



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

Civil Case 231 of 2009

KENYA ROAD SERVICES LIMITED PLAINTIFF

VERSUS

KIMANDU GICHOHI & COMPANY ADVOCATES RESPONDENT

AND

TERRY WAMBUKU KARIYU.....3RD PARTY

R U L I N G

1. On 26th March 2010 this court made the following order:

“Pursuant to the inherent powers under Section 1A of the Civil Procedure Act, I am inclined to order that this matter be heard by way of viva voce evidence. Meanwhile the firm of Kimandu Gichohi and Co. Advocates is ordered to deposit the sum of Kshs.8,120,000/- being balance of the purchase price and the amount represented by the letter dated 24th February 2009 in court within 30 days. The hearing of this Originating Summons to be given priority in the registry”.

2. That sum was payable by the firm of **Kimandu Gichohi & Co. Advocates** pursuant to an irrevocable professional undertaking contained in the letter they wrote to the respondent dated 24th February 2009. The Advocates have now filed an application under **Order 41 Rule 4(1)** of the **Civil Procedure Rules** seeking for stay of execution of the orders of 26th March 2010 pending the hearing and determination of an appeal which they have lodged in the Court of Appeal.

3. This application is premised on the grounds that the applicant has an arguable appeal which raises points of law and it has high chances of success. If stay is not grant, the Applicant will suffer irreparable harm because the entire firm of **Kimandu Gichohi & Co. Advocates** will be affected by the order. Moreover no money was deposited with the advocates after the letter of undertaking was issued. These matters are elaborated by the supporting affidavit sworn by **Kimandu Gichohi** on 6th May 2010 and a further affidavit sworn on 9th September 2010.

4. This application was opposed; Mr. Kimondo, learned counsel for the respondent faulted this application as it was filed by way of a Chamber Summons instead of Notice of Motion which is the prescribed procedure under the provisions of Order 50 rule (1) of the CPR. Secondly, the application does not meet the

mandatory test for granting an order of stay of execution which can only be granted if the applicant can satisfy the court that, they will suffer substantial loss and must also provide security for due performance. The order sought to be stayed is a form of security where the applicant was ordered to deposit the money in court pursuant to their own professional undertaking.

5. Counsel relied on the case of **St. Elizabeth Academy Karen Ltd v Samuel Mirang'a Kimemia [2008] eKLR** and also **Kwality Candies & Sweets Limited & another v Corn Products Kenya Limited [2009] eKLR**. The Court of Appeal held:

“The money, if deposited, will remain so deposited until the trial court or this Court of appeal orders otherwise. If the applicants eventually succeed in their intended appeal, the money will be paid back to them. If they fail in that appeal, the money will most likely be paid over to the respondent to the extent as shall be shown to be due to it. Si, as rightly pointed out by Mr. Katwa, no damage, incapable of being remedied by an award of damages, interest or costs is likely to be occasioned to the applicants if they comply with the condition imposed by Lesiit, J.

Having come to the foregoing conclusions, it is quite clear that the applicants have not satisfied both principles for the grant of orders of stay.”

6. Based on the irrevocable professional undertaking contained in the letter dated 24th February 2009 by the firm of **Kimandu Gichohi & Co. Advocates** to pay a sum of Kshs. 8,120,000/- the Respondent's property was transferred to Third Party. It is on that basis the court ordered the firm of **Kimandu Gichohi** to deposit that sum in court until the determination of the suit. That money is supposed to be a security, it will be safe, and should the advocates be successful either in the suit or the appeal, they intend to file in the Court of Appeal. The sum so ordered to be deposited shall be safe and available to the Applicant.

7. This application besides being incompetent, lacks merit, it does not meet the threshold of the test set out under **Order 41 rule 4(1) of the Civil Procedure Rules**. It is therefore dismissed with costs to the Respondent.

RULING READ AND SIGNED ON 17TH SEPTEMBER, 2010.

M.K. KOOME

JUDGE