



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**ENNVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 13 OF 2015**

**BEJA NGOJA MWERO.....APPELLANT**

**-VERSUS-**

**NYAWA NYALE NYAWA.....RESPONDENT**

**RULING**

1. The appellant who is the applicant in this case filed the present application dated 8<sup>th</sup> October 2015. The applicant seeks for the following orders ;

- 1) Spent
- 2) Spent
- 3) That this honourable Court be pleased to issue an order of injunction restraining the Respondent by himself and/or his agents, servants and or any person working for him from excavating building Blocks, selling and/or disposing off the property and/or Plot No. “1114 A” situated at Kinango within Kwale County pending hearing and determination of this Appeal.
- 4) Spent
- 5) That this Honourable Court be pleased to set aside the Ruling by the Honourable Karani (PM) issued on the 10<sup>th</sup> September, 2015 and subsequent order herein pending hearing and determination of this Appeal.
- 6) That the costs of this application be in the cause.

2. The application is supported by the grounds on the face of it and the affidavit of the appellant. The grounds inter alia states that the ruling which dismissed his application gave liberty to the Respondent to excavate building blocks on the appellant's land. The appellant also stated that the Respondent is in the process of disposing the suit land. In the supporting affidavit, the applicant annexed handwritten copy of the ruling and photographs showing pieces of stones.

3. The application is opposed by the Respondent who filed a lengthy and detailed affidavit. He has accused the applicant of non-disclosure of the several suits he has filed. He also accused the applicant of non-joinder of parties deposing that he does own a portion of parcel 1070 and the remainder part is owned by other people not joined to this suit.

4. I have read that replying affidavit in detail and note that some of the issues raised should be raised in before the trial Court and not this Court who is sitting as an appellate Court. The appeal filed before this Court is in respect of a ruling which dismissed the application seeking injunction reliefs. One of the prayers the applicant is seeking is for this Court to set aside the order dismissing the application.

5. The applicant has filed this application under the following orders ;

40 : *Which deals with issuance of injunctions.*

*The opening statement in Order 40 (1) is “where in any suit it is proved by affidavit or otherwise ..”*

42 *Rule 6 deals with stay of execution pending appeal*

45 : *Deals with application for review of decree or order*

6. The application as worded has not made a prayer for stay of execution of the order issued by the trial Court therefore I will not determine whether this application meets the threshold of Order 42 rule 6. Secondly Order 45 does not apply to this case as review is only available to the Court which heard and determined the matter. An appellate Court cannot sit to review.

7. The only order for this Court to consider is order 40. Can the Court grant the injunction as sought in prayer 3 ? The order of dismissal appealed from was in respect of a similar application before the lower Court. The trial Court heard and determined the application before him on merits. The applicant filed an appeal against that order. The applicant is again asking this Court to re-hear a similar application. In my understanding of the law, this application is *res judicata* the same having been heard and determined by a Court of competent jurisdiction.

8. Be that as it may, assuming it is not *res judicata*, if the orders sought are granted, what would remain for trial in the appeal ? Granting the orders at this stage would result into determination of the appeal by an appeal via an interlocutory application which in law is improper.

9. Lastly this Court is of the view that granting the injunctions at an appellate stage is a preserve of the Court of Appeal under rule 5 of the Court of Appeal Rules. This Court does not have such powers although the applicant asked it to invoke the inherent powers under section 1A, 1B and 3A of the Civil Procedure Act. I say so because Order 40 refers to a suit. In section 2 of the Civil Procedure Act, a suit is defined as “*all civil proceedings commenced in any manner prescribed*”. An appeal is a second stage after commencement therefore it is not a suit.

10. In conclusion, I find the application is not properly before the Court and the orders sought cannot be granted for the reasons given. Consequently, I dismiss the application with costs to the Respondent.

**Ruling dated and delivered at Mombasa this 15<sup>th</sup> day of July 2016**

**A. OMOLLO**

**JUDGE**