



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 113 of 2007**

KINGORANI INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD & ANORDEFENDANTS

R U L I N G

The application is dated 3rd of December 2007. It is the Plaintiff's application brought under **Order XLI r. 4(1) (2) and (6) of Civil Procedure Rules** in which it seeks prayers 4, 5, 6, and 7 as follows:

4. Pending hearing and determination of the intended appeal, this Honourable Court be pleased to temporarily restrain the second Defendant, his agents, servants or otherwise howsoever from acting and or purporting to act as the Receiver and or manager of the Plaintiff and or from in any manner interfering with the Plaintiffs quiet possession and enjoyment of all the Plaintiffs land, properties, machinery, equipment, assets or stock or any part thereof.
5. Pending hearing and determination of intended appeal, this Honourable Court be pleased to temporarily restrain the Defendants by themselves, their agents or servants or otherwise howsoever from selling, disposing off, offering for sale or alienating in any manner whatsoever any of the plaintiffs land, properties, machinery equipment, assets or stock or any part thereof, and or interfering with all the existing suits and or litigation initiated by the Plaintiff or involving it.
6. In the alternative to prayer 4 and 5 above, this Honourable court be pleased to grant a limited period temporary injunction as respectively set out in prayers 4 and 5 above for a period of 18 months to allow the prosecution of the intended appeal.
7. Costs of this application be in the cause.

Mr. Kingara summarized the prayers by stating that in prayer 4 the Plaintiff was seeking an injunction from eviction from the suit premises; in prayer 5 the Plaintiff was seeking to restrain the Defendant from selling or disposing land, machinery and stock pending an intended appeal before the Court of Appeal; and in prayer 6, they were seeking a limited injunction for a period of 18 months to allow the Applicant prosecute its appeal.

This application emanates from a ruling of this court dated 8th November 2007, in which the Plaintiff's application for interlocutory injunction was refused. The Plaintiff/Applicant has since filed an appeal before the Court of Appeal against the said ruling.

Mr. Kingara urged the Court to find that the Plaintiff may suffer loss if this application is not granted. Counsel has urged the Court to consider that the equipment that is the subject matter of the suit is worth

Kshs.3 billion, which were sourced from various parts of the world, and that if the stay sought is not granted, and the equipment is sold, the Applicant will suffer great loss that it may never be able to recover. **Mr. Kingara** submitted that the said equipment was specialized and it may be impossible to replace it. **Mr. Kingara** has also urged the Court to find that this application was made timeously as required and that the intended appeal has merit. The counsel explained that the Applicant was pursuing one point before the Court of Appeal, which is that this Court greatly misdirected itself that the debt in the suit, which is for Stoni Athi Limited, was paid but that two of the debentures were for other debts. **Mr. Kingara** urged the Court to be persuaded that since the guarantee in question has a suit pending to enforce it, the Principal Debtor should be pursued before guarantors and therefore the Court be persuaded to find that it will be justifiable in the circumstances to grant the injunction sought in this application.

Mr. Kingara relied on the case of **Butt vs. The Rent Restriction Tribunal, Civil Appl. Nai 6 of 1979** in which **Madan, JA**, quoted from an English case, **Enriforn Properties Limited vs. Cheshire County Council [1974] 2 All England Reports 448**, the ruling of **Megarry J**, at page 464 as follows: -

“On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.

There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on.”

Counsel relied on the case of **Russel Co. Ltd. Vs. commercial Bank of Africa Ltd. & Anor. [1986] KLR 633** where at page 650, the Court of Appeal commended the views of **Megarry, J.** in **Erinford Properties Limited case**, supra, to judges considering an application for an injunction pending an appeal from its own ruling.

Counsel also relied on various other authorities for instance, **Kenon Limited vs. Giro Commercial Bank Limited HCCC No. 789 of 1999**, a decision of **Mbaluto, J.** and **In The Matter of Global Tours & Travel Limited Winding Up Cause No. 43 of 2000** a decision by **Ringera, J.** (as he then was) in which both judges adopted the position that judges do make mistakes and that a party who exercises its right to appeal should not be prevented from doing so by denying them either a stay or an injunction. That what the Court should consider is whether it is in the interest of justice to order a stay of proceedings or to grant an injunction and the terms upon which such order can be made.

This application was opposed.

Mr. Ogunde gave submissions purely on the points of law as no grounds of opposition or replying affidavit had been filed by the Respondent. **Mr. Ogunde** conceded that there was no considerable dispute regarding the factors that should weigh in the Court’s mind and the principles that should guide the Court in making the decision in the instant application. **Mr. Ogunde** urged the Court to consider whether it was satisfied that the Applicant had an arguable appeal to present before the Court of Appeal, before granting this application. **Mr. Ogunde** urged the Court to greatly consider its own ruling on the initial injunction application, and compare it with the grounds of the intended appeal, to form an opinion

whether the appeal had any merits. Counsel relied on three cases, the outstanding one which was **Halai & Another Vs. Thornton & Turpin [1990] KLR 365** where the Court of Appeal held:

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

Mr. Ogunde argued a second point that in order to satisfy the Court that the application should succeed, the Applicant should satisfy the Court that it will provide security and that none had been offered by the Applicant in the instant application. Counsel urged the court to find that it had no jurisdiction to grant the prayer sought in the absence of security being given. Counsel relied on the case of **Motichand Virpal Shah & Others Versus Investment & Mortgages Bank Ltd. & Others**, in support of that proposition. In the said case **Azangalala J.**, ordered the Applicant in a similar application to deposit Kshs.45 million as a condition for grant of stay even though none was offered by the Applicant and despite the suit property being preserved.

Mr. Ogunde argued further the point that the Applicant must both satisfy the Court and demonstrate that it will suffer substantial loss if the prayers sought were not granted. **Mr. Ogunde’s** view was that the loss, if any, was contemplated by the parties when the securities were offered to guarantee the debts in question in the suit in the event that there would be enforcement of those securities. In those circumstances, **Mr. Ogunde** submitted, the loss was contemplated and the Applicant could satisfy the requirement that it would suffer any substantial loss. In any event, the Respondent, which is a bank, was capable of putting the Applicant to the position it is at the moment in the event that the appeal before the Court of Appeal was successful, if the Court declined to grant the prayers sought in this application. **Mr. Ogunde** urged the Court to find that the remedy sought is a discretionary remedy and that the Court has to exercise its own discretion to determine the application on the merits.

In regard to **Butt’s case**, supra, **Russel Co. Limited case**, supra, and **Kenon Limited**, supra, **Mr. Ogunde** said that there was nothing in those decisions that departs from the four principles which form basis upon which the Court should determine the application.

I have considered the application together with submissions by both Counsel. There is agreement between counsel that this Court has jurisdiction to grant a temporary injunction or stay of its orders pending an appeal. I am well guided by all the cases cited by **Mr. Kingara** for the Applicant. The guiding principles in the exercise of this discretionary power are first and foremost the need to preserve the status quo and the property. The Court is enjoined not to frustrate an Applicant’s right to appeal even where the Judge felt no doubt in dismissing an application for an interlocutory injunction. As the Justices of Appeal commended in the **Russel case**, supra, it is necessary that the High Court considers whether the nature of the appeal could be rendered nugatory if an injunction is not granted, and; the High Court should be loyal and realistic in doing so in case wider issues than those relied upon have to be taken into consideration.

No doubt in my ruling in which I refused an application for interlocutory injunction, I express firm belief that the Applicant’s request was not merited. However, I also do accept that this is a complex matter and that it may be that in its appeal, the Applicant is relying upon other issues than those argued before me. It is also possible that I was wrong in my ruling. That aside, 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. The Applicant has deposed that the equipment and stock intended to be sold by the Respondent was sourced over time from many countries and that it was highly specialized and may not adequately be compensated by an award of damages. Their loss, if the Respondent exercised its right under the debenture, may not be recoverable.

The Respondent has not controverted that point. Indeed the Respondent filed no papers in response to this application. I am mindful that the Respondent’s rights have crystallized both under the ruling in its favour and also under statute. However, there is equally a weighty right which is the undoubted one of

the Applicant herein to an appeal and the expectation that it should not be rendered nugatory. The court has to balance both rights.

The Applicant's plea is that the Respondent may not be able to return it to its position if the application is refused and the Respondent exercises its rights. Indeed the Respondent has not challenged the Applicant's contention that the Applicant's total capital value of the suit property *inter alia* in land, equipment and stock may far surpass the total capital of the Respondent bank. That is a serious point, which should not be assumed.

On the other hand, if the appeal is unsuccessful, the suit property equipment and stock will still be available to the Respondent to deal with as provided in the law, including to sell the same.

Mr. Ogunde urged the Court not to grant the orders sought if no security is provided. I do not agree with the Respondent's Advocate that security must be provided as a prerequisite to the grant of the orders sought.

Having come to these conclusions, I will allow the application in the following terms:

- 1. The 2nd Defendant be and is hereby restrained by a temporary injunction from acting as Receiver and or Manager of the Plaintiff.**
- 2. The Defendants be and are hereby restrained by a temporary injunction from selling, disposing off, offering for sale or alienating in any manner whatsoever any of the Plaintiffs land, properties, machinery, equipment, assets or stock.**
- 3. The Applicant shall bear the costs of this application.**
- 4. The temporary injunction granted under (1) and (2) above shall be for a period of six months.**

Orders accordingly.

Dated at Nairobi, this 7th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Makotsi holding brief Mr. Kingara Advocate for the Applicant

No appearance of Mr. Ogunde Advocate for Respondent

LESIIT, J.

JUDGE