



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Miscellaneous Application 1 of 2004

CHARLES MATHEKA PLAINTIFF

VERSUS

HACO INDUSTRIES LIMITED RESPONDENT

RULING

1. On 17/11/2008, I dismissed the Plaintiff's claim that he was entitled to the suit land by fact of adverse possession. He has apparently filed an appeal against that decision and by his Chamber Summons dated 18/12/2008, he seeks orders that the Defendant be restrained from evicting him and from entering, fencing or damaging or interfering with L.R. 337/833 (Grant I.R. 37868) pending the hearing and determination of his appeal.
2. The grounds in support are that;
 - (a) "The Court made its judgment on 17/11/2008 dismissing the originating summons of the Plaintiff in which he wanted to be declared the owner of parcel of land known as L.R. 337/833 (Grant I.R. 37868) having been On the land for a period exceeding 12 years.
 - (b) The Plaintiff has already filed a Notice of Appeal to the Court of Appeal which was filed on 20/11/2008 and served on 24/11/2008.
 - (c) The Defendant/Respondent has given the Plaintiff Notice to vacate the premises immediately and intends to evict the Applicant and to enter and damage the Plaintiff's premises or structures and development made on the said parcel of land before the intended Appeal is heard and determined.
 - (d) The Applicant is likely to suffer substantial loss which cannot be compensated by money and an order of stay of the judgment made on 17/11/2008 or preserve the *Status Quo* before the intended Appeal is heard and determined.
 - (e) The Court should consider that the intended Appeal shall be rendered nugatory if the Plaintiff is evicted before the intended Appeal is heard and determined.
 - (f) The Application has been made without undue delay and if no stay of Judgment is granted the Applicant stand to suffer substantially."
3. In his Affidavit sworn on 18/12/2008, the Applicant states that he has made developments on the suit land; has goats and cattle shed; has put piped water and has beans, maize, sugar cane, bananas, oranges

and trees on it. That if he is evicted, as threatened by the Defendant, he will suffer substantial loss. However, before the Application could be heard, the Defendant filed a Notice of Preliminary Objection and argued that this court has no jurisdiction under order XLI Rule 4 and Order L Rule 7 of the Civil Procedure Rules to grant an injunction pending appeal. That Section 3A of the Civil Procedure Act does not apply where there are other provisions and the Appellant should seek injunctive reliefs in the Court of Appeal. That the Application is therefore incompetent and should be struck off.

4. The response by the Plaintiff is that the objection is vague and that the issue of jurisdiction should have been raised earlier. That in any event, the court has jurisdiction to grant the injunction for a limited period. That the objection should therefore be rejected.

5. Order XLI Rule 4 provides as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as has been given by the applicant.

(3) (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.

(5) (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

6. Further, Order L Rule 7 provides as follows:-

“7. Every summons shall state in general terms the grounds of the application being made and shall be heard in chambers and, where any summons is based on evidence by affidavit, a copy of the affidavit shall be served”.

7. My view is that Order XLI Rule 4 cannot apply in this case because there is no order or decree that is capable of being stayed. I dismissed the Originating Summons because I saw no merit in the claim for adverse possession. I gave no order that either party could execute and it was upto the Defendant to determine how to take possession of the suit land.

8. Similarly, Order L Rule 7 is a general rule that confers no positive benefits to an aggrieved party.

Having so said, Order L Rule 12 provides as follows:-

“12. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

No party should be held to account for quoting the wrong provision of the law and therefore on that ground alone, the objection has to fail. However, there is still the question whether this court can, in the circumstances of this case, and on merit, grant an injunction pending appeal. There is of course no doubt that this court can grant such an injunction – see Erinford Properties Ltd vs Cheshire County Council (1974) 2 All E.R 448.

9. As to the issue of concurrent jurisdiction of the High Court and Court of Appeal on the subject, in Madhupaper International Ltd vs Kerr (1985) KLR 840 it was held *inter-alia* as follows:-

(i) “Where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed.

(ii) (*Obiter*) It is preferable for the High Court to deal with an application for injunction pending an appeal from its decision not so much as to protect the Court of Appeal from inconvenience but more because the Court of Appeal would have the advantage of seeing what the High Court judge made of the application. The judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs.

(iii) The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid.”

10. I accept the above as being the law on the subject and the merits of the Application will be determined separately.

11. The above being my finding, it follows that I see no merit in the Preliminary Objection and the same is overruled with costs.

12. Parties should now take hearing dates for the Application dated 18/12/2008.

13. Orders accordingly.

Dated and delivered at Machakos this 22nd day of September 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Masika for Plaintiff

Mr Kibanya for Defendant

ISAAC LENAOLA

JUDGE