



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 586 of 2005

GENALD MUTURI MAINA.....APPELLANT

VERSUS

MAVJI RAMJI PATEL.....RESPONDENT

RULING

This is an application by way of Notice of Motion filed by the defendant for the two substantive orders.

It seeks to discharge, vary or set aside the order for an injunction made by Osiemo J. On 17th May, 2005. An order is also sought to review, vary or set aside the ruling made by this court on 20th April, 2010.

The application is premised on the provisions of Section 3A of the Civil Procedure Act and Orders 40 Rule 7 and 50 Rules 1 and 15 of the Civil Procedure Rules. There are grounds set out on the face of the application alongside an affidavit sworn by the defendant.

The application is opposed, and a replying affidavit has been sworn by one Washington Muchiri Muturi. Both learned counsel have also filed written submissions.

The injunction order made by Osiemo J. whether ex-parte or by consent has now been spent, by operation of the law and also as a result of the ruling of 20th April, 2010 from which an order capable of execution can be extracted.

Following the ruling by this court on 20th April, 2010, the Defendant filed a Notice of Appeal dated 23rd April, 2010. That Notice has not been withdrawn. Where a party has preferred an appeal, the right to review any order is compromised. Order 45 Rule 1 (1) (b) of the Civil Procedure Rules is clear in that regard.

I note also that, following the ruling of 20th April, 2010 aforesaid, no order was extracted and if one was, the same has not been annexed to the application before me.

My reading of the record resting with the application before me is that, the defendant is bent on avoiding an obvious eventuality. He must come to terms with his commitment and obligations.

The application lacks merit. It is therefore dismissed with costs.

Orders accordingly.

Signed dated and delivered in open court this 31st day of October, 2012.

**A.MBOGHOLI MSAGHA
JUDGE**

Mr. Marigi holding brief for Oyugi for Plaintiff/Respondent.

No appearance for the applicant.