



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

**ENVIRONMENT AND LAND CASE NO. 205 OF 2008**

CHRISOTPHER KIRUBI.....APPLICANT

-VERSUS-

ALI KHAN MUSES.....RESPONDNET

**RULING**

1. The defendant/applicant filed his notice of motion dated 21st July 2015 under section 3A and 63 of the Civil Procedure Act and Order 40 rule1 – 7, 10 (i) of the Civil Procedure Rules. In the motion, the applicant sought six prayers with prayer 2 and 3 as the main prayers for determination ;

**2) That pending the hearing and determination of this Application inter-parties the Plaintiff/Respondent by himself and/or his agents, nominees and whomever be restrained by a temporary injunction from effecting any further demolitions on the Defendant's/Applicant's unfinished Hotel structures standing on Plot Kwale/Galu Kinondo/50.**

**3) That pending the hearing and determination of this Suit the status quo obtaining at the 'locus in quo' be maintained by both parites.**

However in the submissions, the applicant mainly urged the Court to issue orders for the maintenance of the status quo obtaining at the 'Locus in quo'.

2. The application is supported by the grounds on the face of it and the affidavit of Ali Khan Muses. In paragraph 3 of his affidavit, the applicant deposed that the Order of 11th August 2008. In Paragraph 4, 5 and 6 he deposes that the Respondent is executing the interlocutory orders and failing to fix the main suit for hearing.The applicant admitted the wall has been demolished. Further the applicant deposes that the order as extracted is incorrect as the order only provided for the demolition of the wall and not any other structures yet the respondent now wants to demolish part of the hotel structure. The applicant deposes that the Court of appeal granted stay order in Civil Application No 41 of 2014. He urged the Court to order status quo to protect him from imminent loss.

3. The application is opposed by a replying affidavit sworn by Andrew Mukite Musangi advocate. Mr Musangi deposed that the lawful boundaries for plot 47 have at all times been fixed. The advocate denied his visit to the OCPD Msambweni was to fix beacons but for provision of security during the demolition exercise.The respondent states further that he has never been stopped from demolishing the structures illegally built on his land. Lastly that the applicant had never filed an appeal against the orders issued

against him and has only filed this application as an abuse of the Court process. He urged the Court to dismiss the application.

4. The applicant herein has admitted that the respondent obtained an order of mandatory injunction except the order was limited to the demolition of the wall only. In the ruling annexed as “AKM 1”, delivered on 12th March 2012 the plaintiff's application dated 11.8.2008 was allowed in terms of prayer 3 and 4 with costs. Prayer 4 which is relevant to the present application read thus :-

*“That a mandatory injunction compelling the defendant to forthwith pull down and remove the wall and such part of the structures as encroach onto and are built by the defendant on the plaintiff's property”. (under line mine)*

This applicant in his affidavit has deposed that there is a stay of execution issued by the Court of appeal. He annexed the ruling in C. A Civil Appeal No 41 of 2014. On perusing the said ruling, the Court of appeal gave a stay of execution of the decree arising from the judgement of Mukunya J. dated 13th October 2013 for a period of twelve (12) months. This matter as admitted by the applicant has not been heard.

5. This stay mentioned was not in respect to the order of 12th March 2012. The record therefore reveals that the applicant never appealed this order. The mandatory order allowed the respondent to demolish the wall and **any structures built** on the respondent's plot No 47. If the applicant felt aggrieved, he knew what channel to follow but asking me to revise the said order without taking appropriate steps is not one of the channels open to him. Further my understanding of the status quo being sought by the applicant is equivalent to asking the Court to issue stay of execution of the orders issued in respect of the application dated 11th August 2008. The principles for granting stay of execution are only available to a party challenging the order to be executed. The applicant has not made any steps to vary or set aside that order therefore prayer 3 is not available to the applicant and is dismissed.

6. As regard the remaining prayers No 4 and 5 the same is allowed I do hereby direct the plaintiff/respondent to comply with Order 11 within a period of 30 days of the delivery of this ruling. Thereafter the defendant to also comply within 30 days of being served with the plaintiff's documents. The parties can then fix the matter for pre-trial directions. I make no order as to costs.

Ruling dated and delivered in Mombasa this **8th** day of **October, 2015**

**A. OMOLLO**

**JUDGE**