



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

**Civil Case 3 of 2006**

**MOHAMMED GULAMHUSSEIN FAZAL KARMALI.....1<sup>ST</sup> PLAINTIFF**

**NAZNEEN MOHAMAD GULAHUSSEIN FAZAL KARMALI...2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**C.F.C. BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a notice of motion dated 11<sup>th</sup> March 2007 Mohammed GulamHussein Farzal Karmali and Nazneen Mohammed Gulamhussein Fazal Karmali the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein have moved this court under **Section 3A** of the Civil Procedure Act and the inherent jurisdiction of court, and in the alternative **Order 49 Rule 5** of the Civil Procedure Rules for orders as follows: -

- 1.) *This application be certified urgent and heard exparte in the first instance.*
- 2.) *This Honourable Court be pleased to suspend the Public Auction of the suit premises scheduled for the 22<sup>nd</sup> May 2007 temporarily pending hearing and determination of this application and thereafter pending the hearing and determination of the suit.*
- 3.) *This Honourable Court be pleased to enlarge the time for compliance with its order of 6<sup>th</sup> March 2007 and order the Plaintiffs' statement of Agreed issues and list of documents filed and served on the 12<sup>th</sup> April 2007 to be deemed filed within time.*
- 4.) *This Honourable Court be pleased to reinstate the interlocutory orders of Honourable F. Ochieng issued on the 2<sup>nd</sup> day of May 2006.*
- 5.) *Costs of this application be in the cause.*

The motion has been necessitated by the fact that the Applicants failed to comply with an order issued by Warsame J. on the 6<sup>th</sup> March 2007, to the effect that: -

***“The Plaintiff be and is hereby directed to resolve all the preliminaries within the next 30 days and fix the matter for hearing within the next 45 days from the date hereof failure to which the orders granted on 2<sup>nd</sup> May 2006 shall stand set aside.”***

The Applicants did fix the suit for hearing within 45 days but failed to resolve all the preliminary matters as he filed the statement of agreed issues and the list of documents after a period of 30 days. As a result the 1<sup>st</sup> Respondent C F C Bank Limited going by the default clause in the order of Warsame J. considered the interlocutory injunction granted on 2<sup>nd</sup> May 2006 to have been discharged and proceeded with the exercise of its statutory power of sale through the 2<sup>nd</sup> Respondent Joseph Gikonyo t/a Garam Investments.

The Applicants' advocate concedes that it failed to file the statement of agreed issues and the list of documents within time but contends that this default was as a result of pressure of work on the advocates who failed to convey the directions of the judge to Mr. Simiyu the Advocate who was to take action. The Applicant's advocate pleads with the court not to penalise the Applicants for a mistake which is not of their making. He urges the court to administer substantial justice by exercising its discretion in the Applicants' favour, extending time for the filing of the documents and reinstating the interlocutory orders issued on the 2<sup>nd</sup> of May 2006. He maintains that the Respondents will not suffer prejudice.

The application is strenuously opposed by the Respondent through a replying affidavit sworn by Rita Wambui Kuria Senior Manager Legal Services of the 1<sup>st</sup> Respondent. It is submitted on behalf of the Respondents that the Applicants having failed to comply with the conditional order issued by Warsame J. the interlocutory injunction has been discharged and the order cannot be reinstated as the court can only extend or reinstate what is in existence. It was further submitted that the notice of motion is misconceived as the Applicants ought to have filed a fresh application for an interlocutory injunction and not applied for reinstatement of the previous orders. The court was urged not to exercise its discretion in the Applicants' favour as the failure of the Applicants to comply with the orders of Warsame J. was further evidence of the Applicant's dilatory conduct that was deprecated by Warsame J. when He issued the conditional order.

Contrary to the submissions made on behalf of the Applicants that the Respondents would suffer no prejudice, it was submitted that the 1<sup>st</sup> Respondent was already in the process of exercising its statutory powers of sale. The sale is scheduled for 22<sup>nd</sup> May 2007 and if the orders sought by the Applicants are granted by the court, the Respondents will be highly prejudiced for a mistake not of their making.

It is evident from the court file that the Applicant has been enjoying an interlocutory injunction which was issued on the 2<sup>nd</sup> May 2006. From that time the matter was listed for hearing only once, i.e. on the 6<sup>th</sup> March 2007, when hearing had to be adjourned as the pre-trial procedures had not been finalized. It was that adjournment that precipitated the order of Warsame J. It is evident that the Respondent for obvious reasons is anxious to have this matter finalized. Nevertheless, the Respondents maintain that the Applicant has been deliberately delaying and frustrating the hearing of this suit, the matter having only come before the court for hearing on one occasion, it would be a rather harsh judgment to arrive at that conclusion based on what transpired on the 6<sup>th</sup> March 2007.

I do agree with the Applicant's advocate that the court has to exercise substantial justice. This would not be achieved by shutting out the Applicant without the suit being heard on merit. I appreciate that the Respondents have initiated the process of exercising their statutory rights of sale. However, the sale not having taken place, the prejudice suffered if any is not one in respect of which amends cannot be made.

I have further considered the submissions that the application before the court is defective the order for interlocutory injunction being no longer in existence. I do not ascribe to the view of the Respondents' advocate that the court can only reinstate or extend something already in existence. Reinstatement by its very nature implies putting back what has been removed. The interlocutory orders having been discharged, they have been removed and are no longer there. It is therefore necessary that they be reinstated, i.e. brought back and given new life. Moreover, the court having previously heard and determined the application for interlocutory injunction on merits, a fresh application would in fact be asking the court to hear and determine the same issues which have already been heard and determined and this would obviously be met with a plea of *res judicata*. In my view the applicant has gone the right way

by applying for reinstatement of the interlocutory orders made on 2<sup>nd</sup> May 2006. His application is therefore properly before this court.

It is evident that the Applicant filed the list of documents and agreed issues on the 12<sup>th</sup> April 2007, which was about 7 days late. Although the delay was not so inordinate that it cannot be cured by this court extending time, it is noted that this delay caused the hearing of the suit to abort for the second time. In order to ensure that the Applicant takes this matter seriously and proceeds with due diligence, I will make a conditional order reinstating the interlocutory injunction on the following terms: -

- 1. The interlocutory injunction order issued on 2<sup>nd</sup> May 2006 is hereby reinstated subject to the Applicant providing an undertaking for payment of damages by way of a Bank Guarantee for an amount upto Kshs. 5 Million within 21 days from today. In default of the applicant providing the guarantee as aforesated, the interlocutory injunction shall stand set aside without further reference to the court.***
- 2. Time is extended for purposes of filing the list of documents and the agreed issues. Accordingly the documents filed on 12<sup>th</sup> April 2007 will be deemed as properly filed.***
- 3. For avoidance of doubt the auction scheduled for 22<sup>nd</sup> May 2007 is hereby suspended.***
- 4. Costs of this application and all thrown costs shall be paid by the Applicant's advocate personally.***

***Dated, signed and delivered this 21<sup>st</sup> day of May 2007.***

**H. M. OKWENGU**

**JUDGE**