



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 323 of 2008

**GEORGE O. KAUMA.....APPLICANT
VERSUS
BANK OF BARODA.....RESPONDENT**

RULING

1. What is before me is a notice of motion dated 27th November, 2008. The motion is brought under Order XLI Rule 4(1) and (6) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the motion, George O. Kauma (hereinafter referred to as the applicant) seeks *inter alia* orders as follows:

- That the execution of the order and the ruling in CMCC No.9528 of 2007 Milimani Commercial Court be stayed pending the hearing and determination of the appeal.
- That this honourable court be pleased to restrain the respondent, its agents or servants from trespassing on and or selling and or advertising for sale land registered as Ngong Township Block 2/261 until the appeal is heard and determined

2. The background to the application as I have gathered from the court record and the affidavits filed by the parties is as follows: the applicant was formerly employed by Bank of Baroda (K) Limited (hereinafter referred to as the respondent). During the course of his employment, the applicant obtained from the respondent a loan of Kshs.2,500,000/= repayable over 23 years at an interest rate of 7% per annum, for the purpose of purchasing a property known as Ngong Township Block 2/261 (hereinafter referred to as the suit property). On or around 7th November, 2003, the applicant was dismissed from the respondent's employment. The applicant contends that upon his dismissal the respondent deducted Kshs.504,000/= as part of the loan money but has failed to account for this money in the statement of account. The applicant also complained that the respondent changed the interest rate from the agreed rate of 7% to 12%.

3. The applicant filed a suit in the Chief Magistrate's court against the respondent. Filed contemporaneously with the plaint was a chamber summons dated 30th October, 2007 in which the applicant sought the following orders which were similar to the orders sought in the plaint:

- (a) That this honourable court be pleased to restrain the defendant/respondent its agents or servants from trespassing on and/or selling and/or advertising for sale land registration No.Ngong Township/Block/2/261 until the suit herein is heard and determined.
- (b) That the applicant be allowed to pay Kshs.16,571/= towards the loan repayment.
- (c) That the cost of this application be provided for by the defendant/respondent.

4. The chamber summons application was heard and dismissed on 9th June, 2008. On 19th June, 2008 the applicant lodged an appeal in this court against the order of the lower court dismissing his application. The applicant's attempts to obtain an order for stay of execution having been unsuccessful in the lower court the applicant brought the current motion. The applicant contends that the respondent is threatening to sell the applicant's property known as Ngong Township/Block 2/261 and therefore there is a danger of the property being sold unless the orders sought are granted. The applicant maintains that there is an amount of Kshs.504,000/= which he has paid, and which has not been accounted for by the respondent. The applicant further maintains that the respondent owes him over Kshs.3 million in respect to salary arrears, accumulated leave days worked, wrongful termination and salary in lieu of notice, which will be able to repay the loan balance in respect to the suit property.

5. The applicant has indicated that he is ready and willing to continue paying Kshs.16,571/= towards the loan repayment. Counsel for the applicant relied on *Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah Civil Appeal No.320 of 2006 Nairobi* in respect to the application for stay pending appeal and the case of *Rajabali Alidina vs Alidinia & another Civil Appeal No.22 of 961 High Court at Tanganyika, Dar-es-salaam* in respect to payment by installment.

6. In response to the applicant's motion, Kiran Pal Singh who is employed by the respondent as a senior manager, has sworn a replying affidavit to which is annexed all the pleadings relating to the applicant's suit and the applicant's notice of motion which were filed in the lower court. Grounds of opposition have also been filed. It was maintained for the respondent that the order of the dismissal of the application for injunction by the subordinate court was incapable of being stayed. In this regard the following case was cited; *Mombasa Seaport Duty Free Limited vs Kenya Ports Authority Limited (2006) eKLR*

Nairobi Civil Appeal No.242 of 2006.

7. It was submitted that the suit property was charged to the respondent and that the applicant having defaulted in payment the respondent's power of sale had arisen. It was contended that the applicant had not come to this court with clean hands, and had also not satisfied the test for grant of injunction pending appeal. The following cases were relied upon:

- **D.J. Lowe & Co. Ltd vs Banque Indosuez [1998] LLR 2798 (CAK) Court of Appeal.**
- **Kariuki vs National Bank of Kenya Ltd (2005) LLR 4502 (CAK).**
- **J.K. Industries Ltd vs KCB (1982-88) 1 KAR 1088.**

It was submitted that the applicant's case was not appropriate for the granting of the order of injunction.

8. I have carefully considered the application, the affidavit in support and in reply to the application, the submissions made by counsel for each party and the authorities cited. With regard to prayer (c) for "stay of execution of the order and the ruling in CMCC No.9528 of 2007 Milimani Commercial Court" pending the hearing of the appeal. Firstly the applicant has not identified which order he wishes to have stayed. Be that as it may, there are two orders which were issued by the lower court, the first was the order dated 9th June, 2008 dismissing the applicant's application for an injunction. This is the order subject of the pending appeal.

9. I find that as was stated by the court of appeal in Mombasa **Seaport Duty Free Ltd vs Kenya Ports Authority [2006] eKLR** (supra), the lower court did not order the parties to do anything or to restrain from doing anything. There is therefore nothing arising out of that order which is capable of being stayed by this court. The second order which was issued by the lower court was the one striking out the applicant's application for stay of execution. That order is also for similar reasons not capable of being stayed. The prayer for stay of execution pending appeal is therefore misconceived and same is rejected.

10. As regards the prayer for interlocutory injunction pending the hearing of the appeal, this court has powers under Order XLI Rule 4(6) of the Civil Procedure Rules to grant such an order. However, the applicant must satisfy this court that he has an arguable appeal which *prima facie* has good chances of success. The applicant must also satisfy the court that unless the orders sought is granted, he will suffer substantial loss, the applicant must also be ready and willing to provide appropriate security for the due performance of the decree.

11. In this case, the applicant has contended that the respondent has not accounted for the sum of Kshs.504,000/= and that the respondent owes him over Kshs.3 million arising out of salary arrears, accumulated leave days, wrongful termination and salary in lieu of notice. In response to these allegations, the respondent has exhibited documents showing that the applicant obtained a loan of Kshs.2,500,000/= in consideration for which he charged the suit property to the respondent, and that the respondent is merely exercising its statutory power of sale over the suit property following default on the part of the applicant. This fact has not been challenged. Further, although the applicant contended that the respondent unilaterally and illegally raised the interest rate from 7% to 12%, an agreement signed by the applicant dated 27th May, 2005 was exhibited in which the applicant agreed to that variation. The applicant has not denied signing that document. Therefore the applicant has not demonstrated that *prima facie* he has a good cause of action against the respondent or that his appeal is arguable. Moreover, the applicant is offering to pay a sum of Kshs.16,571/= and this is clearly contrary to the agreement signed between the parties.

12. It is true that the applicant stands to lose the suit property if the order of interlocutory injunction is not granted as the respondent may exercise its statutory power of sale over the suit property. That however is a risk which the applicant freely undertook when he offered the suit property as security for the loan.

13. The upshot of the above is that I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 5th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Okao for the applicant

Advocate for the respondent absent

Eric - Court clerk