



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1540 of 2002 (O.S)

1. MOHAMMED ABDI ROBA

2. IBRAHIM LEMARINPLAINTIFFS

V E R S U S

WEST END BUTCHERY LIMITEDDEFENDANT

R U L I N G

The Plaintiffs filed suit herein on 27th September, 2002 by originating summons claiming to have acquired title to land parcel **L.R. No. 7149/10(I.R. No. 30601)** (hereinafter called the **suit land**) by adverse possession under the **Limitation of Actions Act, Cap. 22**.

The Defendant subsequently applied by **chamber summons dated 7th May, 2004** under **Order 6, rule 13 (1)** of the **Civil Procedure Rules** (the Rules) for an order to strike out the originating summons. That application was heard *inter partes* on 16th November, 2004. In a ruling delivered on 4th March 2005, the application was allowed and the originating summons struck out and dismissed with costs. Apparently the Plaintiffs lodged a notice of appeal, though the same appears not to be on the court record.

On 3rd May, 2005 the Plaintiffs applied by **notice of motion the same date** seeking the following main orders:-

“1. That (the) court be pleased to order a stay of any further proceedings and/or taxation of costs herein pending hearing and determination of the appeal against the ruling delivered on the 4th day of March, 2005 and the orders made pursuant thereto.

2. Alternatively, a stay of the orders made on 4th March, 2005, in addition to granting an order for injunction pending appeal against the orders made on 4th March, 2005 restraining the defendant/respondent by itself, servants, agents, employees from trespassing, alienating, offering for sale, demolishing the plaintiffs structures, or generally interfering with the plaintiffs’ quite possession of the disputed land L.R. No. 7149/10 (I.R. No. 30601), (be granted).

3. That an interlocutory mandatory injunction be issued ordering and directing the defendant by itself, agents or employees or anybody taking title from them, to cease interfering (with), and to immediately deliver up possession of, any part of the disputed parcel of land, until the full hearing of the intended appeal or further orders of this...court on any terms that the...court may find fair and just to grant.

4.”.

There are supporting affidavits sworn by the Plaintiffs.

The Defendant has opposed the application as set out in the grounds of opposition dated and filed on 13th May, 2005 and replying affidavit filed on 16th May, 2005. The grounds of objection to the application include:-

1. That the application has no basis in law and the court is legally incapable of granting the orders sought.
2. That the application is vexatious, frivolous and an abuse of the process of the court.
3. That the application is an attempt to re-open arguments in a concluded matter.
4. That the Plaintiffs' intended appeal has no probability of success and no draft memorandum of appeal has been exhibited.
5. That there have been previous suits filed by the Plaintiffs over the same subject-matter seeking more or less the same reliefs.

There is a supplementary replying affidavit filed on 24th November, 2008 with the leave of the court which does not raise anything new.

An interim stay of further proceedings was subsequently granted.

I have considered the submissions of the learned counsels appearing, including the authorities cited. On the authority of the English case of **ORION PROPERTY TRUST LTD & OTHERS –VS- DU CANE COURT LTD & OTHERS [1962] 3 All E.R. 466**, the court has jurisdiction in appropriate cases, to grant an injunction pending appeal to restrain an act that might deprive the applicant of the results of his appeal. This inherent jurisdiction is available even where the court has just dismissed the applicant's suit. See also the text, **PRINCIPLES OF INJUNCTIONS**, by Richard Kuloba at page 70.

So, the issue I must decide is whether this is an appropriate case for the court to exercise its discretion in the favour of the Plaintiffs. It is safe to expect that an application for injunction pending appeal must not only be made without undue delay, it must also be prosecuted expeditiously. Furthermore, the appeal must be lodged and prosecuted expeditiously. An injunction pending appeal ought not to have the effect of suspending the matter indefinitely, for the respondent is entitled to expect to enjoy the fruits of his judgment at some time.

In the present case, the Plaintiffs' suit was dismissed on 4th March, 2005. The present application was filed two months later on 3rd May, 2005. But it was not until 9th March 2009, nearly 4 years later, that the application was prosecuted, and then only after the Defendant set it down for hearing. In the meantime, apart from lodging notice of appeal, there is no evidence of lodgement of memorandum and record of appeal in the Court of Appeal under the rules of that court. As already stated, the jurisdiction to grant injunction pending appeal is an inherent one. It is not available under **Order 41, rule 4** of the Civil Procedure Rules. What is available under that rule is jurisdiction to stay execution or proceedings upon appeal or second appeal. As the Plaintiffs' suit was struck out and dismissed, what is there to be stayed, except perhaps proceedings for ascertainment of costs? In my view, it would not be a proper exercise of the jurisdiction to stay proceedings in order to impede ascertainment or recovery of costs of a suit duly awarded.

So, there is no appeal before the Court of Appeal as envisaged by **sub-rule (4) of rule 4 of Order 41**. And even if there was, there has been inordinate delay in lodging the necessary memorandum and record of appeal before the Court of Appeal, without any explanation. Should the Defendant wait for ever for the Plaintiffs to lodge and prosecute their intended appeal?

I find that after so many years the Plaintiffs have not manifested any serious intention to lodge appeal. It would be unjust in the extreme to keep the Defendant indefinitely from the fruits of its litigation. I must therefore refuse the application by notice of motion dated 3rd May, 2005. It is hereby dismissed with costs. Any interim stay of proceedings or injunction is hereby lifted. Those will be the orders of the court.

DATED AT NAIROBI THIS 11TH DAY OF JUNE, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 12TH DAY OF JUNE, 2009