



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Civil Appeal 87 of 2011

JAMES MWANGI NJUKI.....APPELLANT

VERSUS

KERUGOYA/KUTUS MUNICIPAL COUNCIL..... RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 28TH JUNE 2011 BY HON. E.M. NYAGA AT KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT RMCC NO. 16 OF 2010)

RULING

This is the Notice of Motion dated 1/8/2011. It does not indicate under what provisions of the law it is made. In it the Applicant is seeking an Order of stay stopping the Respondent from creating an access road through the Applicant's plot No.41 Kutus Town pending the hearing of this pending Appeal.

He says if stay is not granted his appeal which raises serious issues will be rendered nugatory if it succeeds. He is willing to deposit security for costs.

He also filed a supporting affidavit. He has filed an Appeal No.87 of 2011 out of the Judgment in Kerugoya R.M.C.C. No.16 of 2010.

The Respondent filed a replying affidavit, through it's Town Clerk and states that the Applicant won't suffer any loss as the road already exists on the ground. And that the Order he seeks to stay is a negative one as spelt out in section 38 Civil Procedure Act.

Both Counsels orally submitted reiterating what had been raised in the affidavits filed. The Applicant's Counsel submitted that the application is not resjudicata as what they sought before the lower court is different. Secondly they were not seeking stay of the dismissal orders.

There is an Appeal pending before this court, arising from Kerugoya RMCC NO.16 of 2010. The Appellant/Applicant had filed a suit in the lower court seeking an injunction to bar the Respondents from entering, cutting or constructing an access road through the Plaintiff's plot No.41 Kutus Old Town.

After hearing both parties the learned trial Magistrate dismissed the Applicant's suit which in effect means the prayer for an injunction was not allowed by the court. What the Applicant is asking for now is a similar order. And he chose not to indicate under what provisions of the law he is moving the court. Be it as it may it's clear from what is before me that the Applicant is seeking injunctive orders. It can not be a stay order because the lower court did not issue any Decree or Order for execution. The suit was dismissed hence a negative order was issued. So ideally there is nothing to stay. There is nothing to execute as envisaged under section 38 Civil Procedure Act.

On the basis of the holding in the case of ***ESTATES LTD -VS- KENYA POSTS & TELCOMMUNICATION CORPORATION AND ANOTHER C.A. NO. NAIROBI 162/04*** I do find that the Order issued herein is a negative Order and cannot therefore be stayed. The Applicant has not demonstrated that if the Order sought is not granted the Appeal will be rendered nugatory and/or that he will suffer substantial loss.

The evidence before the lower court is that the structures standing on the plot had already been demolished. In the event of a successful appeal the court will make the necessary Orders to put the Applicant back in the position he was in prior to the filing of the suit.

I therefore do find that the application lacks in merit and is hereby dismissed, with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 9th DAY OF MAY 2012

**H.I. ONG'UDI
JUDGE**

In the presence of:

Mr. Karanja for Mr. Kariuki for Respondent

Njue C/c