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

**HIGH COURT CIVIL MISC. 106 OF 2003**

**JOSEPH KIOKO KIUME :::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**MAKUENI COUNTY COUNCIL :::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**RULING**

The Notice of Motion dated 19/3/04 is brought by one Menze Kasimu who is the interested party (I.P) in this miscellaneous application. He seeks two orders, that the court's order of 15/10/03 wherein the applicant's application for leave to file judicial review application and a stay order issued be set aside and that the application dated 31/10/03 be struck out or be dismissed. The application was brought under Order 53 Rule 1 (4) Civil Procedure Rule and Section 3 A Civil Procedure Act.

The grounds upon which this application is made are that the matters raised in this application and which are pending for hearing were determined before Senior Principal magistrate's Court in Civil Case No. 162/99 and that these proceedings contravene Section 7 of Civil Procedure Act and hence an abuse of Court process and lastly that the only option available to the applicant/Respondent was to file an appeal against the judgement in SPMCCC 162/99. This application is supported by the affidavit of the applicant/Interested Party, Menze Kasimu.

A brief background of this case is that the present applicant/Respondent filed a case SPMCC 162/99. The defendants are one Councilor Mutisya Kituva and the present applicant/Respondent /Interested party Menze Kasimu. In that case the applicant/Respondent (plaintiff) claimed that his father one Kioko Mutyandia had been allotted by the then local authority in charge of Machakos and Makueni Plot No. 11 at Nunguni market Kilungu location which is currently Makueni district. The plot measured 22' x 100'. He averred that the council then agreed to extend the said plot to measure 40' x 1000 and was registered in the name of the plaintiff who bought it from his father. That the letter of allotment indicated that he was allotted only 30' x 100' and yet he continued to pay rates and rents for an area of 40' x 100'. He claimed that the 1st defendant had without authority appropriated the undeveloped part of the plot and sold it to 2nd defendant- now the applicant /interested party and that on 17/3/99 the 2nd defendant /interested party had purported to occupy the said plot which is part of plot No. 11 measuring 40' x 100'. Applicant/Respondent therefore moved to the court for orders of general damages for trespass to his property; a permanent injunction restraining the defendants by themselves or agents from trespassing into the plaintiff's plot No. 11 Nunguni market. After hearing the evidence of both plaintiff and defendants, the court delivered its judgment on 22/8/02. The court found that there was not sufficient evidence to show that the plot No. 11 Nunguni market had been extended from size 22' x 100' to 40' x 100. During the hearing it had been established that the plot that the plaintiff claimed was extended and added to his and which Menze Kasimu claimed to have been allotted to him was plot No. 125 Nunguni market and the court found that the said defendant Menze Kasimu had no proof that it was allotted to him. The court

concluded that that plot in dispute, No. 125 did not belong to either of the parties and is ‘ up for grabs’ to quote the magistrate. The suit was, therefore, dismissed with costs to the defendants. It is note worthy that the plaintiff did not appeal against the orders of that court. The orders stand to date.

The applicant/interested party and 1st Respondent contend that the issues that were dealt within in SPMCC 162/99 are similar to those in the application for Judicial Review dated 15/7/03. The prayers are as follows:

1. That the applicant be granted leave to apply for an order of mandamus directed to the Makueni County Council compelling it to honour, respect and abide by the decision of its predecessor Masaku County Council, extending the size of applicants plot No. 11 Nunguni market vide Minute TPMH 28/76 of 16/7/1976 from 22 x 100 ft to 40 x 100 ft.

2. That the applicant be granted leave to apply for an order of prohibition directed at the Makueni County Council prohibiting it from allocating the open space between plot 11 and 12 Nunguni market to the interested party Menze Kasimu or any other interested party.

The 3rd prayer which is now challenged is that of stay which was granted ex parte upon the grant of leave to apply for Judicial Review.

The application to set aside the orders of 15/10/03 was brought pursuant to order 53 R 1 (4) Civil Procedure Rules. The applicant/Respondent swore an affidavit in opposition to the application and another by Mr Kavila counsel for the applicant/Respondent. One of the issues raised by the Respondent is that an application to set aside cannot be brought under Order 53 Civil Procedure Rules. The Court of Appeal in the case of ***COMMISSIONER OF LANDS Versus KUNSTE HOTEL LTD*** Civil Appeal 234/95 in considering whether Section 13 ‘A’ of the Government Lands Act could be applied in proceedings Under Order 53 Civil Procedure Rules, had this to say:

“ ***So Section 8 (1) of the Law Reform Act denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Criminal or C ivil jurisdiction. What that then means is that not withstanding the wording of Section 13 A above, which talks of proceedings in exercising the power to issue or not to issue an order of certiorari, the court is neither exercising Civil nor Criminal juri sdiction. It would be exercising special jurisdiction which is outside the ambit of Section 13 A of Government Proceedings Act.”***

In support of their argument that the application is properly before this court, the applicants counsel relied on the case of ***Republic Versus Communication Commission*** of Kenya Civil Appeal 175/00. In seeking to strike out proceedings instituted under Order 53 of the Rules, the Court of Appeal held that:

***“It cannot be denied that leave should be granted on the material available . The court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of t he court to the judge who granted leave to set aside, such leave”***

The court of appeal then concluded that they were in doubt whether provisions of Order 6 Rule (3) (1) Civil Procedure Rules were applicable to proceedings under Order 53 of the Rules. In the same case Court of Appeal observed that Order 50 Civil Procedure Rule was also not applicable to the proceedings instituted under Order 53 Civil Procedure Rules. The upshot is that the application as filed is properly before the court as it was brought under Order 53 Civil Procedure Rules and Section 3 A Civil Procedure Act.

The applicants contend that the ex parte applicant’s application is Res Judicata. The question is whether the doctrine of Res Judicata would apply in this case. As pointed out above, in proceedings under Order 53 Civil Procedure Rules, the court is neither exercising Civil nor Criminal jurisdiction and provisions of the Civil Procedure Act are, therefore, not applicable.

Section 7 Civil Procedure Act provides as follows:-

***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between persons under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been heard and finally decided by such court."***

The doctrine of Res Judicata does not apply in Judicial Review proceedings. It means that if an applicant files proceedings of Judicial Review and the court does not grant the prayers the applicant can still go to the other courts for redress and the doctrine of Res Judicata would not apply. The question is whether Res Judicata applies in the present situation because the 1st decision made was by a Civil Court regarding the land in dispute.

In the ex parte applicant's prayer, he seeks an order of mandamus directed at Makueni County Council compelling it to honour the decision of its predecessor Masaku County Council to extend his plot No. 11 Nunguni market from size 22' x 100 ft to 40' x 100 ft. It is my view that the issue of whether or not the plaintiff's plot was extended from 22' x 100ft to 40' x 100ft was resolved in SPMCC 162/99 where after hearing witnesses, the court made a determination on that issue in its judgment. The magistrate found that because of the contradictory evidence adduced by the plaintiff (the ex parte applicant) in that case, it was not proved that the plot was ever extended from 22' x 100 ft to 40' x 100 ft as alleged. The ex parte applicant never appealed against that decision of the lower court.

The 2nd prayer by the ex parte applicant seeks to prohibit the 1st Respondent from allocating the disputed plot which was found to have been given number 125 and lies between plots No. 11 and 12. The court in SPMCC 162/99 also considered this issue and made a determination that the applicant/Interested party who brings this application to set aside leave and stay was not allotted the said plot No. 125 Nunguni market and that the said plot does not belong to the ex parte applicant nor does it belong to the Interested Party/applicant – Menze. It, therefore, means that the 1st Respondent – Makueni County Council can do with the plot whatever it pleases. They can allocate the plot to whoever they wish and the 1st Respondent can not be prohibited from dealing with its property as it wishes. The court, therefore determined the issue dispute regarding plot No. 125. As noted above there was no appeal against that finding by the court.

It was the ex parte applicants contention that the matter cannot be Res Judicata because Masaku County Council were not party to the suit SPMCC 162/99. It is true they were not party. However, I do note that the 1st defendant in that case (162/99) was a councilor who was responsible for allocating plots. Two officers from the council gave evidence for the 1st defendant regarding the disputed plots No. 11 and 125 as to the size and ownership. It is my view that 1st defendant in SPMCC 162/99 was really a representative of Masaku County Council. Evidence was adduced to show the Council's stand in the matter and it is my view that the parties in SPMCC 162/99 and the present proceedings are basically the same and issues are the same. Res Judicata would ordinarily apply to a Civil Suit like SPMCC 162/99 if it has been heard and determined. After the lower court's decision the most normal cause of action to take if dissatisfied with the court's decision was to appeal or seek review as the circumstances dictated. The court in SPMCC 162/99 made specific findings regarding the two plots 11 and 125 after hearing evidence of witnesses. In Judicial Review proceedings the court relies on affidavit evidence and documents. Judicial Review would not be an appropriate remedy in the present circumstances.

In my considered view, I do find that Res Judicata does apply to court proceedings like the ones before the lower court in SPMCC 162/99 and that court having determined these issues and the ex parte applicant having failed to challenge the said decision on appeal, the matter is Res Judicata. It seems that the applicant only came to the court because he was time barred to appeal, judgment in SPMCC 162/99 having been delivered on 22/8/02.

The next question is whether the court can set aside the order granting leave to bring application for Judicial Review and strike out the whole application for Judicial Review. The Respondent's counsel Mr Kavila referred the court to the case of ***Miscelleneous Civil Application 198/04 Republic Versus Hon. Maitha*** in which the Judge considered whether indeed the court can set aside an order for leave and stay.

In his judgment the Judge considered the following cases:

***REPUBLIC Versus SECRETARY OF STATE FOR THE HOME DEPARTMENT exparte BEGUM 1989/Adm. LR 140; REPUBLIC Versus ENVIRONMENT AGENCY exparte LEARN 1998 EMU LR Digest and AGAKHAN EDUCATION SERVICE KENYA Versus REPUBLIC ex parte ALI SEIF C.A 257/03*** where it was held as follows:

***"We would caution p ractitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear -cut cases. Unless it be contended that Judges of the Superior Cou rt granted leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of Certiorari is being sought and it is clear that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success. We would ourselves discourage practitioners from entirely following the grant of leave with application to set leave aside. Fortunately, such applications are rare an d like the Judges, in the U.K we would also point out that the mere fact an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."***

The bottom line in all the cases cited above is that the orders to set aside leave are granted sparingly.

In the present case the matter before court is Res Judicata. It is a clear cut case that the court cannot have jurisdiction to reconsider the issues since they are already determined in another case against which there has been no appeal and this really amounts to an abuse of court process. Despite the fact that such orders to set aside are given sparingly this court will not hesitate to grant the said prayer to set aside the said orders of leave and stay and order striking out of the application dated 30/10/03. The upshot is that the application dated 19/3/04 is allowed with costs to the applicant/Interested party and 1st Respondent.

Dated, read and delivered at Machakos this 28th day of October 2004.

Read and delivered in the

Presence of

**R.V. WENDOH**

***JUDGE***