



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 127 of 1993**

FRANCIS OSORO MARKO-----PLAINTIFF/RESPONDENT

-VERSUS-

JOHNSON KEMONI-----DEFENDANT/APPLICANT

RULING

The applicant was the defendant/judgment debtor in the Notice to Show Cause which was issued by this court on 30/4/2008 at the instance of the respondent who was the plaintiff/judgment creditor. The Notice was issued to the applicant to show cause why the applicant should not be evicted from the suit plot no.19B, Nyakoe market, in the execution of the decree in the case. The applicant filed a notice of preliminary objection against the Notice on grounds that:

- (a) the Notice was frivolous, vexatious and otherwise an abuse of the process of the court, and
- (b) the Notice was *res judicata*.

The Deputy Registrar heard arguments on the objection before dismissing it. This meant that the Notice was to proceed to hearing. The applicant was aggrieved by the dismissal and preferred this appeal. In the appeal, he filed the present motion under *Order 41 rule 4 of the Civil Procedure Rules* for stay of execution, proceedings and all consequential orders pending the hearing and determination of the appeal. Mr. Bosire prosecuted the application on behalf of the applicant. Mr. Oguttu for the respondent opposed the same. The opposition was based on grounds of opposition as follows:

- (a) the application was misconceived, mischievous and otherwise bad in law;
- (b) the order being appealed from was a negative one and hence incapable of stay;
- (c) no leave was obtained before filing the appeal as is required by *Order 42 rule 1 (3) of the Civil Procedure Rules*;
- (d) the conditions of *Order 41 rule 4* have not been satisfied; and that
- (e) the application is fatally defective.

The applicant's position was that he had a competent appeal and application which merited consideration, and that the application had met the conditions set out in *Order 41 rule 4*.

Before the Deputy Registrar, the applicant sought to challenge the Notice to Show Cause on the grounds indicated above. He did this by way of preliminary objection. The objection was dismissed with costs. The order being appealed from is therefore a negative one. I agree with Mr. Oguttu that, on the basis of the decision in *Exclusive Estates Limited .V. Kenya Posts and Telecommunications Corporation and another, Civil Application no. 62 of 2004 at Nairobi*, the order is not capable of execution. If the application is not granted, the applicant cannot say he will

suffer substantial loss or that his appeal will be rendered nugatory.

Whether or not the applicant has a competent appeal should ideally be raised at an appropriate stage. But

it was raised in the application by the respondent. The applicant responded to it by saying he had a competent appeal. It is therefore an issue that the court will deal with now. The order being appealed from was not a preliminary decree as the Notice to Show Cause is still awaiting hearing and resolution. The applicant's plea was that the Notice was *re judicata*. He raised this as a preliminary issue. In *G.R.Mandavia .V. Rattan Singh [1965] E.A. 118*, the then Court of Appeal held that:

".....where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal."

It follows that the applicant required leave to file the appeal. This is as required by *Order 42 rule 1(3) of the Civil Procedure Rules*. He did not seek or obtain leave and therefore the appeal is incompetent. With it goes the application.

For these reasons, both the appeal and application are struck out with costs.

Dated, signed and delivered at Kisii this 20th day of January, 2010.

A.O.MUCHELULE

JUDGE

20/1/2010

Before A.O.Muchelule-J

Court clerk-Bibu

Mr. Leitapa for Applicant

Mr. Oguttu for Respondent

COURT: Ruling in open Court.

A.O.MUCHELULE

JUDGE

20/1/2010