



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 11 of 2004**

JECINTA KATANA APPELLANT

V E R S U S

1. KAZUNGU MURAMBA

2. GABRIEL CHARO KUYONGA RESPONDENT

(Being an Appeal from the Judgement of the Senior Resident Magistrate's Court at

**Mombasa before Hon. J. S. Mushelle - SPM dated 19th December 2003 in Chief
Magistrate Civil Case No. 1470 of 2001)**

Coram : Before Hon. Justice J. Mwera

Tindika for Appellant

Omollo for the Respondents

Court clerk – Kazungu

RULING

The present Notice of Motion dated 17th December 2004 was brought by the appellant herein under O41r4(1)(6) Civil Procedure rules. By it she seeks an injunction to restrain the respondents from building on or disposing of that parcel of land called PLOT No. 26 BAMBAA TRADING CENTRE until the pending appeal is heard and determined.

Mr. Tindika told the court that the subject plot was given to two people one Katanan Nzai, now deceased and represented by the appellant, and the 1st respondent Muramba on 9th April 1975 by Kilifi County Council. This was not in dispute. It was added that allottees were to build a bar and hotel premises on the plot. That the deceased Katana put up some permanent structures then died. That after that Muramba purported to sell the said plot to the 2nd respondent (Charo) without knowledge or consent of the late Katana's estate (family). That Charo moved to demolish Katana's structures and put up his own. That then this suit was brought in the lower court to stop the building and lay a claim of proprietary rights by Katanan's estate over this plot. That the lower court granted the injunction, heard the case which the appellant lost. That the decree that followed said in part:-

“2. That the second defendant be and is hereby allowed and advised to continue with construction of his building on Plot No. 26 Bamba Trading Centre.”

All the above is more or less not in dispute. However the lower court decision seemed to have aggrieved the appellant and so she brought this appeal on grounds including:-

“5. The Learned Magistrate erred in law in granting orders not prayed for.”

Mr. Tindika explained this point in the light of the fact that the Learned Trial Magistrate did allow and advise the two Respondents to continue building on Plot NO. 26, a relief that was not sought by the 2nd respondent. The appeal has seven (7) grounds in all and so the appellant wishes that an injunction do issue pending the determination of it. That if that is not done, the appellant risks to lose her property rights in Plot No. 26 which was allotted to the deceased Katana with Muramba. It was not revealed to the court whether the allotment was joint or common. It was added that besides the probability of losing rights on the plot if Charo goes ahead to build on it before the appeal herein is determined, ie changing the character of the plot altogether, there is also the loss of the value of Katana's structures which Charo demolished. The court further heard that besides lodging the appeal, the same had been admitted to hearing and proceedings had been typed - all in accord with O41r4(6) Civil Procedure Rules.

Mr. Omollo argued the respondents' position that the appellant had not made out what substantial loss she would suffer if the injunction did not issue. That there had been an unreasonable delay in bringing this application since the judgement of 19th December 2003 and that that had not been explained.

In this court's view the applicant's invoking O41r4(1) and (6) imports in such proceedings aspects of stay pending appeal and principles governing temporary injunctions under O39 Civil Procedure Rules – quite a mixed grill.

While the stay pending appeal aspects require that one should demonstrate what substantial loss one will suffer if the stay orders are not given and that an application for them should be made without unreasonable delay, the applicant should also avail security for due performance as may be ordered by the court. When temporary injunctions fall to be considered, it must be shown either that there is a prima facie case with probabilities of success, or the likely loss / damage cannot be compensated with money or that on balance of convenience, this or that party is favoured.

However, with all the above focus on sub rule (6) of O41 r 4(1) is that:-

“(6) Notwithstanding anything contained in sub rule (1) of this rule the High court shall have power in 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.”

Thus going by the above provision of law, and the appellant having done what has been stated above on filing and moving towards hearing and determination of the appeal, this courts' view is that the sought injunction should issue until then. The appellant is not only exercising her right to appeal but also there is a matter to be determined regarding her rights in Plot 26 which the local council allotted to the deceased Katana and Muramba, (1st respondent) yet Muramba on his own made to sell it to Charo without Katana's estate (family) being notified or involved.

The injunction all issue and the appellant will have to file a written undertaking as to damages.

Costs to the appellant.

Orders delivered on 8th September 2005.

J. W. MWERA

JUDGE