



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 109 OF 2010

HASSAN ALI OSMAN.....APPELLANT

VERSUS

**ABDULRAHMAN M. BASHEIKH
MOHAMED AHMED MOHAMED.....RESPONDENTS**

R U L I N G

This is an application under the provisions of Order XLI, rule 4, sub-rule 6 of the Civil Procedure Rules (before it was repealed but which is applicable in this application). The Appellant's main application is for an order that:-

“The Honourable Judge be pleased to grant a temporary injunction restraining the Defendant/Respondent, their servants, agents and/or licensees from selling, blocking the access road, constructing or in any way dealing with the access space rendering it unavailable for the use of the Appellant pending the hearing and determination of this Appeal and/or application”.

The application is supported by an affidavit sworn by the Appellant Hassan Ali Osman on 7th June 2010. The Appellant also filed a further affidavit sworn on 9.06.2010 – producing copies in the trial suit in the Chief Magistrate's court.

The Application is opposed by the Respondents/Defendants who filed an affidavit sworn by Abdulrehman B. Basheikh, the 1st Defendant on 17th September 2010.

I have considered the application, the rival affidavits and the written submissions by Counsel.

The Appeal herein is against the Ruling and decision of the Honourable Chief Magistrate in Mombasa CMCC No. 2304 of 2009 – between Hassan Ali Osman –vs Abdulrehman M. Basheikh and Mohamed Ahmed Mohamed delivered on 14.5.2010. In the said Ruling the trial Court dismissed with costs an application by the Appellant which sought the following orders:-

1. A mandatory injunction compelling the Defendant through its servants, agent or licensee to demolish the well and structures built in front of the plaintiff's house on Plot Number 2681/VI/MN.

2. A temporary injunction restraining the Defendant, its servants, agents, or licensees from selling, blocking the access road, construction or in any other way dealing with the access space so as to render it unavoidable for the use of the plaintiff's house and hotel pending the hearing and determination of the suit and/or application.

Being aggrieved with the said decision, the Appellant lodged this Appeal in this court.

I have considered the application the affidavits, and written submissions by Counsel.

Order 41, Rule 4 Sub-Rule 6 of the Old Civil Procedure Rules which is applicable in this case provided as follows:-

“6. Notwithstanding anything contained in sub-rule (1) of the 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 just provided the procedure for instituting an appeal from a subordinate court or Tribunal has been complied with.”

This rule has been replicated in Order 42 Rule 6, sub-rule 6 of the new Civil Procedure Rules which came into operation on 17th December 2010.

In my view, I think that the main principle is that when exercising this power or jurisdiction at the appellate stage, High Court is not sitting on appeal of the decision of the trial court, the Subordinate court. Also the High Court in such a situation is not hearing the application for injunction afresh applying the Principles in GIELLA –V- CASSMAN BROWN & CO. LTD but it is to consider whether the appeal or the decision of the appellate court may be rendered nugatory should the appeal succeed.

From the facts of this case, irrespective of the merits or demerits, the Appellant's case is that he has a right of access to his property through the space which constitutes a frontage area to the main Magongo Road. In effect he is stating that if the order of injunction is not granted he will not have access to and the right of ingress and egress of his property. He claims that the said alleged access space is part of a road reserve to a public road.

This court will not be concerned with whether the Appellant is entitled to use the said open space or access as part of his hotel premises. What the court is concerned with for the purpose of this application is whether the Appellant will be locked out of his residential property if the order is not granted.

I have looked at the pleadings. The Defence by the Defendant is a mere denial and does not effectively answer the averments and allegations in the plaint.

However, from the Replying Affidavit in paragraph 10 it is deponed as follows:-

“.....

10. That in reply to paragraph 11 of the Supporting Affidavit I state that the said portion has always been a threat for the users of Plot No. 268/VI/M.N. and that is why the 2nd Respondent is putting up a Security fence in front of and around the property for the security of the appellant and other users of the Plot No. 268/VI/M.N.”

From the foregoing it is a fact therefore that the Defendants intend to fence off the disputed area which will interfere with the access of the Appellant to his property. If the Respondents are allowed to erect permanent walls round the said space or area, then it is likely that the appeal herein will be rendered nugatory. There is nothing to stop the Respondents from even erecting other buildings on the said space.

I am therefore inclined to grant the Interim orders of injunction pending appeal. However, this shall not be a licence for the Applicant to construct on the open space or develop it for his hotel business. The injunction order shall not be used to give his unfair advantage on the disputed space.

I therefore do hereby grant prayer 2 of the Notice of Motion dated 7.06.2011 on condition that the Appellant equally shall not construct upon the said space/premises or carry out any developments pending the appeal here.

In view of the circumstances in this case and also that there is all probability that the space in contention could be outside the Plot No. 268/VI/MN and the suit may require the joinder by the Municipal Council of Mombasa, I direct that costs shall be in the appeal.

Dated and delivered at Mombasa this 28th day of January 2011.

M.K IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Mutisya

Mr. Khatib for the Respondent

Mr. Makasembo for the Appellant

Ruling delivered in their presence.

Ibrahim, J