



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Case 76 of 2007**

**1. SAMUEL MUIYA MANYUNZA**

**2. JACKSON MUNYAO**

**3. MUTUKU NGEI MASAKU**

**4. SIMON MUSEMBI MBWIKA**

**5. MATHEKA MWAULU.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**COOPERATIVE BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MASAKU TOBACCO WHOLESALERS .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Application before me is dated 4.8.2008 and in the Notice of Motion premised on Order XLI Rule 4(1), (2) and (4) of the Civil Procedure Rules a temporary order of stay is sought until the Applicant’s Appeal is heard and determined. In the alternative, a limited temporary injunction is sought for 60 days to enable the Applicants file an application in the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules.

2. The background to the Application is that on 22.7.2008, I dismissed the Applicant’s application for a temporary injunction to restrain the 1<sup>st</sup> Defendant from selling, transferring, alienating or otherwise interfering with the Plaintiffs’ right of ownership and/or possession of certain properties in issue. The Applicants who were the Plaintiffs were dissatisfied with that decision and filed a Notice of Appeal on 25.7.2008 and a week or so later filed the present Application. In the Supporting Affidavit sworn on 4.8.2008, Samuel Muiya Manyunza on behalf of his co-Applicants depones that they will all suffer irreparably if no stay order is granted and their appeal would be rendered nugatory if the suit properties are disposed of. That no prejudice would be occasioned if the order is granted as the suit properties are still charged in the 1<sup>st</sup> Respondent’s favour.

3. In grounds of opposition filed on 21.8.2008, the 1<sup>st</sup> Respondent has stated that there are no orders capable of being “**stayed**” and that the Applicants are attempting to go round the dismissed application and obtain injunctive orders.

4. I think I should begin by addressing the issue raised by the advocate for the 1<sup>st</sup> Respondent; what is there to stay? “**Stay**” is defined as;

**“a judicial order whereby some action is forbidden or held in abeyance until some event occurs or the court lifts its order.”** Barron’s Law Dictionary.

5. A typical order of stay is that of stay execution where a judgment is precluded from being executed for a specified period of time. In the instance case, I dismissed an application for a temporary injunction and in the present application I

am not being asked to issue a temporary injunction pending appeal. If that were so, then the decisions cited by the learned advocate for the Applicants would have been useful. They are;

- i. Madhupaper International Ltd vs Kerr [1985] KLR 840
- ii. Russell Co. Ltd vs Commercial Bank of Africa Ltd 633.

6. In both cases, the Court of Appeal discussed at length the question of an injunction pending appeal as being a matter of discretion and to be issued in deserving cases to avoid an appeal being rendered nugatory.

7. In the present, the prayer for an injunction was only for the period prior to the hearing of this application which orders I readily granted as a matter of discretion. The other prayer for an injunction is for a limited period as was advised in Russell (supra) but in fact it is admitted that the Court of Appeal has already declined to grant any temporary relief to the Applicants and therefore a prayer for a temporary relief by this court pending an application for temporary orders in the Court of Appeal is also unsustainable.

8. Having so said, is there anything for me to stay? The Applicants have invoked Order XLI Rules 4(1) and (2) of the Civil Procedure Rules which provide as follows:-

***(1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(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.”***

9. The above rules relate to “***stay of execution***” and “***stay of proceedings under a decree or order.***” Before me there is no decree or order being executed because what I did was to dismiss an application for a temporary injunction. What am I supposed to stay? What am I holding in abeyance until the appeal is heard and determined? Matters would have been different had the Applicants come and applied to stay a specific order but in the application before me what is sought is an amorphous stay order and no mention is made of what I should stay.

10. But suppose I am completely misguided and in fact there is something to stay? Then I am afraid that the Applicants have failed to tell me what substantial loss they will suffer if no order of stay is granted. I say this because in my ruling declining to grant an interlocutory injunction, I stated that the Applicants admit indebtedness to the 1<sup>st</sup> Respondent; admit that they took money from it but failed to repay the same as agreed and have come to court with unclean hands. I also said that discretion cannot favour such a party. I maintain that position and I see no loss to them and if any loss can be discerned from their situation, the same can certainly be compensated in damages and so at this stage, their losses, if at all, cannot be substantial compared to the continued loss that the 1<sup>st</sup> Respondent is suffering at the hands of the Applicants.

11. Granted, the Charges held by the 1<sup>st</sup> Respondent are an adequate security as argued by the applicants but the same Applicants in their Plaint and in the draft memorandum of appeal are also arguing that the Charges are a nullity. How can they at the same time make those conflicting arguments to benefit themselves?

12. Lastly, I am not convinced that there is a proper application before me and the Applicants can pursue other remedies known to law.

13. The Application dated 4.8.2008 is dismissed with costs to the 1<sup>st</sup> Respondent only.

14. Orders accordingly.

Date and delivered at Machakos this **20th** day of **May 2009**.

**Isaac Lenaola**

**Judge**

In the presence of: Miss Mwangi h/b for Mr. King'ara for

Plaintiff/Applicant

Mr. Otieno h/b for Mr. Munge for

Defendant/Respondent

**Isaac Lenaola**

**Judge**