



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 434 of 2009

**CEPHAS OSORO.....
RUTH NGARUIYA..... PLAINTIFFS/RESPONDENTS
CYNTHIA OLIWA.....
SOPHIE MACHARIA.....
VERSUS
DAVID N. THUKU..... DEFENDANTS/APPLICANTS
SUSAN THUKU.....**

RULING

1. By a notice of motion dated 6th July, 2010, the defendants/applicants herein seek an order staying execution of the order made on the 1st February, 2010 pending the hearing and determination of an appeal which the defendants/applicants intend to lodge against that order. The order made on 1st February, 2010, was an order of interlocutory injunction issued by Hon. Sitati J. pending the hearing of the main suit.
2. The interlocutory injunction restrained the defendants their agents or servants, firstly, from using the suit property as a wedding ground or a place of entertainment for wedding parties or other social events, and secondly, from continuing with acts and omissions in the suit property, that constitute noise pollution within the meaning of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations.
3. The defendants/applicants maintain that they have strong grounds of appeal. They argue that unless an order of stay of execution is granted, they stand to suffer direct and indirect financial loss, as they already have binding contracts that will be adversely affected by the order of interlocutory injunction. David Thuku has sworn an affidavit in support of the application to which he has annexed a schedule of bookings for events which were scheduled to be done between 6th February, 2010 and 27th November, 2010. A management and financial report prepared by Dr. Njoroge Kimani a Financial Consultant on the impact of the injunction on the defendant's business has also been annexed to the supporting affidavit.
4. The application is opposed through grounds of opposition filed on 12th July, 2010 on the following grounds:
 - (i) That the application seeks to determine the entire suit without hearing.
 - (ii) That the application seeks to have the court permit the applicants continue illegal activities.
 - (iii) That there has been unreasonable delay in contravention of Order XLI Rule 4(2) of the Civil Procedure Rules.
 - (iv) The applicants are seeking the court's assistance to violate Constitutional and Statutory rights of the respondent.
 - (v) The application is an abuse of the court process.
5. Cephas Osoro, who is the Chairman of the respondents' association, has sworn a replying affidavit in response to the application. He maintains that the applicants have been aware of the suit which sought the order of injunction as far back as 1st September, 2009. Therefore the applicants are the author of its own misfortune for any loss resulting from the orders issued by the court. Cephas further depones that the loss suffered by the defendants/applicants can be substantiated and compensated whereas the infringement of the respondents' right to a peaceful healthy and quiet environment cannot be adequately compensated by an award of damages.
6. Mr. Kibe who appeared for the respondents submitted that the applicants having annexed a copy of the order which they are challenging, they are estopped from arguing that the subject property has not been identified. Counsel pointed out that most of the activities indicated in the schedule had already passed and that no proof of substantial loss has been availed. The court is urged to dismiss the application.
7. I have carefully considered the application before me, the affidavit in support and in reply as well as the submissions made by counsel. Although the applicants have attempted to demonstrate that they have a good appeal, at this stage all that the court is concerned with is the fact that there is an arguable appeal. Of more relevance to this application is Order XLI Rule 4(2) of the Civil Procedure Rules, under which an order for stay of execution pending appeal can only issue on the following conditions:
 - (i) The court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued, and

(ii) The application has been made without unreasonable delay, and

(iii) The applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.

8. The applicants have attempted to show that if the order of stay of execution is not granted, they will suffer substantial loss as they will be unable to deliver on several bookings which have already been made for the period 6th February, 2010 to 27th November, 2010. However, as was pointed out by counsel for the respondent, there has been an interim order of an interlocutory injunction which was granted on 2nd October, 2009 pending the hearing of the respondent's application for an injunction. The interim orders remained in force until the current orders subject of the appeal was granted. The applicants were therefore aware of the possibility of their being unable to utilize the suit premises hence the need to mitigate their losses.

9. Secondly, although there is evidence of some loss likely to be suffered by the applicants as a result of the order issued by the court, no evidence of substantial loss has actually been exhibited. Indeed, such loss must be weighed against the loss and inconvenience likely to be suffered by the respondents. Further, the applicants have not offered or given any security for the due performance of the order issued by the court.

10. Finally, the ruling was delivered on 1st February, 2010. The applicants have admitted that their counsel became aware of the ruling on 8th February, 2010. Nonetheless, the current application was not filed until 6th July, 2010. Clearly, there was inordinate delay in filing this application which delay has not been adequately explained.

11. In the light of the above, I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 17th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Ngugi H/B for Gathenji for the defendants/applicants

Kibe for the plaintiffs/respondents

Kosgei - Court clerk