



1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court Case*

LAND

- a) *LR No. 4894/35*
 - b) *Landlord/tenant*
 - c) *Oral agreement to store machinery and tools without paying out rent till HCCC 23/99 case is finalized by the High Court*
 - d) *Subject to payment of rent Ksh. 10,000/= per month*
 - e) *Equipment vandalized*
 - f) *Original plaintiff filed suit 14th September 2010 for arrears of rent*
 - g) *Eviction orders*
4. *Appeal filed 2nd February 2011 (not heard)*
- a) *Trial magistrate ex-parte judgment of 9th December 2010*
 - b) *Exparte judgment of 9th December 2010 be set aside by Application 25th January 2011*
 - c) *Stay of execution*
 - d) *Application dismissed 27th January 2011*
5. *Application 4th February 2011*
- a) *Mandatory injunction filed for the respondents to return Appellant's tools of trade including cranes, tractors, buses, caterpillars, ten containers, work vehicles and aircraft engines valued at in excess Ksh. 167,000,000/=*
 - b) *Mandatory injunction granted 10th February 2011 (Orders 2 & 3) (Khaminwa J) orders received by Respondent 11th February 2011.*
 - c) *Application received under protest*
 - d) *Matters overtaken by event*
6. *Contempt Proceedings:*
- a) *Orders of mandatory injunction unenforceable*
 - b) *Court holds respondent 1 and 2 events overtaken*
 - c) *Obligated to have returned goods*
 - d) *Sold goods*
 - e) *Orders Ksh. 500,000/= deposited in court.*

7. Application dated 2nd September 2011:

By advocate formerly holding brief for M/s Kaai Mugambi & Co Advocates for 1 and 2 respondent

- a) Application for stay of execution
- b) Files notice of appointment

8. Preliminary objection by appellant/respondent

- a) That advocate had not complied with Order 9 r 9 Civil Procedure Rules for leave to come on record.
- b) Advocate withdrew application of 2nd September 2011 together With notice of appointment.

9. Application dated 20th September 2011:

- a) Stay of execution
- b) Notice of change of advocate

10. Preliminary Objection by appellant/respondent No. 2

- a) That advocate had not complied with Order 9 r 9 Civil Procedure Rules for leave to come on record
- b) Notice of change filed in error

11. In reply:

- a) There is no final judgment in the subordinate court.
- b) The first respondent was never party to the main suit.
- c) May come on record without leave of the court.

12. Advocate for the appellant:

- a) Mandatory injunction is a final order:
Case Law:

- i) **Palace Dry Cleaners Ltd & another – Vs – Kenya Power & Lighting Company Ltd**
HCCC 837/2000
Visram J
Commissiner of Assize (as he then was)

Interlocutory mandatory injunction is a superior order
.....sometimes it has the effect of concluding the suit.

- ii) **Phyllis Wanjiru Mugo – Vs – Hannah Njeri Nganga**
HCCC 334/01
Waki J

Mandatory injunction has a higher standard

13. Held:

Preliminary objection upheld.

14. Case law:
As No. 11 above

15. Advocates :

- i) O P Ngoge instructed by O.P. Ngoge & Co Advocates for the Appellantf
- ii) J W Wanjohi instructed by M/s J W Wanjohi & Co Advocates for the Respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 234 OF 2010

ROY GONTIER
APPELLANT/APPLICANT

ORIGINAL DEFENDANT

VERSUS

YASMIN HAJI ABDULLA 1ST
RESPONDENT/RESPONDENT

ORIGINAL

PLAINTIFF

ELIHAIH MPUTHIA T/A WARLEEN TRADERS 2ND
RESPONDENT/ RESPONDENT

(Being an appeal from the Ruling/Order of Hon. M K Kiema Esq. Resident Magistrate, Milimani Commercial Courts Nairobi, delivered on 27th January 2011 in Milimani CMCC No. 568 of 2010)

RULING NO. 2

I. INTRODUCTION

1. In my Ruling number one, I outlined the background of the proceedings before the subordinate court. This was a matter that concerned LR No. 4894/35 whereby the relationship of the parties was that of landlord and tenants.

2. A final judgment was entered in the subordinate court. The appellant/tenant agreed that the trial magistrate had no jurisdiction to deal with the matter. Execution issued. The appellant tenant appealed to the High Court and asked for stay of execution orders and mandatory injunctive orders. The orders were served on

10th February 2011 with a penal notice (Khaminwa J).

3. The landlord allegedly sold the tenant's goods. The tenant filed contempt proceedings.

4. The court held that the two respondents do deposit Ksh. 500,000/= as the mandatory injunction was overtaken by events.

5. All along, the two respondents were represented by M/s Kaai Mugambi and Co advocates. Mr J W Wanjohi held their brief.

6. On 2nd September 2011, J W Wanjohi filed an application praying for stay of execution of this court's orders requiring the deposit of

Ksh. 500,000/=. The said advocate filed a notice of appointment to come on record for the 2nd respondent.

7. The application of the notice of appointment was withdrawn after the advocate for the appellant raised a preliminary objection.

8. A similar application was filed dated 20th September 2011. This too was filed by Mr J W Wanjohi. He also filed a notice of change of advocate.

9. A preliminary objection was again raised by the appellant.

II PRELIMINARY OBJECTION

10. The preliminary objection raised was that this matter was finalized. If the advocate wishes to come on record, he must seek leave of the court as required under Order 9 r 9 Civil Procedure Rules.

11. The finality comes about the mandatory injunction granted by Khaminwa J.

12. In reply, the advocate intending to come on record J W Wanjohi argued that the 2nd respondent auctioneer was never in the subordinate court case. He was not party to the matter. He can therefore come on record.

13. The advocate for the appellant relied on the case law of:

i) Palace Dry Cleaners Ltd & Another

– Vs –

Kenya Power & Lighting Co. Ltd

HCCC 837/2000

Visram J Commissioner of Assize (as he then was)

who stated that

“interlocutory mandatory injunction is a superior order Sometime it has the effect of concluding the suit.”

ii) Phyllis Wanjiru Mugo – Vs – Hannah Njeri Nganga

Waki J (as he then was)

HCCC 334/01

Mandatory injunction has a higher standard.

14. The advocate requires leave to come on record, argued the appellant in this preliminary objection.

III OPINION

15. The proceedings before the subordinate courts are finalized. The matter has come up on appeal against the Hon. Magistrate ruling of

27th January 2011 entering final judgment against the appellant.

16. The 2nd respondent was never a party to that original matter. He was enjoined to this appeal during the prayers for mandatory injunction and later contempt proceedings.

17. The advocate intending to come on record states he need not infact seek leave to come on record.

18. On perusal of the proceedings, this court noted that the applicant (proposed) in fact had been represented by

Kaai Mugambi & Co Advocates. There is a final judgment on record in the subordinate court. That whereas, a mandatory injunction is a superior order and has the effect of finalizing the case, the appellant (proposed) required to file an application for leave to come on record under Order 9 r 9 Civil Procedure Rules. This would not have been necessary if he had all along acted in person and had no advocate previously.

19. The application is hereby granted. The preliminary objection is upheld. The application and notice of change of advocate is hereby struck out with costs to the appellant.

DATED THIS 6TH DAY OF SEPTEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

iii) *O P Ngoge instructed by O.P. Ngoge & Co Advocates for the Appellantf*

iv) *J W Wanjohi instructed by M/s J W Wanjohi & Co Advocates for the Respondent*

