



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL CASE NO. 9 OF 2016**  
**(Formerly Nakuru HCC. No. 82 of 2016)**

**EQUIP AGENCIES LIMITED.....PLAINTIFF**

**-VERSUS-**

**I & M BANK LIMITED.....DEFENDANT**

**R U L I N G**

1. Before me is the Plaintiff's third application in this matter, primarily seeking to stop the Defendant from exercising its statutory power of sale in respect of the land parcel described as **L.R. No. GILGIL TOWNSHIP BLOCK 2/210** (the suit property). This court by its two previous rulings delivered on 9<sup>th</sup> December, 2016 and 24<sup>th</sup> March 2017 rejected the two previous applications for injunction orders against the Defendant in one, pending the determination of the suit; and in the other pending the lodging and hearing of the Rule 5 (2) b of the Court of Appeal Rules application by the Plaintiff, in the Court of Appeal in respect of the first ruling.

2. In its second ruling of 24<sup>th</sup> March 2017, this court having rejected the subject motion stated in closing that:-

**“In the interest of justice, and to allow the Plaintiff to agitate its application under Rule 5 (2) (b), now pending in the Court of Appeal, I would grant a temporary injunction against the Defendant, for a period of SEVEN (7) DAYS with effect from 25<sup>th</sup> March 2017, restraining the Defendant from selling by public auction or private treaty the land known as L.R. No. GILGIL TOWNSHIP BLOCK 2/210. To that extent only the application has succeeded. The costs of the application will be borne by the Plaintiff in any event.”**

3. The limited temporary injunction thus granted by the court lapsed on 31<sup>st</sup> March 2017. Five days later, on 5<sup>th</sup> April 2017 the Plaintiff filed the application that is the subject of the instant ruling. Hence the oral request by the Plaintiff to amend accordingly, the principal prayer of the Notice of Motion filed on 5/4/2017. That prayer (2) seeks:

**“THAT this Honourable court be pleased to review its order issued on 24<sup>th</sup> March 2017 in the matter herein by extending the temporary injunction to 19<sup>th</sup> April 2017 when the application dated 6<sup>th</sup> January 2017 brought under Rule 5 (2) b) of the Court of Appeals Rules comes up for interpartes hearing at the Court of Appeal.”**

4. Ten grounds are listed on the face of the instant Motion, expressed to be brought under Section 1A, 1B,

3A and 63(e) of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

5. The application is supported by the affidavit of Leonard Njenga, an advocate in the firm of Gichuki King'ara & Company Advocates. The affidavit recites the history set out above, and additionally, includes information that the Court of Appeal has sent out a Notice that the Rule 5 (2) b) of the Court of Appeal Rules application pending therein, is to be heard on 19<sup>th</sup> April 2017. Further, that the Defendant has advertised the suit property for sale by auction, on 20<sup>th</sup> April 2017, and that it is important to preserve the suit property pending the application in the Court of Appeal.

6. Attached to the Supporting affidavit is a copy of the Notice of Hearing indicating that the application will be heard on 19<sup>th</sup> April 2017 at the Court of Appeal sitting at Nyeri.

7. Gilbert Banda swore a Replying affidavit on behalf of the Defendant, in opposition to the Motion. Annexed to his affidavit are copies of two Hearing Notices issued by the Court of Appeal in respect of the pending application, indicating different hearing dates and venues for the hearing, namely 19<sup>th</sup> April 2017 at Nyeri and 25<sup>th</sup> April 2017 at Nakuru. The affidavit also confirms that the sale by auction of the suit property is scheduled for 20<sup>th</sup> April 2017, a day after the likely date for the hearing scheduled before the Court of Appeal. Thus the deponent asserts that this court ought to leave the question of the stoppage of the auction to the discretion of the Court of Appeal.

8. That further, this court is now *functus officio* and should not preempt the decision of the Court of Appeal. And finally, that there is nothing presented by the Plaintiff to bring this application within the provision of Order 45 Rule (1) of the Civil Procedure Rules.

9. Arguments made before me by respective counsel on 13/4/2017 were drawn mainly from the rival affidavits. In addition Mr. King'ara for the Plaintiff emphasized his client's willingness to settle the subject debt, save for the delayed payments owed to it by the Government of Kenya. He stated that the application in the Court of Appeal may be rendered nugatory and that this court has power under the Land Act, for sufficient reason, to stop the impending sale in order to forestall such an eventuality.

10. For his part Mr. Wawire for the Defendant stated that there is no confusion on the date and venue of the hearing before the Court of Appeal. That the hearing is slated to be on 19<sup>th</sup> April 2017 at Nyeri. He reiterated that this court should not entertain this matter therefore, and especially having rendered two rulings herein. He points out that the limited injunction order issued on 24/3/2017 lapsed on 31<sup>st</sup> March 2017 and that the date of auction was a not new matter. He stated that the Defendant would be willing to stop the sale upon the Plaintiff depositing a sum of Shs 325 million, the estimated value of the suit property. He urged the court to dismiss the application.

11. Responding to the assertion that this court is *functus officio*, Mr. King'ara argued that this court is seized of the suit and highlighted the possibility of the sale by auction unless the hearing in the Court of Appeal takes off on 19<sup>th</sup> April 2017. The new evidence, according to him, is the hearing date before the Court of Appeal. Offering to pay thrown away costs in respect of the auction, Mr. King'ara submitted that the Plaintiff has no capacity to make the deposit sought by the Defendant.

12. I have given due consideration to the matters canvassed by way of the respective affidavits and oral arguments. While much has been made out of the question whether the Rule 5 (2) b) of the Court of Appeal Rules application in the Court of Appeal will be heard on 19<sup>th</sup> April, 2017 at Nyeri or on 25<sup>th</sup> April, 2017 at Nakuru, in my view nothing significant turns on this question in light of the history of this matter. This court did reject the Plaintiff's prayer for an injunction pending the lodging and hearing of the said application in the Court of Appeal, generally. It was of course anticipated that a date would be issued in the course of time.

13. The fact that a date has now been assigned for the hearing of the application under Rule 5 (2) b) while an important milestone cannot be the basis of further order which effectively upends this court's previous

substantive ruling. As the ruling delivered on 24<sup>th</sup> March 2017 clearly demonstrates, the seven-day limited injunction granted by this court did not rest on the merits of the dismissed application but was based purely on the court's discretion in the interest of justice.

14. The said limited injunctive order lapsed five days before the present application was filed. Hence there can be no question of an extension of the same. As Mr. King'ara submitted in his closing submission, any application subsequently filed must at best, necessarily be one for a fresh injunction to stop the auction. Still Mr. King'ara argued that the new date in the Court of Appeal is a new matter within the meaning of Order 45 Rule 1 of the Civil Procedure Rules.

15. Nonetheless the stated purpose of review sought is an order for a temporary injunction twice rejected by this court. This is to my mind an argument in infinite circles, that I find difficult to follow.

16. Order 45 Rule 1 and 2 of the Civil Procedure Rules are in the following terms:

**“(1) Any person considering himself aggrieved:-**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.” (emphasis added)**

17. The Plaintiff herein having preferred an appeal from the initial ruling of this court cannot also avail itself of the provisions in Order 45 Rule 1 of the Civil Procedure Rules. The initial application was for injunction pending the hearing of the suit. The second for an injunction pending appeal. The third and instant application is also effectively seeking an injunction pending the hearing of the application in the appeal pending in the Court of Appeal. Clearly the 2<sup>nd</sup> and 3<sup>rd</sup> Applications are similar and inseparably connected to the pending appeal in respect of the first application.

18. It matters not in my view that no appeal has been filed in respect of this court's ruling of 24<sup>th</sup> March 2017. Substantively, there is a pending appeal in this matter and it relates to the rejection of an injunction application brought against the defendant. The application before me, in so far as it is anchored upon Order 45 Rule (1) of the Civil Procedure Rules and is primarily seeking review of the court's order of 24/3/2017 is incompetent. There is a pending appeal that is substantially connected thereto.

19. Secondly, the Plaintiff's application dismissed on 24<sup>th</sup> March 2017 was brought under Section 1A, 1B and 3A of the Civil Procedure Act *inter alia*, primarily seeking a temporary injunction pending the hearing of the intended application in the appeal pending before the Court of Appeal. This court pronounced itself on that Motion. The fact that the stated application has been filed and scheduled for hearing does not give this court a new jurisdiction to entertain afresh, what is patently a similar application albeit dressed up as an application under Order 45 Rule 1 of the Civil Procedure Rules, for the review of the orders made on 24<sup>th</sup> March, 2017.

20. I think I have given enough reasons why the application filed on 5/4/2017 must fail. And in light of

the impending hearing before the Court of Appeal, this court's view is that at this stage, the less said the better. The application filed on 5<sup>th</sup> April 2017 is dismissed with costs.

Delivered and signed at Naivasha this **19<sup>th</sup>** day of **April, 2017**.

In the presence of:-

No Appearance for Plaintiff/Applicants

Mr. Mburu holding brief for Mr. Wawire for Defendant/Respondents

Court Assistant – Barasa

**C. MEOLI**

**JUDGE**