



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 518 of 2008

THIKA GENERAL WORKSHOP LIMITED

(In receivership).....1ST PLAINTIFF
ANN NJOKI KAMU AND JOSEPH MWANGI KAMAU

Both suing as the administrators of the estate
of the late WILSON KAMAU ITUME.....2ND PLAINTIFF
VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT
PONANGIPALI VENKATA RAMANA RAO and
KOLLURI VENKATA SUBBARAYA
KAMASASTRY.....2ND DEFENDANT

RULING

On 21st July 2009, this court dismissed an application which had been filed by the plaintiffs seeking to restrain the defendants, and particularly the 1st defendant, from exercising its statutory power of sale in respect of the suit property known as LR No.4953/427, Thika. The suit property was charged by the plaintiffs to secure certain sums which had been advanced to the 1st defendant. The plaintiffs were aggrieved by the said decision of the court and have intimated their intention to appeal against the said decision to the Court of Appeal. On 22nd December 2009, the plaintiffs moved this court by notice of motion purportedly made under the provisions of **Order XXXIX Rules 1, 2 and 3** and **Order XLI Rule 4(1)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Rules** seeking various orders from the court. The plaintiffs sought an order from the court to stay the sale of their property pending the hearing and determination of the application. They further sought mandatory injunction to compel the defendants to reopen the suit premises and further for the receivers appointed by the 1st defendant to be removed from the suit premises and possession handed back to the plaintiffs pending hearing and determination of the suit. The grounds in support of the motion are stated on the face of the application. The application is supported by the annexed affidavit of Ann Njoki Kamau. The application is opposed. Chris Theuri, the relationship manager – credit support swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Kimathi for the plaintiffs and Miss Babu for the defendants. I have carefully considered the said submissions. I have also considered the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiffs made a case to enable the court grant the orders that they seek in the application. From the outset, it should be stated that this court dismissed an earlier application filed by the plaintiffs which had sought to restrain to the 1st defendant either from appointing a receiver to manage the affairs of the 1st plaintiff company or to sell the properties that comprise the securities that were the subject of the charge. The plaintiffs were aggrieved by the said decision of the court and have duly moved to the Court of Appeal seeking to reverse the said decision of this court. The appeal is yet to be heard and determined. The plaintiffs have not obtained any orders from the Court of Appeal pursuant to the provisions of **Rule 5(2) (b)** of the **Court of Appeal Rules** staying the taking effect of the said order of this court. As it were, the defendants informed the court that the suit property, including the loose assets of the 1st defendant, had already been sold by the defendants in exercise of the 1st defendant's statutory power of sale.

It is apparent that the prayers sought by the plaintiffs in their current application are a rehash of their application which was disallowed by this court. The plaintiffs are seeking to re-argue, before the same court, issues which this court

has already rendered a decision. This court cannot grant orders of mandatory injunction as sought in the present application when it had clearly reached a finding that the plaintiffs had not established a prima facie case in their previous application. This court cannot grant stay of execution of its said order as it did not grant a positive order that is capable of being stayed. This court dismissed the plaintiffs' said application for interlocutory injunction. This court lacks jurisdiction to stay an order of dismissal.

For the above reasons, I find no merits with the plaintiffs' application dated 22nd December 2009 and proceed to dismiss it with costs.

DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2010.

L. KIMARU
JUDGE