REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC CIVIL CAUSE NO. 1 OF 2004 (O.S)

IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF L.R. NO. 337/883

CHARLES MATHEKA.....PLAINTIFF

V E R S U S

HACO INDUSTRIES LTD.....DEFENDANT

R U L I N G

The Plaintiff's suit herein in adverse possession was dismissed by a **judgement dated and delivered on 17th November, 2008** (Lenoala, J). The Plaintiff lodged **notice of appeal** on 25th November 2005. Apparently memorandum and record of appeal have not yet been lodged in the Court of Appeal.

By **chamber summons dated 18th December, 2008** the Plaintiff sought a temporary injunction to restrain the Defendant from evicting him and from entering, fencing, damaging or interfering with the suit land, **L.R. No. 337/883 (Grant I.R. 37868)** pending disposal of his intended appeal.

There was a preliminary objection to the application, mainly upon the ground that the court lacked jurisdiction to grant injunction pending appeal.

In a **ruling dated and delivered on 22nd September 2009** the court (Lenaola, J) held that the court had jurisdiction to grant the injunction sought. The court further directed that the application be heard by way of written submissions.

The Defendant filed its submissions on 10th November 2009 or thereabout. The Plaintiff filed his on 11th May 2010. Because of the horrendous volume of work for a single judge at Machakos, my state of ill-health and subsequent transfer, ruling could not be prepared and delivered earlier. The delay is regretted. I am happy to note that with effect from 1st October 2011 Machakos will be a three-judge station, instead of the long suffering single judge!

I have read the supporting and replying affidavits. I have also read the judgment of my learned

brother, Lenaola, J delivered on 17th November 2008. Finally, I have considered the written submissions filed on behalf of the parties, including the authorities cited.

This court can grant injunction pending appeal to prevent the decision of the appellate court being rendered nugatory should the appeal succeed. See the Court of Appeal decision in the case of **Madhupaper International Ltd –vs- Kerr [1985] KLR 840**. The jurisdiction is discretionary, and like all discretions of the court, it must be exercised judicially and not arbitrarily. The Court of Appeal observed in the above quoted case that it would be wrong to grant injunction where the appeal is frivolous, or where to grant it would inflict greater hardship than it would avoid.

Two important issues have been raised by the Defendant in the replying affidavit filed on 22nd October 2009. The first is that there is no way for the court to determine that the intended appeal is not frivolous as the Plaintiff has not exhibited any draft memorandum of appeal.

Not one of the grounds on the face of the application by chamber summons dated 18th December 2008 alludes to any grounds of appeal that might be taken up before the Court of Appeal. In the supporting affidavit, not one single instance has been given of the court erring in fact or law in its judgment of 17th November 2008. The court is thus not able to hold that the intended appeal is not frivolous.

In connection with this, I note the factual finding by the court in its judgment that the Plaintiff had not been in adverse occupation of the suit land for 12 or more years, and that he was a trespasser without any colour of right that can properly be accepted under section 38 of the Limitation of Actions Act. In dismissing the Plaintiff's suit the court further stated:–

"**I … state firmly that it was he (Plaintiff) who had the onus of proof and he has failed to meet the test set out by the law as to his claim. In any case, on a balance of probabilities, his case is weak and cannot be sustained as opposed to that put forth by Defendant.**"

So, what are the Plaintiff's complaints regarding the judgment sought to be appealed against? Where or how did Lenaola, J err? It is not sated, not even in the written submissions filed on behalf of the Plaintiff!

The second important issue raised by the Defendant in the replying affidavit is that after judgment was delivered, the Defendant transferred its legal interest in the suit property to a third party, and that since the injunction sought, if granted, cannot bind the third party, the court would have acted in vain if it granted the injunction.

A copy of the certificate of title to the suit land is annexed to the replying affidavit at paragraph 15. It shows that on 23rd December 2008 the suit property was transferred to **Kiruma International Company Limited**. This was one month and six days after the Plaintiff's suit was dismissed. Its application for injunction was filed on 18th December 2008. It is not clear when the application was served.

More importantly, interim injunction pending formal application was not sought immediately after judgment was delivered. Again, though the application for injunction was filed under certificate of urgency, certification in that behalf does not appear to have been sought. Nor was interim injunction sought pending hearing of the application.

That being the position, there was nothing lawfully to prevent the Defendant from disposing of the suit property after judgment in its favour was delivered.

In these circumstances, what would be the use of the injunction sought by the Plaintiff in the present application? The Defendant is no longer the registered proprietor of the suit land. Such injunction obviously cannot bind the new proprietor, Kiruma International Company Limited, which is not a party to these proceedings.

The application was overtaken by the fact of transfer of the suit property by the Defendant to a third party. The transfer was after judgment was delivered in favour of the Defendant (by dismissal of the Plaintiff's claim). The Plaintiff sought no interim injunction immediately after judgment was delivered or even after filing under certificate of urgency the formal application.

To grant injunction in these circumstances would be to act in vain, and the court does not act in vain.

Upon the two issues discussed above, I find no merit in the chamber summons dated 18th December 2008. The same is dismissed with costs to the Defendant. It is so ordered.

I find it unnecessary to determine the other issues canvassed in the submissions.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2011