



EPHRAIM MUTAHI MUTUNDIE.....PLAINTIFF

VERSUS

TOWN COUNCIL OF MARIAKANI.....DEFENDANT

RULING

Through Notice of Motion Application dated 9th September 2010 brought under provisions of Section 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act, Order XLI, Rule 4 and Orders L, Rule 1 of the Civil Procedure rules all other enabling provisions of the laws of Kenya, the applicant is seeking:

- “1.
2.

3. The Honourable court be pleased to grant a stay of execution of the orders as per the ruling delivered on 31st August, 2010 pending the hearing and determination of the instant Appeal.

4. The cost of this application be provided for.”

Prayers 1 & 2 in the motion are not relevant at this stage as they have already been dealt with at the preliminary stage of the application and that is why I found it unnecessary to reproduce them in the ruling. By consent, the Court allowed the parties to file written submission on the basis of which it will make its ruling. The parties filed their respective written submissions as directed.

The Appellant informs the court that he constructed and rented out 34 temporary commercial structures on his land and that he is challenging a threat by the Town Council, the Respondent herein, to demolish the structures for being illegal contrary to the Council’s By-laws. The Appellant seems to have no dispute with the fact that the structures are substandard and he only wants the Town Council to give him a reasonable time to get funds to enable him construct a permanent structures and for his tenants to look for alternative premises.

The Counsel for the Appellant submitted that to get the orders sought, all he needs to show the court is that he filed appeal with probability of success and that the appeal will be rendered nugatory and unless orders sought granted, his client will suffer irreparable damage. He also submitted that his client will comply with any order for security. The learned Counsel did not rely on any decided cases in support of this line of argument. The alleged tenants are not in the suit as Co-Plaintiffs but the Appellant is seeking protection for them and on their behalf. The Counsel urged the court to grant the orders sought.

The Counsel representing the Town Council, the Respondent herein, opposes the application. There are written submissions on record. The Counsel submits that the applicant did not meet the legal requirements under Order XLI Rule 4(1) and (2) of the Civil Procedure Rules and in his view, the Applicant is not entitled to stay of execution. He relied on several cases in support of his view. He further submits that looking at the orders of the Magistrate’s court, there is nothing capable of being stayed.

I have considered the rival submissions. I have also looked at the applicable law. The Applicant has not

succeeded to convince the court that without stay he will suffer irreparable loss or injury. The applicant cannot be permitted to seek protection on behalf of the alleged tenants, who are not parties in the suit. The alleged tenants have right to seek redress from court if they have a cause of action. The Applicant seems to be in agreement with the Town Council that his structures are built contrary to the Town By-laws.

As a general principle, developers must obtain development permission before carrying out developments such as the Applicant's temporary structures. Indeed, it is criminal offence for anyone to develop land without development permission from Local Authorities. The Applicant did not disclose to the court if he had obtained development permission from the Town Council before constructing the structures. The applicant did not demonstrate as to how the Mariakani Town Council will not be able to compensate him in the event of his appeal succeeding.

If the Applicant's structures were developed without development permission which will make them illegal structures, the Court will be hesitant to interfere with a process that is intended to make the applicant comply with the law. The Applicant did not convince the court to exercise its discretion in his favour. The court's discretion being judicial, it will not exercise in favour of a litigant who is seemingly in breach of the law.

For these reasons I hereby dismiss the chamber summons application dated 9th day of September 2010 with costs to the Respondent. Subsisting interim orders are discharged.

Dated and Signed At Nairobi This 2nd Day of august 2012

M.K IBRAHIM

JUDGE

DATED AND Delivered At Mombasa on This 28th Day of AUGUST 2012

J.W. MWERA

JUDGE

Delivered in the presence of: Both sides represented