



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 533 of 2008**

**MARIAM ARICKS BILALI..... APPELLANT**

**VERSUS**

**MICHAEL KARIUKI KIRUNGIA (guardian of**

**Joyce Wanjiru Ng'ang'a).....1<sup>ST</sup> RESPONDENT**

**THEOFILO M. MBAABU.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

Mariam Aricks Bilali (hereinafter referred to as the appellant) has filed an amended chamber summons under Order XXXIX Rule 1(a), 2 & 2(a) of the Civil Procedure Rules, Section 3, and 3A of the Civil Procedure Act seeking *inter alia* orders of interlocutory injunction and orders of mandatory interlocutory injunction as follows:

- (i) That the court be pleased to restrain the respondents by themselves, their servant and/or agents or otherwise howsoever, by way of a temporary injunction from wasting, damaging, selling and/or disposing the applicant's household goods pending the hearing of this application and determination of this appeal.
- (ii) That the court be pleased to order the applicant's goods returned to the suit premises on such terms that are just and fair pending the hearing and determination of this appeal.
- (iii) That the court be pleased to restrain the 1<sup>st</sup> respondent by herself, her servants and/or agent or otherwise howsoever by way of a temporary injunction from evicting and/or interfering with the plaintiff's peaceful enjoyment of Flat Number CR 54 Pumwani, Highrise Phase 1 pending the hearing of this application and determination of this appeal.
- (iv) That the court be pleased to restrain the 1<sup>st</sup> respondent by herself, her servants and/or agents or otherwise howsoever from alienating, selling, charging or disposing of Flat Number CR 54 Pumwani, Highrise pending the hearing of this application and determination of this appeal.
- (v) That the respondents be condemned to pay the costs of this application.

Mr. Nyakundi who appears for the respondents Michael Kariuki Kirungia and Theofilo M. Mbaabu t/a Metropolitan Auctioneers, has raised a preliminary objection to the application contending that the application before the court is incompetent and ought to be struck out.

Firstly, Mr. Nyakundi contends that the application for injunction brought under Order XXXIX of the Civil Procedure Rules is improper as there is no suit upon which the application can be anchored. He concedes that such an application could be brought under Order XLI Rule 6 of the Civil Procedure rules but maintains that it can only be brought through a notice of motion. Mr. Nyakundi submits that the appellant cannot seek solace under that rule as she has neither invoked order XLI Rule 6 of the Civil Procedure Rules nor has she come by way of notice of motion.

Mr. Nyakundi further submitted that the appellant having failed to annex a copy of the order appealed against, the court

cannot know the order referred to and therefore his application is defective. In this regard Mr. Nyakundi referred to **HCCC No.729 of 2003, Morris & Co. Ltd vs Kenya Commercial Bank & 2 Others**, where Ringera J. held that where a plaintiff was seeking both interlocutory prohibitive and mandatory injunctions, it was incumbent to do so, on a notice of motion and an application made by chamber summons was defective.

Mr. Mwanjumba who appeared for the appellant drew the attention of the court to the ruling in **Prafula Enterprises Ltd vs Norlake Investments Ltd & Another, HCCC No.336 of 1999**, where Mwera J. dealing with a similar situation regarding whether an application ought to have been brought by notice of motion or chamber summons stated that the court was prepared to overlook the procedural defects of the application in the course of doing justice. Mr. Mwanjumba urged the court to consider the larger interest of justice as paramount. He maintained that the application had properly been brought by way of notice of motion. He urged the court to look at the substance of the application rather than the form.

Mr. Mwanjumba further submitted that Order XLI Rule 3 of the Civil Procedure Rules, envisages a situation where a formal appeal has been lodged, and the appellant's application was therefore borne out of that appeal. Mr. Mwanjumba maintained that the court has powers to grant a temporary injunction under Order XXXIX Rule 1 of the Civil Procedure Rules until the determination of the suit. He maintained that the appellant was not obliged to move the court under Order XLI Rule 6 of the Civil Procedure Rules.

Mr. Mwanjumba also referred to **Civil Application No.227 of 1985 Priscilla Krobought Grant vs Kenya Commercial Bank Ltd & 2 Others**, where an application for injunction pending appeal was considered under Rule 5(2)(b) of the Court of Appeal Rules. Mr. Mwanjumba urged the court not to be tied down by undue technicalities but to exercise its inherent jurisdiction to do justice. Mr. Mwanjumba further relied on the case of **Kanwal Sajit Singh Dhiman vs Keshavji Jevraj Shah (2008) eKLR**. He maintained that although an order of stay of execution was not applied for, the court should issue an order of temporary injunction as the court understands that there is a remedy being sought and the application has been made under Order XXXIX of the Civil Procedure Rules.

With regard to the failure to annex a certified copy of the order appealed against Mr. Mwanjumba contended that the documents in respect of the appeal were still under preparation. He referred the court to Order XLI Rule 1A of the Civil Procedure Rules which provides that a certified copy of the decree or order appealed against shall be filed as soon as possible or within such time as the court may order.

I have considered the preliminary objection which was raised. The issue as I understand it, is essentially, whether an application for interlocutory injunction and mandatory injunction pending the determination of an appeal can be made under Order XXXIX Rules 1a, 2 & 2a of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act, as opposed to Order XLI Rule 4(6) of the Civil Procedure Rules.

Order XLI Rule 4(6) of the Civil Procedure Rules states as follows:

***“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.”***

In my understanding, that rule gives an appellate court powers to issue a temporary injunction during the pendency of an appeal. It does not however, give the court powers to grant orders of mandatory injunction during the pendency of an appeal. Such orders can only be granted in exercise of the court's inherent jurisdiction. In that regard, Section 3 & 3A of the Civil Procedure Act were properly invoked by the applicant.

Order XXXIX Rule 2 of the Civil Procedure Rules, states as follows: -

***“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”***

In effect therefore, orders of temporary injunction can be granted at any time either before or after judgment. The applicant could therefore elect to seek orders of interlocutory injunction pending the appeal under that rule. In this regard, Order XXXIX Rule 9 of the Civil Procedure Rules provides that applications under rules 1 & 2 have to be made by way of chamber summons. The complication here arises by the invocation of Order XXXIX Rules 1 & 2 together with Section 3 & 3A of the Civil Procedure Act, pursuant to which an application ought to be made by way of a notice of motion. In such a situation where there is such a contradiction, the more general form of notice of motion ought to have

been applied. In my considered view however, the application ought not to be defeated by mere want of form. The court must apply substantive justice without undue regard to technicalities. For that reason, I would, like Mwera J. did in the Case of *Prafula Entreprises Ltd vs Norlake Investment Ltd & another*, overlook that procedural defect which has not in any case prejudiced the respondent. For this reason, I do overrule the preliminary objection and order that the parties do take a date for the hearing of the chamber summons dated 6<sup>th</sup> October, 2006.

Those shall be the orders of this court.

**Dated and delivered this 4<sup>th</sup> day of December, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mwanyumba for the appellant

Nyakundi for the respondent