



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Appeal 165 of 2007**

**RUPEN DULLABH CHAUHAN .....APPELLANT**

**VERSUS**

**1 SHAMSHUDDIN MOHAMMED KASSAM**

**2 MUNICIPAL COUNCIL OF MOMBASA ..... RESPONDENTS**

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**R U L I N G**

This application is brought by a notice of motion dated 14<sup>TH</sup> December 2007. It is made under Order XLI rule 4(6) of the Civil procedure Rules. After the application was certified urgent, there remained the following two prayers.-

1 *THAT pending the hearing of this application inter-partes, there be an order restraining the 2<sup>nd</sup> defendant either personally or through its employees, servants and/or agents from entering, excavating, laying culverts or in any way discharging rain water into the suit property, namely plot No. 235/1/MN.*

2 *THAT pending the hearing and determination of this appeal there be an order restraining the 2<sup>nd</sup> defendant either personally or through its employees, servants and/or agents from entering, excavating, laying culverts or in any way discharging rain water into the suit property, namely plot Number 235/1/MN.*

The application is supported by the annexed affidavit of Repen Dullabh Chauhan, the appellant herein, and is founded on the following grounds –

- a) *THAT the appellant's application for injunction pending the hearing of CMCC No. 1719 of 2007 was dismissed on 22<sup>nd</sup> August, 2007.*
- b) *THAT being dissatisfied by the ruling of that court, the appellant preferred the appeal herein.*
- c) *THAT the appellant has complied with the procedure for instituting an appeal.*
- d) *THAT unless this application is granted the appellant's appeal will be rendered nugatory..*
- e) *THAT the 2<sup>nd</sup> respondent is hastily laying culverts which "by any time reach" (sic) the appellant's property.*

f) *THAT it is in the interest of justice to grant the orders sought.*

g) *THAT the appellant is ready to abide by any terms that this Honourable Court may deem fit to grant.*

In opposition to the application, a replying affidavit was sworn and filed on 21<sup>st</sup> December, 2007 by one Peter Migosi was Migosi, a resident of Mombasa, employed as an Engineer in charge of Roads by the 2<sup>nd</sup> Respondent.

At the hearing of the application, Mr. Hamza for the applicant argued that immediately after the dismissal of the interlocutory application in the lower court, the 2<sup>nd</sup> respondent started excavating to facilitate the installation of culverts which will drain water onto the appellant's property, thereby diminishing its value. As the appellant has already filed an appeal, he applies for an injunction under Order XLI rule 4(6) to restrain the 2<sup>nd</sup> respondent from continuing with the excavation since the appeal has very strong grounds and stands high chances of success. He asked for orders as prayed.

Mr. Chakera for the respondents opposed the application and relied on the replying affidavit. He raised two main grounds. Firstly, he submitted that the area where the appellant's plot is situated is an area where natural small waterways systems cross the appellant's plot. The appellant was granted permission to build a wall subject to terms and conditions. He ignored the conditions and failed to provide weep holes in the walls in order to allow the water to flow. This caused the wall to block the storm waters thereby leading to flooding, and in turn the 2<sup>nd</sup> respondent had to resort to installing culverts.

Secondly, the appellants had raised exactly the same prayer in the lower court as they are raising here, and the same issues canvassed in the lower court are the ones being canvassed here. The lower court declined to grant the orders, and on that note Mr. Chakera urged this court to dismiss this application.

In his reply, Mr. Hamza contended that Order XVIII of the Civil Procedure Rules is clear that allegations in interlocutory affidavits must be supported, and that a deponent must show, among other things, the source of his information. He submitted that we are not told the source of information that the area is prone to flooding. He further submitted that there was no evidence to show that the appellant's wall was not built according to specification. Lastly, he also submitted that the application in the lower court was seeking mandatory orders but here the applicant is seeking restraining orders. He then asked the court to grant the orders as prayed.

I have considered the pleadings and the submissions of both counsel. I must say from the outset that the High Court has jurisdiction to grant a temporary injunction pending appeal, in the exercise of its appellate jurisdiction. That jurisdiction is expressly conferred by order XLI rule 4(6) which provides –

*“Notwithstanding anything contained in subrule (1) of this 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.”*

Even in exercise of its original jurisdiction, as opposed to its appellate jurisdiction, the court has power to grant a temporary injunction pending appeal, even where the appeal is from an order of that same court, dismissing an application for an interlocutory injunction. The philosophy underlying that jurisdiction is not far to seek. It was explained clearly in ERINFORD PROPERTIES LTD v. CHESHIRE COUNTY COUNCIL [1974] 2 All ER. 448, in which Magarry J. said at 453 –

*“...where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pending of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative*

*explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal”*

I have digressed this far in order to allay the fears of anyone who may be harboring any notions that once a temporary injunction is denied in an interlocutory application, the court cannot entertain an application for a temporary injunction pending appeal against that denial. Such a view is erroneous. The jurisprudence behind this is simply that the court may be wrong in declining to grant the first injunction.

While I am alive to the fact that the court has jurisdiction to grant a temporary injunction in this matter, I am not satisfied that the appellant has made out such a case as would entitle him to an injunction pending appeal. The 2nd respondent's replying affidavit comes out strongly that the inconvenience encountered by the appellant could easily be surmounted if the appellant had cooperated. In paragraphs 6, 7, 8 and 9 of the replying affidavit, Engineer Peter Migosi wa Migosi deposes as follows –

*“6. THAT the appellant herein applied for a construction permit to construct the wall complained of above and was granted approval to construct subject to certain conditions.*

*7. THAT the plan approved for the appellant was clear that the appellant was to construct the wall with weep holes to ensure that storm water would flow through the natural waterways.*

*8. THAT the appellant's wall and plot stand on one of the major natural waterways in Kisauni.*

*9. THAT the appellant ignored the conditions issued for the construction of the wall and has failed to provide for weep holes in the walls thereby causing the wall to block the storm waters leading to serious flooding within the neighbouring plots ...”*

In his reply, Mr. Hamza argued that the deponent of the replying affidavit had not disclosed the source of information that the area was prone to flooding and that there was no evidence to show that the wall was not built according to specifications. To these contentions, Mr. Chekara had no opportunity to respond. On my part, I would only say, at this stage, that the deponent is an engineer who, on the face of the record, ought to know what he is saying and going by his evidence, which was not controverted by a supplementary affidavit, he has raised very weighty issues, all of which point at an accusing finger at the appellant. Personal egos aside, this is a matter which calls for co-operation by all the interested parties for the common good of all. The appellant has not established that he really deserves a restraining order either in terms of prayer 1 or prayer 2. His application cannot succeed.

It is accordingly hereby dismissed, with no order as to costs.

Dated and delivered at Mombasa this 19<sup>th</sup> day of March 2008.

L NJAGI

JUDGE