



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 41 of 2012

DANIEL LUWAMBI 1ST APPELLANT

IDI KATANA 2ND APPELLANT

GEORGE TUJI 3RD APPELLANT

V E R S U S

PENGUIN HOLDINGS LIMITED RESPONDENT

RULING

1) On 24th February 2012 Hon. T. Gesora delivered a Ruling in Mbsa RMCC No. 2524 of 2011 Penguin Holdings Ltd –Vs- (1) Daniel Luwambi (2) Idi Katana & (3) George Tuji. In that Ruling the Court concluded as follows-

“The Plaintiff has asked me to give such other orders as I may deem fit to grant and in pursuance to that prayer I would say that the Plaintiff is granted permission to use all reasonable force to eject the Defendants and remove all offending structures should the Defendants decline to move out on their own but as they do so, they shall enlist the help of the Police through the Officer Commanding Station in whose jurisdiction the suit property is. Costs shall be in the cause. Orders accordingly.”

2) Dissatisfied with the decision of the learned Magistrate, the Appellants preferred this Appeal vide a Memorandum of Appeal filed on 2nd March 2012. About 24 days later, on 26th March 2012, the Appellants filed an application to Stay Execution of the orders of the Magistrate. Through Counsel they appeared on the same day under Certificate before Justice Mwongo. That application was, however, withdrawn after the Judge pointed out a lapse in it.

3) On 23rd April 2012, the Appellants filed a fresh application for stay seeking the following orders-

“(a) Spent.

(b) There be a stay of execution of the orders

made by Honourable T. Gesora in RMCC 2524 of 2011 PENGUIN HOLDINGS –VS- DANIEL LUWAMBI KATANA IDI and GEORGE TUJI at Mombasa on 24th February 2012 pending hearing and determination of the Appeal before this Honourable Court.

(c) In the alternative status quo be maintained pending the hearing and determination of the pending appeal.

(d) Any other orders that this Honourable Court may deem fit to grant.”

- 4) In the affidavit of Idi Katana (the 2nd Appellant) sworn on 19th April 2012 he explains that this appeal will be rendered nugatory unless the stay is granted. Annexed to the affidavit are a bundle of photographs which showed that demolitions of their homes had already happened and that the Respondent was putting up some structures.
- 5) On the same day of filing of the application the Appellants moved Court *ex parte* and obtained an interim stay. Not too long thereafter, on 3rd May 2012, the Respondent filed an application seeking the variation, discharge or setting aside of the interim stay obtained on 24th April 2012. Principally the Respondent’s position is that the order of the Subordinate Court was fully executed on the same day it was issued ie 24th February 2012 and there was nothing to stay. This, in its view, should have been disclosed by the Appellants at the *ex parte* proceedings. Failing which there was material non-disclosure.
- 6) By agreement of Counsel both applications of 19th April 2012 and 3rd May 2012 were heard together. This decision is in answer to both applications.
- 7) The order that has vexed the Appellants was issued on 24th February 2012. They complain that they had no notice of the order. From the Court record of the day when the Ruling giving rise to the order was made, Mr. Abed appeared for the Respondent but there was no representative for the Appellants. But it needs to be noted that the date of Ruling had been taken in the presence of Counsel for both sides. The Appellants were however aware of the decision by at least 2nd March 2012 when they filed a Memorandum of Appeal against it. What surprises the Court is the sluggish manner in which the Appellants treated the question of stay. It took them 24 days to file the first application. Even then they had to withdraw it on 26th March 2012.
- 8) There was then inaction for another 27 or so days before the current Notice of Motion dated 19th April 2012 was filed. It is the position of the Respondents that they have fully executed the Courts order, having done so on the same day it was issued on 24th February 2012. The pictures annexed to the Appellants affidavit shows some structures which appear fully demolished. This would corroborate what the Respondent says about the execution of the Court Order. Then there is the following written comments made by the O.C.S Changamwe Police Station on the Court Order itself-

- **EXECUTED ON 24TH FEBRUARY 2012 BY OCS CHANGAMWE POLICE STATION JOINTLY WITH ADMINISTRATION POLICE OFFICERS FROM CHANGAMWE D.C’S OFFICE AND ASKARIS FROM MOMBASA MUNICIPAL COUNCIL.**
- **NOBODY WAS INJURED NOR LOSS OF PROPERTY.**

OCS

SIGNED BY TWAHA ABDULHAKIM THE DIRECTOR OF PENGUIN HOLDINGS LTD.

- 9) Even though the execution happened on the same day the Ruling was delivered, the Appellants ought to have moved with some urgency and brought this to the attention of the Court. Secondly as eviction had been carried out, the Appellants should have considered seeking an order of mandatory injunction to enable them retake possession. The provisions of Order 42 Rule 6 (6) offers that avenue. It reads-

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the 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.”

Under these provisions the Court can grant a prohibitory or mandatory injunction.

10) Order 42 Rule 6(2)(a) of The Civil Procedure Rules requires that an application for stay be brought without unreasonable delay. The need for promptness extends to applications for injunctions under Order 42 Rule 6(6). What amounts to unreasonable delay depends on case to case. In the instant case, execution took place on the very same day the Order was made. It took the Appellants about 60 days to bring the application now under consideration. No good explanation has been given for the lateness. This delay is not acceptable! I have also noted that the Appellants have sought an order which is less than efficacious. They seek to stay execution that has already happened! Upto this point I would be inclined to reject the Appellants plea entirely. But there is a disturbing aspect about the manner in which the lower Court order was extracted and executed.

11) What the Magistrate said in the ultimate paragraph of his decision bears repetition. He said-

“The Plaintiff has asked me to give such other orders as I may deem fit to grant and in pursuance to that prayer I would say that the Plaintiff is granted permission to use all reasonable force to eject the Defendants and remove all offending structures should the Defendants decline to move out on their own but as they do so, they shall enlist the help of the Police through the Officer Commanding Station in whose jurisdiction the suit property is. Costs shall be in the cause. Orders accordingly.”
(my emphasis)

12) This needs to be compared with the order extracted by the Respondent which reads-

“IT IS HEREBY ORDERED-

(a) That the Defendants be compelled by

way of a mandatory injunction to demolish any structures, walls, buildings, houses and or developments on the suit property that is Plot Number LR 2427/V/MN and to remove all equipments, labourers construction materials belonging to the Defendants or their servants, agents and or employees from the suit property and to allow the Plaintiff free ingress, use and operation of the suit property pending determination of this suit.

(2) That the Defendants, whether by themselves, their servants, agents or employees be restrained by way of an injunction from developing, constructing, or in any way interfering with or wasting the Plaintiff’s suit property that is Plot Number LR 2427/V/MN pending the hearing and determination of this suit.

(3) That the O.C.S Changamwe Police Station do provide necessary assistance to maintain law and Order.”

13) As earlier noted, the Ruling was read in the absence of the Applicants Counsel who was well aware of the Ruling date. On this the Appellants would have to blame their Advocates. That notwithstanding the order extracted by the Respondent should have faithfully accorded with the decision of the Magistrate. It is not difficult to notice that the extracted order did not include the part of the learned Magistrates Ruling that the Appellants would be removed forcefully should they **“decline to move out on their own.”**

14) A plain inference from the decision of the learned Magistrate was that the Appellants ought to have been notified of the decision so that they would elect whether to move out on their own volition or face forcefully ejection. A complaint by the Appellants is that the eviction caught them unawares. I have looked at the affidavits sworn on behalf of the Respondent. It has not been demonstrated that the order was served or brought to the attention of the Appellants or that they were given a fair chance to comply. Instead eviction was carried out on the very day the Order was issued.

15)It is infact doubtful that the order was prepared as required under Order 21 Rule 8 of The Civil Procedure Act which provides-

“8. (1) ...

(2) Any party in a suit in the High Court may

prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the Registrar who, if satisfied that it is drawn up in accordance with the Judgement, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the Registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment,shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may file the draft decree Marked as “for settlement” and the Registrar shall thereupon list the same in chambers before the Judge who heard the case or, if he is not available, before any other Judge, and shall give notice thereof to the parties.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall

refer to magistrate.

(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.”

A departure from the previous edition of The Civil Procedure Rules should be noted. Under The Civil Procedure Rules 2010, Rules 2, 3, 4 above bind the Subordinate Court as they do the High Court (Rule 5). And under Rule 6 Orders shall be prepared in the same manner as Decrees.

16)The Respondent did not controvert the Appellants contention that they were not served with the eviction order. It seems to me that the preparation of the Order was a unilateral action of the Respondent. That would be contrary to the provision of Order 21 Rule 8(2) of The Civil Procedure Rules. In addition, from my perusal of the lower court record, it cannot be said that the Order was prepared under Order 21rule 8(7) which empowers a Court to approve a draft Order at the time of making the Order. And it would be surprising if indeed the learned Magistrate were to approve a draft Order which did not conform to an Order he had just made.

17)What is the Court to do in the face of these irregularities? The integrity of Court Process is threatened when a Court order is Not extracted in accordance with the Ruling/Order of the Court. That integrity must be protected. For this reason I invite Counsel to address me as to why I should not order the restoration of the status quo existing before the evictions were carried out.

18)This Court shall thereafter make its final orders on the two applications before Court.

Dated and delivered at Mombasa this 5th day of November, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Chigiti for Appellants

Mohamed for Respondents

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**