

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 263 OF 2001

MUCHIRI MUHUNYOPLAINTIFF

VERSUS

MWANGI MUHUNYODEFENDANT

R U L I N G

When the application dated 21st December, 2001 came up for hearing on 22nd February 2002 counsel for the respondent raised a preliminary objection which he argued as follows:-

That a similar application was dismissed by Judge Kuloba on 23rd November 2000. That an attempt to set aside the dismissal was also dismissed on 7th December, 2001 for lack of merit.

That the application before the court was an abuse of the court process and that it should be dismissed with costs.

Counsel for the applicant on the other hand argued that the application dismissed on 23rd November 2001 was because of non-attendance and that the application dismissed on 7th December, 2001 was because of lack of merit.

That none of the application had been heard and determined on merit.

That this was an application for stay of execution and that the applicant is not banned from coming back to the court particularly that the appeal is still pending with high chances of success.

That the preliminary objector can be compensated in costs.

I have heard the arguments from both counsel for the parties.

The application dismissed on 23rd November 2001 was for stay of execution. It was dismissed for non-attendance.

An attempt to set aside that dismissal order was also dismissed because it had no merit. This was on 7th December, 2001.

This later order was as if the matter had been determined on merit hence the use of the term “the application does not have merit”, hence final and effective.

When then counsel for the applicant submits that none of the applications had been heard and determined on merit – he is just try to make a case for himself which the court does not understand.

The principle of res judicata effectively applies to this case and the present case (application) is just a repeat of what has already been determined.

I uphold the preliminary objection and declare the application dated 21st December, 2001 as being res judicata.

Delivered this 27th day of February, 2002.

D.K.S. AGANYANYA

JUDGE