



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 163 of 2008

ERICK OUMA ABONGO.....APPELLANT

-VERSUS-

1. CLERK, MUNICIPAL COUNCIL OF MIGORI

2. JULIUS ARUTI

3. ABDI AHMED IBRAHIM.....RESPONDENTS

RULING

On 14/8/2008 the Acting Senior Principal Magistrate, Migori, dismissed with costs the suit which the appellant in this case had brought against the respondents. The appeal was filed on 10/9/2008 to challenge that decision. Pending the hearing and determination of that appeal, the appellant has applied under *Orders 41 rule 4 and 21 rule 22 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act* to have stayed the execution of the judgment of the lower court. Mr. Ocharo prosecuted the application which Mr. Odero for the respondents opposed.

I have considered the application and the submission made by counsel. Mr. Ocharo spent quite some time analyzing the evidence that was tendered in the subordinate court in effort to show that the appellant had a good case which ought not to have been dismissed. Counsel, therefore, asked the court to conclude that the appeal filed had high chances of success. His contention was that the trial court did not appreciate the law when it found that his client lacked capacity to bring the suit. Mr. Odero's response was that the merits of the appeal will have to await the hearing of the matter. His further submission was that stay cannot be granted where there is a negative order, like in this case, which is not capable of execution. He relied, for this point, on the decision in *Exclusive Estates Limited .V. Kenya Posts and Telecommunications Corporation and Another, Civil Application no. 62 of 2004 at Nairobi*. Counsel further submitted that the appellant had not demonstrated that he would suffer substantial loss, or what the appeal would be rendered nugatory, if the applications is not granted. He relied on *Kenya Shell Limited .V. Benjamin Karuga Kibiru & Another [1992-88] 1KAR 1018*.

Mr. Ocharo's worry was that if there is no stay the plot may leave the hands of the 3rd respondent.

The appeal may very well have merits, but at this stage *Order 41 rule 4(2)* requires the court, before granting stay, to be satisfied that substantial loss may result to the appellant unless the order is made and the application is made without unreasonable delay. (See *New Stanley Hotel Limited .V. Arcade*

Tobacconists Limited [1986] KLR 757). Order 41 rule 4(2) (b) then requires that security for the due performance of the decree be provided by the appellant. Of course, this presupposes that the respondent is holding a decree which he is going to execute against the appellant. In this case, the respondents are not holding any decree that they can execute against the appellant. Except that they will execute for costs. In *Excusive Estates*

Limited case (above), this is what the Court of Appeal stated:

“The order which dismissed the suit was a negative order which is not capable of execution. If the order sought is not granted, the appeal will not be rendered nugatory because if the appeal succeeds the dismissal order will be set aside and the suit will be restored on the register. The application has not sought an order for stay of execution of the decree on costs of the dismissed suit.....”

In *Venture Capital And Credit Ltd .V. Consolidated Bank Of Kenya Ltd, Civil Application No. 349 Of 2003 At Nairobi*, the Court of Appeal observed that where there was no positive order made in favour of the respondent which is capable of execution the application of stay of execution is misconceived.

In short, I do not find merit in this application as the respondents do not hold any decree that they can execute against the appellant. It is dismissed with costs.

Dated, signed and delivered at Kisii this 13th Day of November, 2009

A.O.MUCHELULE

JUDGE

13/11/2009

13/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Oguttu for Mr. Ocharo for Applicant

Mr. Odero for 2nd Respondent

COURT: ruling in open court.

A.O.MUCHELULE

JUDGE

13/11/2009