



Editorial Summary

1. *Civil Appeal*
2. *Civil practice and procedure*
3. *Subject of subordinate court case*

MANDATORY INJUNCTION

- 3.1 *Respondent/original plaintiff
business woman.*
- 3.2 *Allegation that appellant original defendant,
a limited liability company invaded premises
and took away goods and locked premises
using police.*
- 3.3 *Matter reported to Shauri Moyo Police
(OB 54/1/1/12) by respondent/
original plaintiff.*
- 3.4 *That appellant/respondent alleged to have
refused to return goods.*
- 3.5 *Respondent/original plaintiff files suit
(26th January 2012) and seeks orders for the
immediate return of the plaintiff's goods
of trade in custody.*
- 3.6 *Permanent injunction against applicant/*

original defendant from interfering with the respondent/original plaintiff's business.

3.7 *Application 26th January 2012*

i) *Stay sale of plaintiff's goods and restrain defendant from harassing plaintiff.*

ii) *... order to forthwith release plaintiff's ... goods of trade.*

iii) *... police officers ordered to forthwith re-open the plaintiff's/applicant's business.*

3.8 *Trial magistrate grants orders that inter alia goods of trade be returned 9th March 2012.*

3.9 *Respondent/original plaintiff files application for contempt for failure by appellant/original defendant from obeying law. (20th March 2012).*

3.10 *Appeal filed to High Court after application for stay of execution had been declined.*

3.11 *Appeal filed 16th March 2012.*

4. *Application in appeal*

Dated 16th April 2012

4.1 *Stay of execution of orders made 9th March 2012.*

4.2 *Unable to comply with court orders as goods with police.*

4.3 *Orders unenforceable.*

5. *Held:*

i) *Application granted.*

- ii) *Kenya courts no powers to issue mandatory injunction unless they are exceptional circumstances.*

6. *Case Law:*

7. *Advocates :*

- i) *Gabriel Shibutse appellant present in person*
- ii) *V K Mungai holding brief for A N Thengei instructed by M/s Waruhiu K'Owade & Nganga & Co Advocates for respondent/original defendant*

METAL CROWNS LTD..... APPELLANT/APPLICANT

VERSUS

JOCCINTA WANJIRU RAPHAEL T/A JESIMU AGENCIES...RESPONDENT/RESPONDENT

R U L I N G

Application for stay of execution

Dated 16th April 2012

I. INTRODUCTION

1. M/s Metal Crowns Ltd were sued in the magistrate's court by Joccinta Wanjiru Raphael t/a Jesimu Agencies for a mandatory injunction. The prayers in the original plaint read:

- a) **An order compelling the defendant to immediately return the plaintiff's goods of trade unconditionally.**
- b) **Permanent injunction restraining the defendant by itself, its agents and servants from harassing the plaintiff and or in any other manner interfering with the plaintiff's legal business**
- c) **General damages**
- d) **Costs of the suit**
- e) **Interests on damages and costs.**
- f) **Any other relief as this Hon. Court may deem fit to grant.**

2. She then filed an application dated the same date of 26th January 2012 and prayed inter alia:-

2.1 _____

2.2 _____

2.3 That the defendant/respondent be ordered to forthwith release the plaintiff's/applicant's goods of trade.

2.4 That the police officers be ordered to forthwith re-open the plaintiff/applicant's business premises.

2.5 That the defendants/respondents be ordered to pay costs of this application.

3. The application was opposed by the original defendants on grounds that the police were the ones who were investigating the matter. They are the ones who impounded the goods, whilst investigating a criminal offence.

4. The trial magistrate made orders that the original defendant do return the goods held back to the original plaintiff.

5. The original defendant applied for stay of execution (19th March 2012). This was delivered and dismissed (13th April 2012).

6. The original plaintiffs filed an application for contempt dated Notice of Motion 20th March 2012 and filed on 21st March 2012.

7. Whereas the original defendant had filed an appeal on 16th March 2012 against the orders of the trial magistrate ordering the return of goods to the original plaintiff by the original defendant, the original defendant and now appellant filed an application for stay of execution of the trial court's orders. The same was unenforceable.

8. This application was heard interparte.

II APPLICATION 16TH APRIL 2012

9. The arguments put forward by the appellant/applicant is that the said orders are unenforceable. The goods were never in their possession to release to the original defendant and now respondents herein. It is the police who are in possession of the goods and have stated so in documents filed to court.

10. The respondent argued that the appellant is using its financial muscles to frustrate the respondent's business.

III FINDINGS

11. There are certain facts that have come out of this matter. The first is that the appellant original defendant has not been served with summons to enter appearance. The second is that the defendant original defendant has not filed a defence, which defence is to be filed upon being served with a plaint and summons to enter appearance simultaneously. The third is that the application before the trial court, by way of an interlocutory application sought in the same prayers as that in the plaint. The prayers were granted by the trial court which prayers finalized the whole suit.

12. It is further noted as a fact that the main suit actually seeks a mandatory injunction. As a matter of law, Kenyan courts have no powers to issue mandatory injunction unless they rely on Section 3A of the Civil Procedure Act and for exceptional circumstances that must be demonstratable.

13. The fact that an affidavit by an officer of the Kenyan police had stated that it is the police who impounded the goods and are holding the same. That a warrant of arrest is pending against the respondent/original plaintiff.

14. It is this court's opinion that the orders of the trial magistrate may not be enforceable on grounds that it is incapable of being enforced. This is the main appeal hearing yet to be heard.

15. I would find that there be a stay of execution of the trial court's orders pending the hearing of the main appeal. the main suit in the subordinate court is still pending.

16. I award costs to the appellant/applicant/original defendant.

DATED THIS 28TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *J Owino instructed by Morara Apiemi & Co Advocates for
applicant/original plaintiff*

ii) *K. O. Masese instructed by Omwoyo Masese & Co Advocates for
respondent/original defendant*