



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil appeal 13 of 2006**

**FREDRICK M'ITHINJI MWAMBA.....APPELLANT**

**V E R S U S**

**THE CLERK COUNTY COUNCIL OF MERU.....1<sup>ST</sup> RESPONDENT**

**PAUL RUKARIA.....2<sup>ND</sup> RESPONDENT**

**JULIUS MWITI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant Fredrick M'Ithinji Mwamba by his Application dated 22.2.2006 seeks orders as follows:-

(a) .....

(b) That the court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> respondent herein from re-allocating PLOT NO.916 NKUBU MARKET to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or 3<sup>rd</sup> parties; AND orders of temporary injunction restraining the respondents or their agents from further constructing any permanent structures and or developing in any way plot No. 916 NKUBU MARKET until the suit in lower court is heard and determined.

(c) That costs be in the cause.

The Application which is brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules seeks those orders on the following grounds:-

(a) Plot Nos. 916 and 33Nkubu Market were amalgamated by Min No. 3/72C 100 and they belong to the appellant/applicant.

(b) That unless the orders of injunction are issued, the subject matter would be extinct before the primary suit is heard and determined.

2. In his supporting Affidavit sworn on 22.2.2006 and in submissions by his counsel, it is the Applicant's contention that he is the owner of Plot No. 916 Nkubu Market as well as another plot No 33 and that in 1972 he applied to the council for amalgamation of the two plots as they were adjacent to one

another. The proposal was approved by the County Council of Meru vide minute No. 3/72/(c) (100). He then developed the adjoining plots and built rental houses thereon. It is his contention that the 1<sup>st</sup> Respondent then demolished his buildings in the year 2004 and he stored the building stones from the demolished buildings on the part that was plot No. 916 but on 9.1.2006 the Respondents jointly removed the stones and deposited them on a road reserve. He filed a suit in the lower court and sought an injunction in the interim which was denied by the lower court in CMCC No. 21/2006 and which triggered the Appeal herein. It is his case that an injunction should issue in terms set out in the Application.

3. There is a response to the Application in the form of a Replying Affidavit sworn by the 3<sup>rd</sup> Respondent on behalf of himself “and the other Respondents save the 4<sup>th</sup> Respondents who is not alive” He depones, and his advocate reiterated the same matters in submissions, that he and the 2<sup>nd</sup> Respondent are the owners of plot No. 32 Nkubu Market and which neighbours plot No.33 Nkubu Market owned by the Applicant. That the Applicant had built some structures on a road reserve and the same were demolished and the stones deposited behind plot No.32. That the deposits soon turned into a dumping ground and the 1<sup>st</sup> Respondent issued notice for health reasons that the same should be removed. The Applicant agreed to their removal to a road reserve but changed his mind and reported the matter to the police and later came to court. He and counsel urge that the Applicant is a vexatious litigant and the Application should be dismissed.

4. I should note from the outset that the substantive matter before this court is an Appeal from a Ruling made in CMCC 21/2006. (Meru) Neither the pleadings in that suit nor that Ruling have been brought before this court. I gather however from the Memorandum of Appeal filed on 23.2.2006 that it arises from the refusal by the learned Chief Magistrate, J.R. Karanja Esq. to grant an interlocutory injunction in the terms now set out in this application. I also note that the orders sought in this Application are those of an interlocutory injunction under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules “until the suit in the lower court case is heard and determined.” Even without going to the argument for or against grant of those orders that were refused by the lower court the Applicant is seeking orders not “pending hearing and determination of the Appeal” but “until the suit in the lower court case is heard and determined.” If I was to grant those orders, what would be left to be heard on Appeal? It means I would have effectively allowed the Appeal before it is heard and on an interlocutory Application and parties would then happily proceed back to the lower court and have that case heard and determined with the Applicant safely secured by the Order of an injunction within a spent Appeal!

5. A court of equity and discretion cannot act to give a party who does not come to it with clarity and good faith, orders that are advantageous and favourable to it.

6. I cannot allow the Applicant to approach this court by way of an application which would render the Appeal nugatory.,

7. The application for these reasons is either misguided and not well thought of, or mischievous and made with intent to mislead the court. I prefer to think of the former and not the latter. It does not matter in any event, as it cannot be granted in the way that it is worded and framed.

8. I see no reason to return to the depositions and arguments on both sides. The Application dated 22.3.2006 is hereby dismissed with costs to the Respondents.

9. Orders accordingly.

Dated, signed and delivered in open court at Meru this 3rd day of May 2006

**ISAAC LENAOLA**

**JUDGE**