

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 34 of 2009

WILLIAM KANYANYI ONYANGO.....APPELLANT

VERSUS

BANANA LEAF INN CO. LTD.....RESPONDENT

R U L I N G

1. The application before me is a notice of motion dated 17th March, 2009. It is an application seeking orders for stay of execution and stay of proceedings pending appeal under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. It is clear that under Order XLI Rule 4(2) of the Civil Procedure Rules, an order for stay of execution pending appeal will only issue where the applicant has satisfied the court that he will suffer substantial loss unless the order of stay of execution is issued.
3. In this case, the applicant is dissatisfied with the order issued by the lower court on 16th January, 2009, granting an injunction restraining the applicant from interfering with or stopping the construction of the sewer line extension from the suit premises Plot No.131/132 Mtarakwa Road Kariobangi South PDS 1956. The applicant has filed an appeal in this court against that order, which appeal he believes has high chances of success. The applicant maintains that unless the orders sought are granted his appeal will be rendered nugatory. The applicant further maintains that he stands to suffer as the actions of the respondents are likely to interfere with the service lines serving the residents of Kariobangi South of which he is a resident. The construction has also interfered with electricity supply and water supply.
4. The application is opposed through an affidavit sworn by Benard M. Njuguna a director of the respondent. It is contended that the applicant has no locus as he is arrogating to himself the role of Nema and the City Council of Nairobi. It is further submitted that the applicant has not demonstrated any specific loss that he is likely to suffer if the approved sewer is constructed. It was maintained that the respondent was the one likely to suffer loss if the orders sought are granted. The court was therefore urged to dismiss the application.
5. I have considered the application before me. It is evident that the order of injunction issued against the applicant was in the nature of a mandatory order though couched in negative terms. However, the pertinent question is whether the applicant has satisfied this court that he is likely to suffer substantial loss if the order of stay of execution and stay of proceedings is not issued.
6. I find that the applicant has alleged that there are certain inconveniences caused by the respondents' actions e.g. temporary loss of water and electricity, and likelihood of interference with the service lines. However, apart from the mere allegations, the applicant has not produced any technical report from either Kenya Power & Lighting Company or the Water & Sewerage Company to confirm the alleged interferences and inconveniences or any loss resulting therefrom. There is actually no evidence of any substantial loss suffered by the applicant.
7. The applicant has therefore failed to satisfy the main condition for granting an order of stay of execution or proceedings. His application must therefore fail. It is accordingly dismissed.

Dated and delivered this 18th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ligunya H/B for Maleche for the appellant

Adipo for the respondent