

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 254 OF 2001

MOSES WACHIRA WAMUNYUPLAINTIFF

- V E R S U S -

FREDRICK KAGIO KINYUA1ST DEFENDANT

NGUNYU KARURI.....2ND DEFENDANT

WACHIRA KIMATHI.....3RD DEFENDANT

KIMATHI WAIGERA.....4TH DEFENDANT

PETER WARUI.....5TH DEFENDANT

R U L I N G

This is an application for stay of my orders issued on 2/5/2001 pending appeal to the Court of Appeal.

Mr. Kithinji for the Plaintiff/Respondent opposed the application arguing that to grant the application would promote unlawful action. I agree with him. As was said by COCKAR J.A. (as he then was) in **Kamau Mucuha v. The Ripples Ltd** NAIROBI C.A. Civil Application No. NAI 186 of 1992 (NAI 77/92 UR) (unreported) (HANCOX, C.J., KWACH, J.A. & HIMSELF) “A party as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....” KWACH, J.A., for his part said as follows:-

“For my part, I am content to decide this application purely on the track record of the applicant since the order complained of was made last September. He was required to do three things. First, he was ordered not to alienate or demise the suit premises. Secondly, he was required to reinstate the tenant. And thirdly, he was required either to return the goods of the tenant or pay him compensation. Up to this day, he has made no attempt to comply with any of these orders. With regard to the first and second, he could have gone back to the Judge and explained his difficulties having in the meantime put a new tenant into possession. But with regard to the return of the goods wrongfully attached, what possible excuse can he have for not complying? None at all. He is, in my opinion, in flagrant disobedience of the order of the Judge and now comes to this Court for temporary dispensation. He should not be allowed to use the process of this Court for such a patently mischievous purpose. As Lord Goddard L.J. said in the case of Thomason v. Park [1944] 2 ALL E.R. 477 at page 479 – E:

“Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and, he then says:

‘I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the status quo preserved.’

The **status quo** that could be preserved was the **status quo** that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a Court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason, for not granting an injunction”.

I agree fully with the Learned Judges of Appeal who decided that case. What possibly will be achieved by granting this application? Would I not be condoning an act which I found to be unlawful? I am afraid I cannot do that.

I, therefore, dismiss this application with costs. The temporary stay granted on 2/5/2001 and extended variously is hereby vacated.

DATED and DELIVERED at NAIROBI this 21st day of June, 2001.

ALNASHIR VISRAM

JUDGE