REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 669 OF 2010

THIKA INN LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The application before court is that filed on behalf of the plaintiff dated 16 February 2012 supported by an affidavit sworn by **Elizabeth Wanjiku Kinyanjui**. It is an application for injunction pending appeal prompted by the ruling of this court delivered on 14 February 2012 covering an application again filed by the plaintiff and dated 6 October 2012. The injunction seeks to stay the sale of suit properties being L.R. Nos. 4953/1990 and 4953/1991 ("the suit properties"). This court having dismissed the plaintiff\'s application of 6 October 2012, the plaintiff has now filed a Notice of Appeal and has requested this court to provide it with copies of the proceedings. This application is opposed by the defendant who has filed a Replying Affidavit sworn by a Legal Counsel of the defendant bank, one **Nereah Okanga** dated 19 March 2002.

2. There is no dispute between the parties as to the lending to the plaintiff by the defendant. Facilities were granted by the defendant under cover of its letter of 24th of June 1999 in which an overdraft facility of Shs.2 million was granted along with a loan of Shs.10 million reducing at Shs.278,000/- per month. That facility was to the plaintiff but it was to be secured by a legal charge over the suit properties. Again there is no dispute that the suit properties were registered in the name of John Kinyanjui Kanya. The Charge is dated 21st of July 1999 for a principal amount of Shs.13,510,000/-. The same was registered at the Land Titles Registry at Nairobi on 2 August 1999. Further, the lending was supported by the personal guarantees of the directors of the plaintiff namely the said John Kinjanjui Kanya and his wife, the deponent of the Supporting Affidavit, Elizabeth Wanjiku Kinyanjui.

3. The said Replying Affidavit detailed the history of this matter before this court and detailed that the application such as the one before court had been made in a different guise and in different applications in two suits, a number of times, all seeking to restrain the defendant from realizing its security. In reference to the Memorandum of Appeal, the defendant maintained that the grounds of appeal lacked merit as follows: –

"a. The Bank charged interest as per the agreement between the plaintiff and the defendant and that it did publish in the daily newspapers its base rate as and when the same changed.

b. In any event, under the terms of the facility as contained in the charge instrument, there was no requirement of service of notice prior to review of interest rates.

c. The power to review interest from time to time was reserved under the agreement as between the plaintiff and the defendant which agreement was documented in the Charge instrument.

d. The securities sought to be realised do not belong to the plaintiff and any perceived cause of action with respect of the suit property can only be urged by the registered proprietor of the said property.

e. The principal debtor has on various occasions admitted its indebtedness to the defendant.

f. The defendant\'s power of sale has crystallised.

g. There was no appeal preferred in respect of the findings contained in a Ruling delivered by Justice Leonard Njagi in Nairobi HCCC No. 246 of 2004 delivered on 21May 2010 in which the same issues that were raised in the plaintiff\'s application dated 28 September 2010 were raised."

The defendant noted in its said Replying Affidavit that the subject loan had been non-performing and consequently there was a cap on the interest that the defendant can charge. The deponent of the said affidavit pointed out that any delay in realising its security prejudices the defendant.

4. In its submissions, the plaintiff\'s counsel detailed that the plaintiff was afraid that the defendant might move in and dispose of the suit properties pending the hearing of the Appeal which would render the same nugatory. He pointed out that the draft Memorandum of Appeal attached to the Affidavit in support of the application, detailed some of the grounds that the plaintiff will rely upon in the Court of Appeal. He noted that there was a previous suit being *HCCC No. 246 of 2004* when a guarantor sought an injunction which was refused and this would seem to have influenced this court in the Ruling now appealed against. One of the main issues is that the plaintiff states that it has paid the amounts claimed but the defendant says that it has not. Plaintiff\'s counsel admitted that the suit properties are not registered in the name of the plaintiff but in the name of the guarantor John Kinyanjui, who was the plaintiff in *HCCC No. 246 of 2004*. In counsel\'s view, it is important that the suit properties be preserved so that the parties can enjoy their respective rights. It is more convenient to preserve the suit properties pending appeal. There will be no prejudice to the defendant as the suit properties will still remain charged to the defendant and will appreciate in value. I was then referred to the List of Authorities filed by the plaintiff filed on 22 February 2012.

5. Mr. Odera, the defendant\'s counsel, opposed the application. In respect of prayer 3 thereof, he noted that his firm had so far not been served with any notice in relation to an application to the Court of Appeal. Further, he maintained that prayer no.5 of the application referring to **section 52** of the Transfer Property Act does not apply as it was only available to a party who has an interest in the suit properties. He noted that the plaintiff has no interest in the suit properties, they belong to the guarantor. The only party that can apply for relief is the registered owner of the property or any other person with a registered interest. The plaintiff can only mitigate on the accounts but not on the disposal of those properties under a Charge or Mortgage. As regards prayer no.6 of the application, counsel for the defendant pointed out that *HCCC No. 246 of 2004* had been dismissed for want of prosecution and cannot be consolidated with this suit.

6. Counsel for the defendant noted that prayer No.4 of the application is brought under the provisions of **Order 42**, *Civil Procedure Rules* 2010. **Order 42 Rule 6 (2)** details the test for an order of stay. Counsel maintained that the nature of this case is such that there is nothing capable of being executed. There was no positive order granted by this court. All the court had done was to dismiss an order for injunction. Counsel went on to note that this court had not been addressed as to its jurisdiction to grant the application. The question of whether an appeal is to be rendered nugatory or otherwise is covered under **Rule 5** of the Court of Appeal Rules, not the *Civil Procedure Rules*. Under those Rules, as the suit properties do not belong to the plaintiff, the only party that can claim loss is the registered owner. That section also requires the furnishing of security. The fact that the suit properties are secured to the Defendant is not sufficient to satisfy the rule. The security offered by the plaintiff does not belong to the plaintiff. The suit properties belong to John Kinjanjui who has not sworn any affidavit in support of the application. Consequently it was counsel\'s opinion that the plaintiff had not satisfied the requirements of

Order 42 Rule 6 (2). Counsel further noted that this was the fourth application made to restrain the defendant from realising its security. The defendant noted that, as a bank, it was not in the business of speculating as to the appreciation in property values. It must be allowed to realise the security. The recent amendments to the Banking Act provided that where a debt is non-performing the rate of interest that may be charged is fixed thus there will be prejudice to the bank if the rate of interest is frozen. Counsel maintained that the grounds in the draft Memorandum of Appeal bear no merit and requested that this court do dismiss the plaintiff\'s application with costs.

7. In reply, Mr.Kariuki, counsel for the plaintiff, maintained that under **section 52** of the *Transfer of Property Act*, the plaintiff had demonstrated its interest as regards the suit properties. It was not in dispute that the plaintiff is carrying out its business situate on the suit properties. Secondly, counsel remarked that it was not incumbent upon the plaintiff to show that it had filed an application (presumably for stay) to the Court of Appeal. It was for this reason that the plaintiff referred to the prayer in the current application as a "temporary injunction pending Appeal". Counsel maintained that this court has the discretion to give the plaintiff timelines within which to file an application to the Court of Appeal. He commented that the plaintiff\'s application was within the guidelines of the **Erinford Properties Ltd v Cheshire County Council (1974) 2 All ER 448** case**.** He stated that although the application does not say that it is an injunction pending appeal, the plaintiff is seeking a reprieve from this court. The plaintiff is asking for an injunction not a stay of execution thus the issue of putting up security does not arise. He repeated that it was more convenient to preserve the suit properties rather than allow the defendant to realise its security. He confirmed that the application for injunction is brought under section 52 of the Transfer Property Act.

8. The plaintiff referred to no less than 11 authorities commencing with the Ruling of **Madan JA** (as he then was) in **Butt v the Rent Restriction Tribunal** *Civil Appl. No 16 of 1979.* Of course, that case followed the finding in the **Erinford Properties** case (supra) as therein stated:

"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another which, in his opinion, will be a better remedy will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court, as a general rule, ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory, per Brett, LJ in Wilson v Church (No. 2), 12 Ch.D. (1879), 454 at p. 459. In the same case, Carson, LJ, said at p. 458:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

9. **Megarry J.** later in his ruling in the **Erinford Properties** case at P. 464 had this to say:

"On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgement that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is a possibility that the judgement may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio quoad* **granting any injunction at all.**

There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship that it would avoid, and so on."

Counsel for the plaintiff also relied upon the Ruling of Lesiit J in **King'orani Investments Ltd v Kenya Commercial Bank Ltd & Anor** *HCCC No. 113 of 2007* in which the learned judge adopted the finding in*HCCC No. 789 of 1999,* **Kenon Ltd v Giro Commercial Bank** as per **Mbaluto J.** Both the judges accepted the position that judges do make mistakes and that the party who exercises its right to appeal should not be prevented from doing so by being denied either a stay or an injunction. What the court should consider is whether it is in the interests of justice to order a stay of proceedings or to grant an injunction and the terms upon which such order can be made.

10. Further, **Njagi J** in **Alliance Media Kenya Ltd v World Duty Free Company Complex Ltd t/a Kenya Duty Free Complex** *HCCC 678 of 2004* observed that in*Winding Up Cause No. 43 of 2000,* **Re Global Tours & Travels Ltd.**, under the old **Order XLI Rule 4**, the court has a discretion to order a stay of proceedings pending appeal from its order or decree and that its discretion is unfettered. The judge however added:

"Unfettered as its discretion might be, however, before that court can grant an order of stay, it must be satisfied, inter-alia, that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay".

11. The plaintiff then referred me to the recent Ruling of my learned brother **Mabeya J.** in*HCCC No. 339 of 2011* **James Juma Muchemi & Partners Ltd v Barclays Bank of Kenya Ltd.** In that case, before arriving at his decision, the judge detailed the provisions of **Order 42 Rule 6 (2)** as follows:

"(2) No order for stay of execution shall be made under sub rule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

It was the learned judge's view that the above provision is in mandatory terms. He felt that for any stay of any order or decree then security must first be provided and/or given by an applicant. He also agreed that once security has been ordered for by a court, the same must be provided. Thereafter, the learned judge detailed what I consider to be a relevant view in relation to the plaintiff\'s application herein, as follows:

"While I cannot delve into any of the issues which the plaintiff seeks to agitate in the Court of Appeal as set out in the draft Memorandum of Appeal exhibited in the application before the Court of Appeal, I am of the view that the provisions of Order 42 Rule 6 (2) may not be applicable in its strict sense to the application before me. If I understood Mr. King'ara well, the application has been brought under the principles of the *Erinford Properties case*. In that case, the issue that was considered and decided upon was whether a judge who has dismissed an injunction application can at the same time grant one pending an appeal to the Court of Appeal. Clearly, it was not an issue of a stay of any execution pending appeal. Although granting the prayer sought may amount to the same thing as stay of execution as Megarry J found, the considerations applicable in the *Erinford P*rinciple may not be the same to those under Order 42 Rule 6 (2). There is no provision to grant an injunction pending appeal to the Court of Appeal under Order 42 Rule 6. My understanding is that Order 42 Rule 6 (2) in its strict sense applies in this situation where a stay of execution of an order or decree is being sought whilst under the *Erinford* Principle, it applies where an injunction is being sought pending appeal.

An examination of the application before me will show that the prayers sought are not for stay of execution pending appeal, but grounds of the declined injunction pending the hearing and

determination of an application under Rule 5 (2) (b) of the Court of Appeal Rules. In my view therefore, when a court in Kenya is applying the *Erinford Properties Principles*, it does so under its inherent jurisdiction."

12. The plaintiff then referred me to*HCCC for 30 of 2002*a Ruling of **Ibrahim J** (as he then was) in **Ruaha Concrete Co. Ltd. v Paramount Universal Bank Ltd.** which was an application based under **section 52** of the *Indian Transfer of Property Act*. The learned judge made two observations in his Ruling of interest to this court. Firstly, at page 8 of his Ruling with regard to **Order XLI rule 4 (1)** of the old *Civil Procedure Rules* he detailed that there was no provision for the grant of injunctive orders thereunder. He observed that the rule dealt with and provided for orders for stay of execution pending appeal and stay of proceedings. He went on to say that in any case under the said rule, the court had no power to grant an injunction. Only the Court of Appeal had such powers under **Rule 5 (2) (b)** of its Rules. Secondly, the judge observed the contents of **section 52** of the Indian *Transfer of Property (Amendment) Act, 1956* which reads as follows: –

"52. During the active prosecution in any court having authority in British India, or established beyond the limits of British India or established by the Governor-General in Council, of a contentious suit or proceeding in which any right of immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order, which may be made to therein, except under the authority of the court and on such terms as it may impose."

It should be noted, however, that in that case the plaintiffs had proprietary rights in the suit properties being the registered owners and mortgagors thereof.

13. The next authority to which I was referred, again as regards **section 52** of the *Indian Transfer of Property Act*, was the case of **Mawji v US International University& Anor. (1976) 185** again as per **Madan J** (as he then was). In that case, counsel had argued that there was no prohibition on the transfer of the property therein, only that the leave of the court had to be obtained to do so when the court may impose conditions; counsel maintained that until an application is made to the court for leave to transfer the property, the court has no power to impose any restrictions. The learned judge was not prepared to accept such a limited interpretation of the provisions of **section 52**. The judge detailed as follows: –

"We are unburdened by trammelings obtainable or operable in India upon the conditions in which country the Transfer of Property Act is, I say it respectfully, in many respects archaically based. I think the situation in Kenya is, or it ought to be, this: the court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealing in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose."

Later in his judgement **Madan J** went on to say: –

"It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The court therefore must protect the status quo. Lord Cranworth said in *Bellamy v Smith(1 DeG & J at p. 578)* the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

This then would seem to be the protection sought by the plaintiff herein, from this court, as regards the suit properties.

14. The plaintiff referred this court to 3 further authorities being **Mediratta v Kenya Commercial Bank & 2 Ors.** *Civil Appl. Nai 131 of 2005*, **Nyati Security Guards & Services Ltd v Municipal**

Counsel of Mombasa *HCCC No. 992 of 1994*and **Sammy Mwangani & 9 Ors. v the Commissioner of Lands & 9 Ors.** *HCCC No. 298 of 2003***.** To my mind, the last two of these authorities were in relation to consolidation of suits and of little assistance to this court. However, the **Mediratta** case and the Ruling of the Court of Appeal therein is pertinent. After having looked at the various points of appeal, the Court was satisfied that there was at least one if not several arguable issues raised by the appeal and the same would not be frivolous. In considering whether, even though injunction was granted, the applicant would be likely to suffer irreparable loss making the appeal nugatory if it succeeded, the Court thought that there was considerable force for the application of **section 52** of the *Transfer of Property Act*.

15. On my part, I am not satisfied that this is a suitable case for injunction to be granted on a temporary basis pending appeal. As has been observed by counsel, this is the fourth if not the fifth occasion, in which the plaintiff or indeed the guarantor/registered owner of the suit properties has tried to obtain orders to stop the defendant exercising its statutory right of sale under the Charge that it holds over the suit properties. It seems to me that the arguments put forward by counsel for the plaintiff in the application before me amount to the same arguments as put before my learned brother Mr. Justice Muga Apondi when he dealt with the plaintiff\'s Notice of Motion dated 6 October 2010. Counsel for the defendant had pointed out to the Judge firstly, that it was not open for the plaintiff in the case to claim for an order under **section 52** of the *Transfer of Property Act* since he is not the registered owner of the suit properties or the securities thereover. Secondly, it was counsel’s considered view that the only cause of action for the plaintiff would be an action on accounts and not on the securities. My learned brother endorsed the submissions in his Ruling dated 30 March 2010. It seems to me that if I was to find anything different in the current application, I would be sitting, as it were, on appeal as regards my learned brother\'s finding.

16. Further, as regards the provisions of **Order 42 rule 6 (2)**, I am satisfied that no substantial loss will result to the plaintiff in this matter and in any event I find that I am not able to make any order for injunction under this provision of the *Civil Procedure Rules, 2010*. Indeed, plaintiff\'s counsel herein emphasised in his submissions that this application was for an injunction not a stay. I also find that I am unable to grant prayer 6 of the application seeking an order for consolidation with suit *HCCC No. 246 of 2004*, as that suit has already been dismissed by this Court. Accordingly, I dismiss the plaintiff\'s application dated 16th February 2012 with costs to the defendant.

DATED and DELIVERED at NAIROBI this 31st day of July, 2012.

J. B. HAVELOCK
JUDGE