

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 397 of 2006

ANDREW MATINDI NYAMU.....PLAINTIFF

VERSUS

K-REP BANK LIMITED.....DEFENDANT

RULING

On 12th March 2008, Azangalala J dismissed with costs the plaintiff's application seeking to restrain the defendant from realizing the security charged to it by exercising its statutory power of sale. The plaintiff was aggrieved by the said decision of the court and duly filed notice of his intention to appeal against the said decision of the court. On 14th August 2008, the plaintiff moved the court by notice of motion under the provisions of **Section 3A** of the **Civil Procedure Act** and **Order XLI Rules 4(1)(2)(4) & (6)** of the **Civil Procedure Rules** seeking the orders of this court to stay execution of the said order of dismissal made on 12th March 2008 by issuing a temporary injunction to restrain the defendant by itself or by its agents or servants from advertising for sale, transferring, taking possession or otherwise exercising proprietary rights over the suit premises, being LR. No.12495(original No.12495/12/3) Karen, Nairobi pending the hearing and determination of the intended appeal to be filed at the Court of Appeal.

In the alternative, the plaintiff sought a temporary injunction to restrain the defendant for a limited period of nine (9) months from exercising its statutory power of sale pending the lodging and determination of an application to be made to the Court of Appeal under **Rule 5(2)(b)** of the **Court of Appeal Rules**. The plaintiff further urged the court to invoke the provisions of **Section 52** of the **Transfer of Property Act** to prevent any transactions in respect of the title of the suit property pending the hearing and determination of the suit. The application is supported by the annexed affidavit of the plaintiff and grounds stated on the face of the application. The application is opposed.

Before the oral hearing of the application, counsel for the parties herein agreed by consent to file written submissions in support of their respective clients' cases. They duly complied and filed the said written submissions. At the hearing of the application, I heard rival arguments made by Mr. Kingara for the plaintiff and Mr. Chacha for the defendant. I have carefully considered the said submissions, including the authorities cited by both counsel. I have also read the pleadings filed by the parties in support of their respective opposing positions. That this court has jurisdiction to stay execution of its decree or order is without doubt. Under **Order XLI Rule 4(1)** of the **Civil Procedure Rule**, this court may grant an order staying execution of its decree or order where it is satisfied that the applicant would suffer substantial loss. The applicant must be prepared to provide security for the due performance of the decree. Of course, for the application to be favourably considered, it must be filed without undue delay. There is a further requirement that where the court is convinced that the applicant has an appeal that has a chance of success, it should grant stay so as not to render the intended appeal nugatory (*see **Butt vs Rent Restriction Tribunal [1982] KLR 417***).

As stated earlier in this ruling, the plaintiff wishes to stay the order of this court dismissing his application for injunction. It was the plaintiff's plea that stay should be granted so that its intended appeal would not be entered nugatory. The plaintiff contends that its intended appeal is not frivolous on account of the weighty issues raised in the grounds of appeal contained in the draft memorandum of appeal. The plaintiff urged the court to restrain the defendant from exercising its statutory power of sale pending the

hearing and determination of the intended appeal. The plaintiff was of the view that he would suffer irreparable damage that would be impossible put a value since in the suit property is his matrimonial home which he and his family are sentimentally attached to. The plaintiff explained that he had delayed in filing the application due to his wife's illness that required hospitalization in India. He urged the court to exercise its discretion under **Section 52 of Transfer of Property Act** and issue an order preserving the prevailing *status quo* pending the hearing and determination of the suit. The plaintiff cited several authorities in support of its application.

In response to plaintiff's application, the defendant submitted that there was no positive order capable of being stayed by an order of this court. The defendant explained that the court having dismissed the plaintiff's application for injunction, cannot be called upon to reconsider the same application for injunction under the guise of an application for stay of execution pending the hearing and determination of the intended appeal. The defendant pointed out decisions reached by courts as to what constitutes an execution process that is capable of being stayed. The defendant submitted that even under the inherent jurisdiction of this court, this court cannot grant an equitable relief that has not been specifically sought by the plaintiff. The defendant urged the court to dismiss the application with costs.

Can this court grant an order staying the order dismissing an application for injunction? I do not think so. In **Kileshwa Service Station Ltd vs Kenya Shell Ltd [2008] eKLR**, the Court of Appeal observed at page 3 of its ruling as follows:

*"The order of the superior court that the applicant intends to appeal against merely set aside the order requiring the company to compensate the applicant in the sum of Kshs.13,088,000 /= for improvements done in the petrol station. It was not a positive order capable of execution by enforcement. It seems that by the stay application the applicant is in effect seeking a restoration for payment of the compensation pending appeal which cannot be done at this stage. As the authors of **BLACKS LAW DICTIONARY, sixth Edition**, explain at page 1423:*

" A "stay" does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal."

*The words of Law, V.P. in **Western college of Arts and Applied Sciences v Oranga [1976] KLR 63** at page 66 L-D) are apt:*

"In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction".

In the present application, although under the **Erinford Properties Ltd** case this court can preserve the *status quo* pending the hearing and determination of an appeal, in Kenya it has been recognized that for the court to grant such an order preserving *status quo* pending the hearing of an intended appeal, it must be satisfied that the applicant has established a prima facie case under the principles enunciated in **Giella vs Cassman Brown [1973] EA 358**.

In the present application, it was clear that Azangalala J formed the opinion that the plaintiff had not established a prima facie case to entitle the court to grant him the order sought of interlocutory injunction. Having considered the grounds placed before this court by the plaintiff in this application, I am not persuaded that the plaintiff has established any *prima facie* case. The plaintiff complains that if the suit property is sold, he would suffer irreparable damage as the premises in the suit property is matrimonial property to which he is sentimentally attached. I think it is now settled that once a property is charged, it ceases to be of sentimental value and becomes a commercial commodity which is capable of being bought and sold. Further, it is apparent that from the time the plaintiff was granted interim orders pending the hearing of this application, he made no effort to move the Court of Appeal under **Rule 5(2) (b) of the Court of Appeal Rules**. **Section 52 of the Transfer of Property Act** is not available to the plaintiff since the court has already ruled that there is nothing in law to prevent the defendant from

exercising its statutory power of sale.

From the foregoing, it is evident that the plaintiff has failed to persuade this court that there is an order of this court capable of being stayed. Further, the plaintiff has failed to persuade this court that he has a prima facie case that can persuade this court to preserve the *status quo* pending the hearing and determination of the appeal. I think the plaintiff should pursue an appropriate remedy before the Court of Appeal. The plaintiff's application filed on 14th August 2008 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 15TH DAY OF JULY 2009

L. KIMARU

JUDGE