dismissed the appeal remarking that it was in any case unmeritorious. On 26th May 2003 the Hon. Justice Visram dismissed the appellant's application for leave to appeal out of time. On 6th December 2005 the appellant returned to court with an application for injunction to restrain the respondent from demolishing his semi-permanent shop. Justice Kimaru heard the application and dismissed it on the ground that the Appellant's appeal having been dismissed there was no basis for granting an injunction. After that ruling the Deputy Registrar taxed the respondent's bill of costs. The indefatigable appellant has now returned to court seeking a review of Justice Kimaru's said ruling and the subsequent order on taxation.

In his supplementary affidavit in support of that application, the appellant has annexed a copy of the judgment in the said Milimani Commercial Court's CMCC No. 8067 of 1996. That was a case by the appellant against TSC for damages for unlawful dismissal. On failure by TSC to appear in court on the hearing date, the court granted the appellant's plea and awarded him general damages of Kshs.100,000/- and arrears of salary of Kshs.158,720/- making a total of Kshs.258,720/-.

If I understood the appellant well during his submissions before me his contention is that the said judgment vindicated him as having been a teacher at Marula Primary School and therefore not a trespasser as the Naivasha court found. So he wants Justice Kimaru's ruling dismissing his application for injunction reviewed so that he can remain on the respondent's said pieces of land.

That is a prayer I cannot grant for three reasons. One, as Justice Kimaru rightly ruled the appellant's appeal having been

dismissed there was no basis for granting the appellant the temporary injunction he sought. Two, even if there was a basis the judgment in Milimani Court awarding him damages for unlawful dismissal is no certificate for him to return to the respondent's land. When the appellant was suspended in December 1988 and ceased teaching at Marula Primary School, if he was housed in that school, he was supposed to vacate. There is nothing in the record to show that the respondent gave him consent to construct a mud structure and/or carry on business thereon. The Naivasha court was therefore perfectly entitled to order the eviction of the appellant from the respondent's said pieces of land. Thirdly, no sufficient ground has been given for the review of Justice Kimaru's said ruling or that of the Deputy Registrar on taxation.

For these reasons I find absolutely no merit in this application and I therefore dismiss it with costs to the respondent.

DATED and delivered this 22nd day of October, 2009.

D. K. MARAGA

JUDGE.