



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Civil Case 25 of 2007**

**GIOVANNI PAPA ..... PLAINTIFF**

**VERSUS**

**MARAFIKI PAMOJA HOMES COMPANY LIMITED .....DEFENDANT**

**RULING**

By an application by way of Notice of Motion dated 23<sup>rd</sup> August 2007, pursuant to the provisions of order L Rule 1, XLI Rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the applicant seeks orders:

- 1) *That the honourable court be pleased to certify this application as urgent and dispense with service thereof at first instance.*
- 2) *That at first instance, there be a temporary stay of execution pending the hearing and determination of this application.*
- 3) *That there be a stay of execution pending the hearing and determination of this appeal.*
- 4) *That the honourable court be pleased to give directions on the inter-parte hearing of this application*
- 5) *That the costs of, and incidental to this application be provided for.*

The application is based on the grounds *inter-alia*, that:

- 1) *On 17<sup>th</sup> August 2007, the learned Magistrate granted orders of injunction against the appellant in proceedings relating to property worth more that Ksh. 590,000,000.00/=. He had no pecuniary jurisdiction to grant those orders*
- 2) *On 22<sup>nd</sup> August 2007 the learned Magistrate delivered two separate rulings refusing to grant a stay of execution of the order given on 17<sup>th</sup> August 2007 and directing the office Commanding Malindi Police Station to enforce compliance with the orders given on 17<sup>th</sup> August 2007 and to offer security to the respondent to allow the respondent's agents to break open gates to the suit premises. The appellant is dissatisfied with both of those rulings and orders and has filed a Memorandum of Appeal to this court.*
- 3) *The appeal has overwhelming chances of success.*

- 4) *The appellant will suffer substantial loss that cannot be remedied by any award in damages unless execution of the orders complained of is stayed.*
- 5) *This application has been made without unreasonable delay.*
- 6) *The appellant's application for a stay of the order issued by JOSHUA KIARIE, SENIOR PRINCIPAL MAGISTRATE, in Malindi SPMCC No. 265 of 2007 – MARAFIKI PAMOJA HOMES COMPANY LIMITED VS GIOVANNI PAPA & ANGELS BAY HOLDINGS LIMITED on 22<sup>nd</sup> of August, 2007 have been refused.*
- 7) *The appellant has preferred an appeal against the said dismissal.*

The application is supported by the annexed affidavit of **GIOVANNI SECUNDO PAPA** sworn on the 23<sup>rd</sup> day of August 2007.

For the applicant it was argued that an appeal has been preferred against the order of Mr. Joshua Kiarie SRM Malindi refusing to stay the courts orders issued on 17<sup>th</sup> August 2007 and marked as exhibit “**API**”.

That the learned Ag. Senior Principal Magistrate equally refused to stay an order issued on 22<sup>nd</sup> August 2007 requiring the OCS Malindi Police station to provide security and/or police officers to ensure that the orders issued herein on 17<sup>th</sup> of August 2007 are complied with and/or in the alternative to direct the OCS Malindi to provide the plaintiff with police officers so as to allow the respondents agents to open the Southern Gate of Angels Bay village.

That the learned Ag. Senior Principal Magistrate also refused to stay an order he issued on the 22<sup>nd</sup> day of August 2007 fixing the hearing of the respondents application for the applicants arrest and committal to prison or in the alternative the sequestration of the applicants properly slated for 5<sup>th</sup> September 2007.

That the effect of this refusal is to allow the respondent to threaten the applicant's personal liberty quite apart from exposing the applicant's property in danger of waste by authorizing trespass into the applicants property hence this application.

That the honourable court has equally declined to give photocopies of the proceedings of the court.

By a Notice of Preliminary Objection dated 29<sup>th</sup> August 2007, the respondent raised preliminary objection on points of law thus:

- 1) *That the orders given by the Senior Principal Magistrate's court on 22<sup>nd</sup> August 2007 were executed by the officer Commanding Malindi police station on 23<sup>rd</sup> August 2007 and execution is complete.*
- 2) *That the order of stay of execution issued by the High Court of Mombasa on 24<sup>th</sup> August 2007 cannot be enforced as execution was completed on 22<sup>nd</sup> August 2007 and there is nothing to stay.*
- 3) *The appellants application is an abuse of the process of the court.*

Mr. Khaminwa argued that at the time the honourable

Judge gave the stay orders on 22<sup>nd</sup> August 2007 execution, had already been done. Hence there was nothing to stay. That it is not open for a litigant or his counsel to interpret a court order. A court order must be obeyed first. Its legality may be questioned later in another judicial proceedings otherwise chaos would reign supreme in the realm.

Mr. Ole Kina teaming up with Mr. Kamunde were of a different view.

Mr. Ole Kina was of the view that the preliminary points of law raised calls upon the court to make a finding at what point in time execution was complete. In that respect it falls outside the purview of the principles enunciated in **MUKHISA BISCUITS MANUFACTURING VS. WEST END DISTRIBUTOR LTD** (1969) EA 69. That the proper procedure is to bring the application under order VI rule 13 (1) (a) (b) (c) or (d) by summons. That the applicant was not bound to obey this order of the Ag. SPM issued on 17<sup>th</sup> August 2007 because it was issued without jurisdiction. That whether or not the gates of the subject premises were opened or not are matters of facts to be ascertained by evidence and cannot found a basis for preliminary objection which should be based on pure points of law.

Mr. Kamunde was of the view that the preliminary points of law raised were incompetent to the extent that there is no evidence from the OCS Malindi that the order of 17<sup>th</sup> August 2007 had been executed. That the order issued on 17<sup>th</sup> August 2007 was without jurisdiction courtesy of the Judicature Act (see Practice Rules made thereunder) which precludes the Magistrate in Malindi from sitting and hearing cases of civil nature during High Court vacation.

I have carefully analysed the arguments of respective – parties regarding the preliminary objection herein.

**LAW JA in MUKHISA BISCUITS MANUFACTURING –VS- WEST END DISTRIBUTORS LTD (1969)** E A 69 took the view that a preliminary point of law consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.

**SIR CHARLES NEWBOLD P** in **MUKHISA BISCUITS MANUFACTURING –VS- WEST END DISTRIBUTORS (SUPRA)** had this to say in-part on the same point:

*“.....Preliminary objection is in the nature of what used to be a demurrer. It raises pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or what is sought is the exercise of judicial discretion.....”*

I have carefully analysed the pleadings and the various applications filed herein in the light of submissions and arguments by respective counsel keeping in focus the issue for determination – whether all facts regarding completion or otherwise of the execution are ascertainable or has to be ascertained.

In my view the question whether the court order in question was complied with or not is a matter of evidence to be ascertained on the evidence at the hearing of this application inter-partes. A point of law cannot be raised if any facts have to be ascertained. I prefer to rest my ruling on that point on the basis of the dicta of **SIR CHARLES NEWBOLD P** as he then was quoted herein-above.

The up-shot is that the preliminary point of law fails and is dismissed with no orders as to costs. The parties to take a date for the hearing of the substantive applications now.

For the evidence of doubt this ruling applies with equal force to the application in HCCC No. 26 of 2007.

**Dated and Delivered on 21<sup>st</sup> Day of September 2007.**

**N. R. O. OMBIJA**

**JUDGE**