



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**HCCC NO. 790 OF 2005**

**1. JACINTA PERE**

**2. NJENGA MARIMBEL.....APPELLANTS**

**VERSUS**

**1. LUKAS KIBEGWA OKARA T/A KENAGWA ENTERPRISES**

**2. OLE KEJUADO COUNTY COUNCIL.....RESPONDENTS**

**RULING**

The Appellant has applied by chamber summons dated 15<sup>th</sup> May 2012 seeking the main order of attachment and sale of the property of the 1<sup>st</sup> Respondent on the grounds that in contravention of the orders of stay of execution made in this matter at the lower court, the 1<sup>st</sup> Respondent demolished the Appellants' property on Plots No. 143 and 144 (the suit premises).

The application is brought under **Order XXXIX, rule 2A (2)** of the **old Civil Procedure Rules. Sections 1A (3), 3A and 63(b)** of the **Civil Procedure Act** (the **Act**) have also been invoked.

There is a supporting affidavit sworn by Counsel for the Appellants. In it he contends -

- i. That on 24<sup>th</sup> November, 2003, the Hon. T.W.C Wamae issued orders staying execution of the decree pending hearing and determination of the appeal.
- ii. That the stay was made conditional upon application by the 1<sup>st</sup> Respondent on 26<sup>th</sup> March 2004. This order was subsequently stayed on 28<sup>th</sup> May 2004 making the stay unconditional pending hearing and determination of the appeal.
- iii. That while the 1<sup>st</sup> Respondent was allowed to take possession of the suit premises on 13<sup>th</sup> January 2005, the order was subsequently vacated on the ground that there was already a stay in place.
- iv. That the 1<sup>st</sup> Respondent proceeded to evict tenants in the suit premises and demolish the suit premises in blatant disobedience of the order of stay on 11<sup>th</sup> November 2011.
- v. The court issued an order on 17<sup>th</sup> November 2011 restraining the 1<sup>st</sup> Respondent from further

demolishing the suit premises which order was served upon him, his advocates and Officer Commanding Station, Ongata Rongai.

vi. These orders were disobeyed by the 1<sup>st</sup> Respondent as he continued demolishing and fencing it despite the fact that Kshs. 10 Million was used to construct it and now it is irreparably damaged.

vii. That it is in the interests of justice that the orders sought herein are granted.

The 1<sup>st</sup> Respondent has opposed the application as set out in the replying affidavit filed on 22<sup>nd</sup> June 2012. Grounds of opposition emerging therefrom include –

i. That Appellants did not comply with the conditional stay of execution which according to them was in place as the application to set it aside was denied on 9<sup>th</sup> December 2004.

ii. That instead the Appellants pursued an application for review in the lower court even after having a pending appeal which was also dismissed which led to filing of the current appeal. Stay of execution was never sought.

iii. That the stay lapsed as that appeal was abandoned when the Appellants sought review of the lower court judgment.

iv. That further, in January 2005, he applied to be put in possession of the suit premises which the appellants did not complain about and even got eviction orders for trespassers in the suit premises on 11<sup>th</sup> October 2011.

v. That therefore when the Appellants sought to stop the eviction of trespassers by the 1<sup>st</sup> Respondent, eviction had already taken place and the order of eviction had not been set aside, vacated or otherwise dismissed.

vi. That the Appellants' application is therefore mischievous and meant to delay hearing of the appeal as there are no orders that have been disobeyed.

vii. That the orders sought are ambiguous to the extent that the suit premises is not captured accurately and it is unclear against which premises they want the orders enforced.

There is a supplementary affidavit filed on 20<sup>th</sup> July 2012 which expands the grounds. The Appellants also argue that the lower court never made the condition precedent for subsistence of the stay order and so it continues to subsist indefinitely; that the orders granting the 1<sup>st</sup> Respondent possession of the suit premises were vacated and thus he was never put in possession of the suit premises; that the 1<sup>st</sup> Respondent used eviction orders granted in another suit Nairobi CMCC No. 4333 of 2011 to execute demolitions over the suit premises; that indeed there were no tenants in the suit property warranting an eviction; orders were granted on 16<sup>th</sup> November 2011 stopping any further demolitions on the suit premises which the 1<sup>st</sup> Respondent ignored which was an affront on the authority and integrity of the court.

In a further affidavit filed on 4<sup>th</sup> December 2012 the 1<sup>st</sup> Respondent asserts that at no time did the appellants seek to comply with the order of conditional stay issued at the lower court; that he only rejected the bank proposed by the Appellants and they never bothered to give a name of a mutually acceptable bank nor did they make any other attempt to comply with the order of depositing money in a joint interest account; that the monthly deposit was condition precedent to the order of stay as security must be provided for an order of stay to be granted; that when the orders of eviction were vacated he was already in possession of the suit premises and the Appellants have never again sought to be reinstated; that in any case these orders were made based on material non-disclosure by the appellants that no stay orders existed at the time; that the issues raised in the application cannot be granted at the interlocutory

stage as they relate of quantum of damages which can only be proved at full trial; sufficient evidence has not been provided as to how the figure of Kshs. 10 Million was arrived at.

In a further supplementary affidavit sworn on 30<sup>th</sup> September 2013, Counsel for the Appellants insists that the 1<sup>st</sup> Respondent was served with the orders stopping him from demolishing the suit premises a fact which he has acknowledged; that the action by the 1<sup>st</sup> Respondent was meant to hinder the proper course of justice and to show disrespect to the Court's authority by wrongly using orders fraudulently acquired to destroy the suit premises.

Parties filed their respective submissions.

It is contended for the Appellants that while the Respondents argue that there was a condition precedent for grant of the stay order, nowhere in the order is it stated that stay would lapse due to non-compliance. That while they attempted to open the joint account, the 1<sup>st</sup> Respondent's Advocates rejected that and should now be estopped from claiming that the Appellants did not comply with the said order.

That in any case, the court subsequently issued orders prohibiting further demolition of the suit premises on 16<sup>th</sup> November 2011. It is maintained that the 1<sup>st</sup> Respondent has not been in possession of the suit premises and thus there was no basis for demolition as he was aware of court orders barring demolition. Further that the appellants have suffered immeasurable damage as a result of the demolition of property they spent Kshs. 10 Million constructing. That any action taken in disobedience of a court order is illegal and the court has a duty to make sure that the 1<sup>st</sup> Respondent does not escape the consequences thereof.

For the 1<sup>st</sup> Respondent it is submitted that there is no stay of execution order as an application to set aside the stay order by the lower court (Hon. Wamae) was dismissed. As the Appellant did not satisfy the conditions as set out in lower court, the 1<sup>st</sup> Respondent argues that the stay of execution lapsed. That having no orders of stay, the Appellant proceeded to the lower court seeking review of its judgment which was declined precipitating this appeal. No stay of execution was sought in the current appeal.

According to the 1<sup>st</sup> Respondent, a party can only choose between an appeal or review but not both. Once an appeal has been lodged and heard, a review cannot be sought. The appellant having chosen review instead of pursuing the initial appeal meant any stay of execution pending that appeal lapsed.

It is averred that there was no order barring the eviction of the Appellant from the suit premises as the orders were sought and granted (17<sup>th</sup> November 2011) after eviction had already taken place on 11<sup>th</sup> November 2011. Thus the 1<sup>st</sup> Respondent could not have breached non-existent orders.

It is also contended that these being contempt proceedings, the order endorsed with a penal notice ought to have been served on the 1<sup>st</sup> Respondent. This has not been done and the appellant has not furnished the court with any proof of service (affidavit of service not filed). It is further argued that evidence in contempt proceedings being quasi-criminal in nature ought to be evaluated so as to gauge whether or not there has been a breach of orders as liberty and property of a party are at stake. The photographs annexed to the supporting affidavit of the appellant likewise have no link to the suit premises.

That the prayers sought cannot be granted because the appellant has not identified the property to be attached making it uncertain; the value of the property is estimated at Kshs. 10,000,000/- without any proof of assessment of the value. The receipts provided can only be proved by way of oral evidence in trial and not at the preliminary stage.

It is maintained that the affidavit of Counsel for the appellant is incompetent and should be struck out as it is in express breach of Order 19 rule 3 of the civil procedure rules. All the information the said Counsel has deposed to is not within his knowledge and he does not disclose the source of his information.

I have considered the submissions of the learned counsels appearing, including the case cited.

With regards to whether the stay order given by the lower court is still in existence, it is instructive to note that where the court orders for security deposit and there is default, then the orders for stay are rendered useless for a defaulting party. Therefore the Appellants having defaulted on the condition set by the lower court could not then suppose that they would subsist indefinitely. The Appellants did not attempt to seek clarification of the orders which made the stay conditional and when they would lapse in case they did not fulfill the conditions.

In any event, the orders for stay were overtaken by events when the eviction and demolition took place. The lower court orders were successfully enforced. In my understanding, the event in this case is the possession of the suit premises. When the Appellant filed an application for injunction demolition had taken place and the 1<sup>st</sup> Respondent was in possession of the suit premises.

The issue of whether the 1<sup>st</sup> Respondent used an order in a different suit to evict and eventually demolish the suit premises or whether they knew a court order existed to that effect are matters to be canvassed in the appeal as they would require production of documents and witnesses to the same. This also applies to the loss and damage visited upon the Appellants when the premises was demolished. A proper valuation of the value of the property destroyed would have to be prepared. These are all matters best left to the substantive appeal.

In my view, as endorsed by Counsel for the 1<sup>st</sup> Respondent, while the said Affidavits of Mr. Chaudhri annexed what is on record before the Court including Court Orders, Court proceedings and correspondence that had been exchanged between Counsel for the Parties, he has also deponed to matters relating to evidentiary facts such as demolition of the suit premises. All these matters were not within the knowledge of Mr. Chaudhri and, I am sure, if called upon, he would not defend the same in cross-examination. To that end, the advocate risks being invited to step from his privileged position at the bar into the witness box and be liable to be cross-examined on his deposition. He would find it difficult to discharge his duty to the court and his client if he were to act as both counsel and witness in the same case. See **H.C.C.C. NO. 1625 of 1996 Kentainers Limited -v- V.M. Assani & Others.** I find that the said offending paragraphs ought to be struck out.

In the end the application dated 15<sup>th</sup> May 2012 is dismissed. Costs shall be in the appeal.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of September, 2016**

**A. MBOGHOLI MSAGHA**

**JUDGE**