



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

Civil Case 446 of 2007

BARCLAYS BANK OF KENYA LTD. PLAINTIFF

VERSUS

MARTHA KARWIRWA ANTHONYDEFENDANT

R U L I N G

Notice of motion brought under **Order XLI Rule 4, Order L Rule 1** and under court inherent jurisdiction seeking orders for prayer 3 for stay and injunction pending appeal and prayer 4 stay of further proceedings in this suit. The grounds upon which the application is based are set out and there is supporting affidavit of David Swao. Notice of appeal is exhibited.

In reply, the respondent swears that she will suffer loss of rents and user of the suit property. She relies on the reply of affidavit sworn on 11/9/2007. Both parties have filed written submissions. The plaintiff submits that it has taken steps to appeal against the dismissal of its application for injunction herein. Counsel relies on the authority of Kingorani Investments Ltd. vs. Kenya Commercial Bank – HCC No.113 of 2007. In that case the court rejected an application for injunction and after the party filed notice of appeal on an application for injunction pending appeal the court stated:-

“I am satisfied that the nature of the appeal may be rendered nugatory if a temporary injunction or stay of the ruling is not granted.”

Injunction was granted for six months. The counsel for applicant further submitted that the interest of justice can only be service if stay and injunction are granted on the ground that the intended appeal is arguable and has good chance of appeal. This court ought not to consider the grounds of intended appeal, that being the work of appellate court.

However, it appears as submitted that the applicant has an arguable appeal and should not be denied the right of appeal. The further submission is that unless orders are granted the applicant shall suffer substantial loss namely:-

1. *Lose its brand presence in the locality of the premises;*
2. *Suffer the costs of litigation here and in the appellate court.*

The application was filed without inordinate delay. The applicant

shall obey any order court may make regarding security. This is not res judicata application. Application for injunction before trial is not similar to application pending appeal.

The defendant submits, it is submitted that regarding Order 41 Rule 4 (1) this court has no jurisdiction to grant injunction as sought by the plaintiff. Order 41 Rule 6 grants High Court power to grant injunctions only when exercising its appellate jurisdiction from the lower courts and Tribunals.

Counsel relies on the decision of the Pop-In (K) Ltd. & others vs. Habib Bank A.G. Zurich. Further argument is that stay cannot be granted on a Dismissal Order. Purely, that is when the injunction is relevant in the interests of justice. On the issue of res judicata, counsel relies on the Kanorero River Farm Ltd. & 3 others vs. National Bank of Kenya – HCC No.699 of 2001 where it was held that the doctrine of res judicata applies to both suits and applications whether they be final or interlocutory.

The authority of HCC No.156/2005 – Alliance Media Kenya Ltd. vs. Monier 2000 Ltd. at page 7, 8 and 9, the court (Azangalala, J.) said:-

“The first prayer for an order of stay on the order dismissing the plaintiff’s application is clearly misconceived. I merely dismissed the plaintiff’s application for interlocutory injunction I made no positive order in favour of either party ...”

That application was dismissed that a third party had been introduced who had no chance of being heard.

In the case of Mrs. Surinder Kumari Mediratta vs. Kenya Commercial Bank & 2 other – HCC No. 21 of 2005, in this matter Hon. Azangalala had also dismissed injunction application. The Presiding Judge, Anyara Emukule dismissed application for stay finding the requirements under Section 41 (4) not fulfilled.

Finally, the respondent cited the authority of Giella vs. Cassman Brown on the four grounds to be fulfilled to warrant granting of injunction. In the case of appeal against a non-dismissal order, the applicant would lose all it being that the respondent would proceed and take the action he was to be prohibited from doing and if the appeal was successful, the appeal would be rendered nugatory.

I would follow the decision in Kingorani Investments Ltd. vs. Kenya Commercial Bank Ltd. & another and grant the injunction pending appeal. I consider that the applicant, a bank was already put in possession and the opportunity to establish business at Ongata Rongai was to enhance its banking business and for the benefit of the local community. Balancing the interest of the parties, it is clear that the establishment of the bank in the locality of Ongata Rongai overrides the private interests of the respondent and the whole transaction can be compensated in monetary terms, since the averment of rent is already agreed upon at Kshs.70,000/= per month.

It is in the interest of justice that the orders sought are granted. I therefore allow the application and grant orders under prayer 3 namely; an injunction restraining the defendant by herself, her agents or servants from interfering in any way with the plaintiff’s quiet possession of the suit premises (plot No. L.R. 17589).

The court is not satisfied that the orders under prayer 4 are supported and therefore stay of proceedings not granted. The plaintiff shall have costs of this application.

It is ordered.

DATED, SIGNED and DELIVERED at Nairobi this 17th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE