



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Appeal 111 of 1995**

**ISAAC NDUNGU MUCHEMI.....APPELLANT**

**VERSUS**

**MARULA ESTATES LIMITED.....RESPONDENT**

**RULING**

The applicant, Isaac Ndungu Muchemi, acting in person, has filed an application under the provisions of **order XXXIX rule 1** of the **Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking to have the respondent restrained by means of an injunction from demolishing the applicants business premises, being a shop built on a semi permanent building set aside or adjacent or curved off the parcel of land owned by Marula Estate Limited. The application is supported by the annexed affidavit of the plaintiff and the grounds stated on the face of the application. The application is opposed. The respondent has filed grounds of opposition to the said application.

At the hearing of the application, I heard the applicant and Mr Kagucia learned counsel for the respondent. The issue which came to the fore for determination by this court is whether there existed a suit which could enable the applicant to file an application for injunction. I have perused the file herein and read the proceedings of the court. The appellant herein filed an appeal against the decision of the lower court which had ruled in favour of the respondent and ordered the applicant to vacate parcels number LR. 421/1, 11313 and 11367 (Marula Estate) or else he be evicted by the respondent. The appeal was heard and dismissed by Rimita J. on the 6<sup>th</sup> of June 2001. The appeal was dismissed after the counsel of the applicant herein walked out of the court when his application for adjournment was refused. The applicant made an application on the 26<sup>th</sup> of June 2003 to be allowed to appeal out of time. The application was however dismissed by the Visram J. who ruled that the appeal had been heard and determined.

Now the applicant is again seeking to re-open issues which were closed sometime ago when the appeal was dismissed. In any event, an application for injunction under the provisions of **Order XXXIX of the Civil Procedure Rules** cannot be made in an appeal. It can only be made where a suit has been filed either by way of plaint or by a procedure allowed by the rules. This case being an appeal, this court lacks jurisdiction to issue an injunction. Furthermore an injunction cannot be issued in the absence of an existing suit. In this case there is no pending suit. The appeal was dismissed in 2001 and therefore no application can be made in a suit which had already been heard and determined.

The application therefore is misconceived and is otherwise an abuse of the due process of the court. This court is *functus officio*. The application dated the 6<sup>th</sup> of December 2005 is hereby dismissed with costs.

**DATED at NAKURU this 8<sup>th</sup> day of March 2006.**

**L. KIMARU**

**JUDGE**