REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 3 of 199

ISAIAH KABERIA…….....
…….APPELLANT

VERSUS

MEME M'IKANATHA…….…….....……..……..1ST RESPONDENT

M'ITHUBUTU M'IKIRIMA…….....……2ND RESPONDENT

MBATURI M'INKANATHA (suing as the legal representative

Of the estate of M'INKANATHA M'IKIRIMA…….....…..3RD RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The preliminary Objection dated 12.3.2007 is worded thus:

(a) "The Appeal herein having been concluded way back on the 15th day of December 1998, this court became Functus Officio and there are no pending proceedings that the Applicant/Interested Party can seek to be enjoined to ventilate. (*sic)*

(b) The alleged Interested Party/Applicant having not been a party to the Appeal herein, prayer 2 seeking leave to allow the firm of M/S Meenye & Kirima Advocates to act for him is completely misconceived and an affront to the clear provisions of O.IIIR.9A of the Civil Procedure Rules.

(c) The Chamber Summons is otherwise an abuse of the Court Process and should be struck out with costs".

2. The Application under attack on the other hand is a Chamber Summons dated 30.1.2007 and seeks the following orders;.

(a) "The service of this Application be dispensed with at the first instance.

(b) The firm of M/s Meenye & Kirima Advocates be allowed to get into this matter on behalf of the interested party.

(c) The Honourable Court be pleased to allow the Applicant be joined in this suit as an interested party since the land parcel No. Nyambene/Antubetwe/1614 which has been transferred to the Appellant belongs to the deceased M'INKANATHA M'IKIRIMA.

(d) The costs be provided by the Appellant."

3. I allowed prayer (ii) of that Application so that the Applicant would not be shut out and to ventilate prayer No. (iii) as above. Having so done however, I now note that there is every reasons to allow the Preliminary Objection and strike out the Application. I say so because the Appeal herein has been heard and determined. The determination was to the effect that the Appeal was dismissed with costs on 15.11.1998. Therefore nothing substantive in terms of the Appeal is left to be determined. An appeal that has been dismissed cannot be the basis for a party like the present Applicant to say that he needs to be enjoined as an interested party because first there are no parties who can enforce any rights and therefore no interest can be added nor is there any anything that this court can do!.

4. I quite understand the Applicant's predicament and as I advised him and his counsel that there is more than one way known to law through which his grievance can best be addressed. I reiterate that the manner he has come to court is not only unknown to our legal procedure but wholly unreasonable and cannot be sustained.

5. I have also seen the record in this file and I cannot understand why the Respondents are using the Appeal file to execute a decree arising from the subordinate court. It is strange to me that after the Appeal has been dismissed, the Appeal file is used to execute a decree which properly ought to be executed in the lower court. I may be wrong in my conclusion but that is the way I see it. I also deliberately raised this issue because it is the reason why the Applicant similarly wants to jump into the fray and seek to enter a dead Appeal; and as an interested party to it. Two wrongs cannot make a right and misconduct on the part of the Respondents cannot clothe the Applicant with legality.

6. In any event and lest I stray further, the preliminary objection is upheld and the Application dated 30.1.2007 is stuck out with no order as to costs as costs will only raise further acrimony in the matter.

Dated signed and delivered this 25th day of April 2007

Isaac Lenaola

Judge