**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 897 of 2007**

**PETER NGANGA MWAURA ……APPLICANT**

**V E R S U S**

**ALFRED MBUGUA NGUGI …… RESPONDENT**

**R U L I N G**

There are two applications here which ought to have been brought as a single application with appropriate separate prayers. They are both by notices of motion dated 23rd November, 2007, and are supported by one single affidavit sworn by the Applicant on the same date.

The first application seeks leave to appeal out of time against the decree of the lower court passed on 23rd March, 2004 and all subsequent orders in **Milimani CMCC No. 7128 of 1999**. By that decree, the lower court found the Respondent (who was the plaintiff) to have an indefeasible title to the suit land and declared the Applicant (who was the defendant) to be a trespasser in the land. The court gave the Respondent judgment for vacant possession and permanent injunction. The court also dismissed the Applicant's counterclaim for adverse possession. There were subsequent orders for the eviction of the Applicant from the suit land. The second application seeks stay of execution of the decree pending disposal of the intended appeal.

The Respondent has opposed the application as set out in the replying affidavit sworn by his counsel and filed on 4th December, 2007. The main ground of opposition emerging from the replying affidavit is that the Applicant, having chosen to challenge the decree of the lower court by way of judicial review, and the judicial review application having been dismissed on merit, the Applicant cannot, as it were, have a second bite at the cherry by way of appeal.

The Applicant filed a further affidavit in response to the replying affidavit. He asserted his right to appeal against the decree of the lower court, notwithstanding the judicial review challenge to the same.

I have considered the submissions of the learned counsels appearing, including the one case cited. The case, **GEORGE CHEGE KAMAU -vs- ESTHER WANJIRA KAMAU, Court of Appeal, Civil Application No. NAI 6 of 2006,** is a decision of a single judge of appeal dealing with an application under rule 4 of the **Court of Appeal Rules** for an order to extend the time within which to file and serve notice and record of appeal under those rules. The decision has no direct relevance to the matter at hand. I have also read the supporting and opposing affidavits, and have perused the many documents exhibited in those affidavits.

The suit in the lower court was tried *inter partes* and a judgment rendered. The Applicant did not appeal. Instead he challenged the judgment by way of judicial review. This was vide **Nairobi HC Misc. Civil Application No. 1375 of 2005** in which he sought an order of *certiorari* to quash the judgment, and also an order of *prohibition* to prohibit the lower court from hearing and entertaining any further proceedings in the case.

The grounds for the judicial review application were, in effect:-

1. That the judgment of the lower court was in conflict with a previous judgment between the same parties over the same subject-matter in **Thika CM LDT Case No. 52 of 2000** entered upon an award of the **Ruiru Land Disputes Tribunal.**

2. That the challenged judgment was thus a nullity.

The judicial review application was heard *inter partes,* and a judgment delivered on 2nd February, 2007. The application was dismissed. In that judgment the court (Wendo, J) made a number of findings, including:-

1. That the lower court case (**Milimani CMCC No. 7128 of 1999**) in which the impugned judgment was delivered was filed before the case before the Ruiru Land Disputes Tribunal that resulted in the adoptive judgment in **Thika CM LDT Case No. 52 of 2000**.

2. That the dispute placed before the **Ruiru Land Disputes Tribunal** involved title to land, and the tribunal therefore lacked jurisdiction under the law to hear and determine the dispute. The resulting award, which was adopted by the Thika court, was thus a nullity.

3. That in any case, the dispute before the **Ruiru Land Disputes Tribunal** was never brought to the attention of the lower court in **Milimani CMCC No. 7128 of 1999**. It was not pleaded nor referred to during trial. This was deliberate concealment in furtherance of a mischief intended to defeat **Milimani CMCC No. 7128 of 1999.**

4. The lower court had jurisdiction under the law to hear and determine the suit before it. The resulting judgment in **Milimani CMCC No. 7128 of 1999** was therefore good and was never challenged in appeal.

The Applicant, being dissatisfied with the judicial review judgment, duly lodged notice of appeal. But he abandoned the intended appeal to the Court of Appeal. The issue now is, should he be permitted to appeal against the decree of the lower court passed on 23rd March, 2004, and which he has already had a go at, albeit unsuccessfully, by way of judicial review?

The Applicant made a conscious decision to challenge the judgment of the lower court by way of judicial review rather than by way of appeal. Either of the two paths was open to him, but not both in the circumstances of this case. He chose one. The only reason he now wants to appeal is because he lost in the judicial review. Put another way, would the Applicant seek to appeal if he had succeeded in the judicial review? I doubt it! He is clearly seeking, as they say, to have a second bite at the cherry. This would amount to a travesty of our system of justice.

If he were to appeal, many of the issues already decided in the judicial review would necessarily be reopened and canvassed afresh. Possibly conflicting decisions thereon may be made. Apart from anything else, this is a state of affairs that should not be permitted. It would create confusion and bring our judicial system into disrepute.

Having made his bed the way he did, the Applicant must now lie in it! Under the proviso to section 79G of the Civil Procedure Act, Cap. 21, the court has power to admit an appeal out of time. But to benefit from that power, the Applicant must satisfy the court that he was prevented by a good and sufficient cause from appealing within time. The fact that the Applicant first decided to challenge the judgment of the lower court by way of judicial review cannot constitute such good and sufficient cause, especially in view

of the fact that the judicial review application was fully canvassed *inter partes* and a considered judgment rendered.

For the above reasons the application for leave to appeal out of time is without merit; I must refuse it. Having so found, I need not consider the application for stay of execution; an order for stay would serve no purpose as there will be no appeal.

In the event, both applications are hereby dismissed with costs to the Respondent. It is so ordered.

**DATED AT NAIROBI THIS 24TH DAY OF JULY, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 25TH DAY OF JULY, 2008**