



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO.8 OF 2008**

**BERNICE WANGARI CHEGE.....APPELLANT**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT**

**RULING**

The applicant's suit for an order of injunction to restrain the respondent from closing, evicting and interfering with her stalls Nos. A52/53 and 75-80 Nakuru West Market was dismissed by the court below prompting an appeal to this court. The appeal too was dismissed.

The applicant has now filed a notice of her intention to challenge this court's decision in the Court of Appeal. In the meantime she has applied that there be a temporary injunction to restrain the respondent from entering, closing or disrupting her business pending the hearing and determination of the appeal. It is the applicant's contention that her appeal to this court having been dismissed, the respondent, through its askaris have demonstrated an intention to forcefully evict her from the stalls in question.

That should that happen, the applicant's appeal, which has high chances of success will be rendered nugatory and the applicant will suffer prejudice.

The respondent through its clerk has sworn an affidavit in opposition to the application in which it is deposed that the application is misconceived, bad in law and ought to be struck out. That the applicant is undeserving of the prayer sought as she has not paid for the charges for ten (10) years since she filed the suit before the subordinate court in 2002, amounting to Kshs. 419,844/=. That this application is an abuse of the court process and further that the applicant has not demonstrated what substantial loss she will suffer if an order of injunction is not granted. The respondent has also averred that the notice of appeal is not valid as the same was filed on 23<sup>rd</sup> June 2011 and not served on the respondent until 11<sup>th</sup> July 2011.

In the alternative, the respondent averred that should the orders sought be granted, the applicant be ordered to deposit Kshs.513,429/= plus costs.

I have considered the foregoing arguments as well as the applicant's further affidavit in which she has given an offer to pay for the single business permit and the accrued arrears as security for the purposes of the orders sought. She has also deposed that she is not capable of paying Kshs.500,000/= as demanded by the respondent.

The application is expressed to be brought under **Order 42, rule 6** of the **Civil Procedure Rules** and, of course, the usual **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.

**Rule 6 (6)** aforesaid provides that:

**“ (6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks first provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”**

(Emphasis supplied)

Clearly this rule is inapplicable as the stage it envisages has already been passed. It is a provision that is available in place of **rule 6(1)** for orders of stay of execution of decrees from the subordinate court.

This court, for these reasons has no jurisdiction to grant those orders.

It is apparent the applicant’s counsel saw the futility of proceeding under **rule 6 (1)**, the applicant’s suit having been dismissed and there being nothing capable of being stayed. I hold that **rule 6(6)** is similarly not applicable. Not even the oxygen principle or the inherent powers of this court can come to the rescue of the applicant for the reason that she has failed to demonstrate good faith by failing to pay the fees that she does not dispute for over ten (10) years yet she continues to draw benefit from the stalls.

If the respondent declined to renew her license, she ought to have demonstrated her willingness and good faith by depositing the charges into court. It is also irregular that for all this time, she has continued to trade without licence. I find no merit in the argument that the clerk to the respondent has not shown any evidence that he had the authority of the respondent to swear the replying affidavit. That authority is statutory and need not be given in writing.

For the reasons stated the application fails and is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 6<sup>th</sup> day of February, 2012.**

**W. OUKO**  
**JUDGE**