



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

**Civil Appeal 196 of 2005**

**(Being an appeal from the Judgment of Honourable Ms. E. Ominde – Ag. P.M in Chief Magistrate’s Court, Nakuru, CMCC No.2403 of 2000 dated the 1<sup>st</sup> December 2005)**

**PATRICK KOMU NJOROGE .....APPELLANT**

**VERSUS**

**JECINTA KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY COUNCIL OF NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Patrick Komu Njoroge, the applicant in the Notice of Motion dated 6<sup>th</sup> January 2006 has filed an appeal against the judgment of the Senior Principal Magistrate’s Court in Chief Magistrate’s Civil case number 2403 of 2000 which was delivered on 1<sup>st</sup> December 2005. While awaiting the determination of the appeal, the applicant now seeks for an order of injunction restraining the respondents either by themselves or through their agents or employer from interfering with the Business Plot Number 93 Gilgil Town Main Road.

The grounds in support of this application are stipulated on the body of the application and more specifically elaborated by the matters deposed to in the affidavit of the applicant sworn on 6<sup>th</sup> January 2006. The plaintiff’s suit before the lower court involved the ownership of the suit property but in the judgment being appealed against the suit was dismissed. Before the suit in the lower court was determined the applicant was granted a temporary order of injunction which lapsed when the suit was dismissed.

Counsel for the applicant urged this court to grant the order prayed for as the 1<sup>st</sup> respondent who would have had a claim over the plot is now staking her claim on **Plot number 119** and more so because the applicant has an arguable appeal with high chances of success.

The 1<sup>st</sup> respondent did not oppose the application but the same was opposed by the 2<sup>nd</sup> respondent. Counsel for the 2<sup>nd</sup> respondent argued that the applicant has not demonstrated that they have an arguable appeal. They have only filed a memorandum of appeal and the substance of what constitutes an arguable

appeal with a probability of success are not shown to the court.

Secondly, the applicant has not demonstrated the loss that he is likely to suffer, the applicant enjoyed an injunction for a period of four (4) years when the matter was awaiting the hearing and determination of the suit before the lower court. All parties were heard and the plaintiff failed to establish or to prove his case to the required standard regarding the suit premises and that is why the suit was dismissed.

Thirdly, the applicant has not offered any security under **Order 41** of the **Civil Procedure Rules** to indemnify the 2<sup>nd</sup> respondent of the loss that they may incur as a result of an order sought by the applicant being granted.

Under the provisions of **Order XLI Rule 4(6)** of the **Civil Procedure Rules**;

*“ 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.”*

The applicant has not filed a record of appeal. The handwritten copies of the judgment by the lower court are not easy to decipher and I find it very difficult to appreciate the basis of the arguable appeal, as there is no material before me.

In the absence of a record of appeal to show the proceedings and the judgment, there is nothing to compare the memorandum of appeal with, so as to form an opinion of whether the applicant has an arguable appeal with a probability of success.

It is the subordinate court that had an opportunity to hear the evidence and with the material placed before me, I am unable to grant the orders sought by the applicant.

In the upshot, the application dated 6<sup>th</sup> January 2006 is hereby dismissed with costs to the respondents.

It is so ordered.

**Ruling read and signed at Nakuru on 28<sup>th</sup> July 2006.**

**MARTHA KOOME**

JUDGE