



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Civ Appli. 191 of 2005

RACHAEL MUMBI MWANGI APPLICANT

VERSUS

**THE MANAGING DIRECTOR APPEX SECURITY SERVICES 1ST
RESPONDENT**

**THE PERMANT SECRETARY MINISTRY OF LANDS & HOUSING .. 2ND
RESPONDENT**

MR. NZIOKA 3RD RESPONDENT

RULING

When the application dated 9th March 2005 came before me for hearing on 21st February 2006 the Respondents raised and argued preliminary objections. The application seeks committal orders against the three Respondents. The objections are in writing. At the hearing, the Court drew the Respondent Advocates to the contentious nature of the Preliminary objection dated 13th January 2006 filed on behalf of the 1st and 3rd respondents. It raises factual matters which have not been agreed. On the other hand the second Respondent abandoned objection 2 of the written objection dated 20/2/2006. The objection finally argued was framed as follows:

“This application is incompetent and fatally defective as it is res judicata”

Although the application before me relates to the suit premises MG 774B Kileleshwa and the application bears HCM C 191/2005, there are several other suits or applications filed as follows:

1. ***R v The Attorney General ex parte Rachael Mumbi Mwangi HCM C 18/2002.*** In this application there is a Ruling by Hon Mr Justice Waki as he then was dated 2nd May 2003 and an extracted order of the same date.

There is also an application dated 3rd June 2003 seeking stay of execution of Hon Mr Justice Waki’s order.

In addition there is an order by Mr Justice Kuloba (RTD) dated 16th June, 2003 extending Justice Waki’s order for 30 days. Subsequent to the above order there is an order given by Hon Mr Justice Kihara Kariuki on 8th July 2004 ordering the status quo until the next hearing date.

On 1st February 2005 I gave an ex parte order for leave and stay and it is this order which forms the

subject matter of the application for committal described above.

On 2nd February 2005 an application to set aside my order of 1st February 2005 was filed by the second respondent is still pending

2. There is also a related application dated 17th February 2005 by way of a Notice of Motion seeking orders of certiorari and prohibition in respect of the same suit property MG 774B Kileleshwa. This application is also pending.

I have carefully considered the preliminary objection raised. Concerning the place of res judicata in Judicial review, I would for consistency's sake like to reiterate my observations in the case of **R v Minister for Health Hon. Charity Ngilm uex parte COTU Misc Civil Application No 1613 of 2003** which I gave last month. On the special facts of the matter before me issue estoppel or res judicata by record would require the party raising it as a preliminary point to demonstrate that the issues upon which a final determination has been given are not in dispute. However it is clear from the applications above that this is not the case.

I have set out the applications filed according to the files availed to me. The litany of the applications is indicative of the considerable confusion surrounding the matter and also that parties are not entirely in agreement concerning the actual factual situation. On this ground I do not on the principle of MUKISA BISQUITS CASE consider the point raised as capable of finally determining the matter. Each and every application has to be heard on merit and a determination given by the court.

Furthermore it is trite law that orders given by the court must be obeyed by the targeted party or parties and that in the event that they are not valid, it is incumbent on the targeted party or parties to obey all the same and immediately move the court to set aside the challenged order. Instead of bringing a preliminary objection which as stated above is not capable of disposing of the matter finally it was open to the objector to apply to set aside the challenged order. They have done so, and as observed above the application is still pending. It is the view of this court that the points raised in the Preliminary objection described above can be raised in the application to set aside. Finally a party who has not obeyed a court order has an immediate problem of audience before the court because he has an obligation to purge the contempt before seeking audience on anything else.

For the above reasons the preliminary objection is dismissed with costs to the applicant.

DATED and delivered at Nairobi this 17th day of March 2006.

J G NYAMU

JUDGE