



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

**Civil Case 266 of 2006**

**CONSOLIDATED BANK LTD. .... 1<sup>ST</sup> PLAINTIFF**

**MARK ONE LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KATHERINE K. MBITI ..... 1<sup>ST</sup> DEFENDANT**

**PRINCIPAL REGISTRAR OF TITLES ..... 2<sup>ND</sup>  
DEFENDANT**

**R U L I N G**

Application dated the 29/6/09 by notice of motion is brought under **Section 3A Civil Procedure Act, Order 50 Rule 1 of Civil Procedure Rules**. Orders sought are that orders given on 25<sup>th</sup> June 2009 and vacated on 26/6/09 be reinstated and costs of application be granted to applicant.

The application is based on the grounds that this court granted stay of orders issued by Justice Kimaru for a period of 7 days and that on 26/6/2009, counsel for 2<sup>nd</sup> defendant appeared before court in the absence of counsel for applicant. This court vacated the 7 days' order that on the allegations made to court to the effect that counsel had made misleading statements and failed to disclose material facts. These allegations are false and without basis, and were intended only to further the 2<sup>nd</sup> plaintiff's interest in execution of orders made on 10<sup>th</sup> June 2009 and thereby rendering the applicants application nugatory.

I am so far aware that his court did make order on 25/6/09 and vacated the same when it appeared to court that the court may have been misled into making the order. I have read the supporting affidavit. The firm of Robson Harris & Co. Advocates for the 2<sup>nd</sup> plaintiff has filed grounds of opposition. Counsel denies having misled the court. He states that order vacated on 26/6/09 was never extracted or served and had been obtained ex parte. The orders dated 10/6/2009 have been fully executed.

The 1<sup>st</sup> plaintiff has also filed an affidavit sworn by its employee Titus Gikonya, which admits that a judgment was entered in the 1<sup>st</sup> plaintiff's favour on 10/6/09 and that there was no justification to allow application dated 23/6/09. Opposing the application the parties have filed lists of authorities which I have perused.

However, it is to be noted that the issue before court was of an application for stay pending appeal. **Order 41 Rule 4 (1)** is clear. If a court from which an appeal is arising does not grant a stay for any

reason, an application may be made in the court to which the proposed appeal is lodged. Therefore, even if the court vacated ex parte order given for 7 days, the applicant was at liberty to rush to the appellate court for stay.

Secondly, there is the issue of misleading the court. The English Case is followed here, **King vs. General Commissioner for the purposes of the Income Tax Acts for the District of Kensington [1917] KB 486**, the Lord Chief Justice stated:-

***“Where an ex parte application has been made to this court for a rule nisi or other process if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts, the court ought for its own protection and to prevent and abuse of its own processes, to refuse to proceed any further with the examination of the merits.”***

Further it was said:-

***The court will not allow a plaintiff to obtain any advantage from an ex parte injunction which he has improperly obtained.”***

Further:-

***“A plaintiff applying ex parte comes under a contract with the court. If he fails to do that when the other party comes to dissolve the injunction that any material has been suppressed or not properly brought forward the plaintiff is told that the court will not decide on merits and that as he has broken faith with court the injunction must go.”***

In other words the court can down the tools and dissolve the injunction. In this case the court on reading the record finds that what is stated in paragraph 4 of the supporting affidavit is not as in the record of the proceedings before that Judge.

The counsel for the 2<sup>nd</sup> defendant did appear before court and made the statements and upon hearing the same the court was of the view that there was non disclosure regarding the application for stay and the same was vacated in accordance with the principle in **King vs. General Commissioners** case aforesaid.

For these reasons, I find no merit in the application and the same is dismissed with costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 30<sup>th</sup> day of July 2009.

**JOYCE N. KHAMINWA**

**JUDGE**