



Head Note

1. Order XXXIX rules 1 and 7
2. Injunction after judgment (?)
3. Judgment for vacant possession and mesne profits: can the successful party be restrained by injunction from demolishing the property?
4. A decision is awaited from Court of Appeal on an application for stay: should the High Court grant an injunction pending the decision or pending the hearing and determination of the appeal which is before the Court of Appeal?
5. Successful party has title documents as well as physical possession of the property that was the subject matter of the proceedings: Is the act of demolition of the property an abuse of court process?

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 600 OF 2003**

SAMOW EDIN OSMAN APPLICANT

VERSUS

PETER MWANGI MBUTHIA & ANOTHER RESPONDENTS

R U L I N G

This is an application dated 16th March 2004. The application was filed under a Certificate of Urgency, by the Defendants, seeking two (2) injunction orders, directed at the Plaintiff. By the said application, the defendants also sought an order directed at the Officer Commanding Police Division (OCPD) Kasarani, requiring him to supervise compliance with the orders issued by the court.

I find it appropriate to set out herein, verbatim, the terms of the two injunction orders sought. They read as follows

“2. That the Plaintiff be restrained by an injunction from demolishing, transferring or charging L.R. NO. 36/111/218 till C.A. Civil Appeal No. 30 of 2004 and 26 of 2004 are heard and disposed of.

3. That the mandatory injunction be issued ordering the defendant into the premises”.

The application was first canvassed before me, *ex parte*, on 17/3/04. After hearing the defendants submissions, I did certify the application as urgent. I also granted interim orders restraining the Plaintiff from demolishing the suit premises until 23/3/04, when the Court of Appeal was due to give its verdict in Civil Appeal No. 38 of 2004 Peter Mwangi Mbuthia Vs Sammow Edin Osman. Immediately, after I finished reading my Ruling, at that *ex parte* stage, Mr. Njiru Boniface Advocate drew my attention to the

fact that the Court of Appeal was scheduled to give its verdict on 23/4/04, as opposed to 23/3/04. However, as I had already directed that the application be heard inter partes on 23/3/04; and also because the court could not, lawfully, grant an ex parte injunction for a period exceeding 14 days, I reiterated that the interim orders would only remain in force until 23/3/04, unless the said orders were extended by the court.

Thus, by the date when the application was argued inter partes on 23/3/04, the Defendants were still enjoying the benefits of the interim orders. And as at the conclusion of the submissions by the parties herein, Mr. Hassan Advocate for the Plaintiff gave his undertaking to the court, that his client would withhold further demolition until the court delivered its Ruling on 29/3/04. Having, so secured the property that is the subject matter of this application, during the currency of the application, I now need to decide the fate of the said application.

The Defendants submitted that the court ought to grant an injunction to restrain the Plaintiff from demolishing the property in issue until the Appeal filed by the said Defendants is heard and determined. The court was informed that after this court delivered its judgment on 19/12/03, the two defendants filed separate appeals, being Civil Appeal No 26 of 2004, and Civil Appeal No 30 of 2004, respectively. The Defendants also informed the court that they had filed an application for stay of execution. The Court did grant the orders for stay of execution, on terms, but the Defendants failed to meet the said terms. Thereafter, the defendants filed Civil Application No. NAI 38 of 2004, seeking orders for stay of execution. The said application was canvassed before the Court of Appeal on 16/3/04, and the Ruling is scheduled to be delivered on 23/4/04. Whilst the Ruling was being awaited, the Plaintiff commenced demolition of the property in issue. It is that action by the Plaintiff which provoked this application.

It is the contention of the Defendants that the whole building will be demolished, and thus defeat the purposes of the appeal by the Defendants. The defendants say that pursuant to the provisions of Order XXXIX rule 1, this court has power to restrain the Plaintiff from damaging the property. It was further submitted that the said provisions are still applicable to this case, even though judgment has already been delivered, as the proceedings now before the Court of Appeal serve to keep the case very much alive.

The Defendants also pointed out that Section 3A of the Civil Procedure Act (Cap 21) gives this court inherent jurisdiction to grant an injunction even though a case had been concluded. Such an order ought to be made to avoid abuse of court process by the Plaintiff. It was asserted that the Plaintiff was taking advantage of the delay in the decision by the Court of Appeal, to demolish the building.

The Defendants also emphasized that by virtue of the provisions of Order XXXIX rule 7, the court could make orders for the preservation of the suit property, until the Court of Appeal delivered its Ruling. The reasons for making the application to the high Court, were inter alia, due to the fact that the Court of Appeal was at present very under-manned, following the suspension of a number of their Judges. In conclusion, the Defendants said that if the orders sought were granted, they were ready to offer security, in the form of a Title deed for a property that is 200 acres, and is valued at Kshs 5,000,000/-. The Defendants would be in a position to make available an appropriate valuation report of the said property within the next 7 days.

In response to the application, the Plaintiff raised a strong opposition. He pointed out that there is no suit pending before this court, following the delivery of Judgment on 19/12/03. Mr. Hassan advocate submitted that the title to the property in issue was decreed to the Plaintiff on 19/12/03, thus bringing the suit to a close. For that reason, the provisions of Order XXXIX were inapplicable.

The Plaintiff also submitted that the only forum before which the Defendants could seek any remedies, after they failed to meet the terms of the order for stay, was the Court of Appeal. The Defendants did recognize that fact, hence their decision to file the applications for stay of execution, in the Court of Appeal. And having so applied, the Defendants are blamed for failing to ask the Court of Appeal to grant them some interim relief whilst awaiting the Ruling on the substantive application.

In the absence of any interim orders barring the Plaintiff, he contends that there was nothing

unlawful about his action in demolishing the property. The said demolition is said to be the manner in which the Plaintiff had chosen to deal with his property, and that cannot be unlawful.

Order XXXIX rule 1 provides as follows;

“Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording a reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by an order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

In this matter, it is common ground that this court has already given its Judgment. By the said judgment, the court determined the rights of the parties. It would therefore appear that the provisions of Order XXXIX rule 1, would not be applicable to this case. But upon a further reflection on the wording of that rule, I am unable to state conclusively that the rule would have absolutely no application after judgment. I believe that in appropriate cases, a court would be entitled to grant a temporary injunction if any property in dispute in a suit was in danger of being wrongfully sold in execution of a decree. To my mind, it is generally a contradiction in terms for one to make reference to the existence of a dispute in a suit, after Judgment was granted.

But the rule does appear to envisage a scenario in which an injunction could be granted to bar the wrongful sale of property “in execution of a decree”. By virtue of the provisions of section 2 of the Civil Procedure Act, (Cap 21), a decree is defined as follows;

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit ...

. Thus to be able to execute a decree, the party taking such action would have to be in possession of a judgment.

In this case, the court granted judgment in favour of the Plaintiff. The said judgment was in relation to the prayers in the Amended Plaint, for the defendants to grant vacant possession of the suit property; mesne profits to be paid by the defendants; and costs of the suit.

After hearing arguments on the Plaintiff’s application for summary judgment, Hon. J.B. Ojwang J, delivered his verdict on 19/12/03, and granted judgment in favour of the Plaintiff. Four (4) days later, the Defendants filed an application for stay of execution. That application was canvassed before Ojwang J., and he gave his Ruling on 6/2/04. By the said Ruling, the court did grant orders for stay of execution, but on condition that the Defendants paid mesne profits calculated at Ksh 150,000/- per month from 25/3/03 upto 6/2/04. The mesne profits were to be paid within 15 days; and the money was then to be held in an interest-earning account, in the names of the advocates for the Plaintiff and advocates for the 1st Defendant. The court made it quite clear that if the defendants failed to meet the conditions, the application would be rendered null and void.

It is common ground that the Defendants failed to meet the conditions. It is also common ground that the Defendants have filed their respective Memoranda of Appeal Simultaneously with the said Memoranda of Appeal, the Defendants filed an application before the Court of Appeal for stay of

execution, pending the hearing and determination of their appeals. The said application for stay was heard by the Court of appeal on 16/3/04, and the Ruling is scheduled to be delivered on 23/4/04.

Whilst the Ruling is still being awaited, the Plaintiff commenced the demolition of the building on the property that is the subject matter in this case. It is for that reason that the Defendants now ask this court to grant an injunction to restrain the Plaintiff from demolishing, transferring or charging the property until the Civil Appeals Numbers 30 and 26 of 2004 are heard and disposed of.

In evaluating the application I must bear in mind the prayers in the Amended Plaintiff. The said prayers were for vacant possession and mesne profits. In execution of the Decree obtained in this case, the Plaintiff did take over the possession of the property. Thus in effect, execution has been carried out. Having obtained possession, the Plaintiff commenced demolition of the property. The Defendants now accuse the Plaintiff for the demolition, which is being perceived as an attempt to defeat the intended appeal. On the other hand, the Plaintiff says that he is free to do as he pleases with his property.

I note that in his Ruling, in relation to the Defendants application for stay of execution, Ojwang J. observed, inter alia as follows;

“It follows that the Defendant’s apprehension that the Plaintiff will transfer title to third parties is not a concern that, strictly, should be the preoccupation of the legal process; because ownership travels together with the power to alienate”.

To that phrase I would add that the court would not stop the owner of a property from demolishing it, unless there were some very special circumstances that have a legal backing. The matters that were in issue in this case related to possession. The Defendants did not lodge a counter-claim claiming title. In my assessment, following the execution of the Decree for vacant possession, the functions of this court are effectively spent.

Indeed, I believe that the Defendants were well aware of the fact that this court did not have any further role to play in the matter, hence their decision to move the Court of Appeal for stay of execution. And once the matter was moved into the hands of the Court of Appeal, it is that court which would have jurisdiction to determine whether or not it would grant an injunction pending either its ruling on the application for stay of execution, or pending the determination of the appeals. I believe that the Court of Appeal would then exercise its jurisdiction pursuant to the provisions of Rule 5 (2) (b) of the Court of Appeal Rules. This court does not have jurisdiction to grant an injunction under those rules.

But if I am wrong, and if I do have jurisdiction under Order XXXIX rule 1, should I exercise my discretion in favour of the Defendants?

As I have already noted, the Decree flowing from the judgment of my brother, Ojwang J., has already been executed. This court is thus functus officio. I cannot sit on appeal over my brother’s decision. And whilst an injunction to restrain demolition is not exactly the same as an order for stay of execution of the order for vacant possession, I must bear in mind the reasons advanced by this court when it granted orders for stay of execution. At page 9 of the Ruling, Ojwang J. expressed himself thus;

“I have no doubts at all that the recognised owner of the suit premises is the Plaintiff, and consequently it follows that the Plaintiff/Respondent has the right to use his property as he deems fit. There is no basis in law for calling upon the Plaintiff to limit his enjoyment of his own property, leaving some room for the Defendants to satisfy any particular sensitivity or practical need attached to real property as such”.

If I were to grant the injunction, I would thereby be limiting the Plaintiff’s enjoyment of his property. In effect, I would be disagreeing with my brother, whose jurisdiction is at par with mine.

I am unable to do so. I therefore decline to grant the injunction to restrain the demolition of the property. And as the Defendants chose to abandon the claim for a mandatory injunction, the application

dated 16.3.04 stands dismissed with costs.

DATED at Nairobi this 29th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE