



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 209 of 2005

CONTINENTAL CREDIT FINANCE LIMITED.....PLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHIDEFENDANT

IGANINYA LIMITED.....2ND DEFENDANT

THE PRINCIPAL REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

The Notice of Motion dated 16th November 2005 seeks stay of the order granted by this court on 21st September 2005, namely two limbs of that order;

- (1) Where an injunction was granted stopping the 1st and 2nd defendants, their servants or agents from collecting rent from the suit property; and
- (2) An order that rent on the said suit property be collected by a third party.

The notice of motion is brought under Order XLI Rule 4 of the Civil Procedure Rules. Having gone through the court file, I failed to find that file copy of the Notice of Appeal. If indeed there is no notice of appeal filed by the defendant I am of the view that this court would not have the jurisdiction to entertain

an application under Order 41 Rule 4. Order 41 Rule 4 (4) provides:

“For the purpose of this rule an appeal to the court of appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”

By that Rule the court’s jurisdiction to entertain an application under Order 41 Rule 4 is invoked only where a notice of appeal is filed. In our present case even though that notice of appeal is not in the file the court will consider the arguments before it by counsels having heard the matter in full and also considering that it could be due to an oversight of the registry staff in failing to place Notice of Appeal on the file.

The defendant’s learned counsel, Miss Ngugi argued that the defendants have an arguable appeal as seen in the annexed Memorandum of appeal, and that accordingly if stay is not granted that appeal would be rendered nugatory. Counsel relied on the case of KOROTOT LIMITED – AND – CAMAC HOLDING INC CIVIL APPLICATION NO. NAI 155 OF 1993. The court of appeal stated that the principle that guides it in considering an application for stay is:

“.....to grant stay where it is shown that there are arguable points to be pressed in the intended appeal.”

Counsel then made reference to this court’s ruling of 21st September 2005 and said that the court wrongly exercised doubt as to whether the plaintiff had exercised its power of sale, when there was no basis, on the evidence to exercise that doubt, since the sale of the suit property was stated to have been on the 19th September 1990 and was not controverted by the plaintiff. Similarly, counsel argued, the assignment of the purchase of the suit property to the 1st and 2nd defendants was not controverted by the plaintiff. These issues counsel said, amongst others were points that will be considered in the court of appeal as evidence that the plaintiff had failed to satisfy the principles in GIELLA V CASSMAN BROWN AND CO. LTD [1973] E.A. 358.

Counsel finally argued that the balance of convenience favoured the defendant being granted orders of stay because it was the defendants who were in possession of the suit property, who had renovated the building thereof and because if the suit property will be managed by the plaintiff it will likely become dilapidated.

Defendant’s counsel then alluded to a suit filed by the tenants on the suit property, namely CMCC No. 2977 of 2005, who wanted the court to determine the issue of ownership of the suit property for the purpose of payment of rent. That as a consequence of this confusion the defendants had lost rental income.

Plaintiff’s learned counsel, Mr Kariuki, opposed the application. He began by saying that the prayer, in the application, seeking that the defendant’s be allowed to continue collecting rent is unattainable in this case by an application of stay, and that it could only be entertained in an application for review or in an appeal.

Counsel further argued that the stay sought cannot be granted because the order of 21st September 2005 is not an order that can be executed under Order 21 of the Civil Procedure Rules. That what the defendant ought to have sought was a discharge of injunction rather than stay.

Plaintiff’s counsel faulted the defendants application for failing to abide by O.41 R.4 in that the defendants had not shown substantial loss nor had they offered any security.

Broadly those are the arguments presented by counsels.

As I stated before if there is no notice of appeal filed by the defendants the application will fail.

On the argument that the stay ought to be granted to ensure that the defendant's appeal, which has high chances of success, is not rendered nugatory, I wholly accept plaintiff's argument that, that is not a consideration for an application under Order 41 Rule 4. Whether or not the applicant has an appeal, which is likely to succeed, need not be considered. Order 41 Rule 4 requires the applicants to show that unless stay is granted they will suffer substantial loss and also offer security for such stay.

The loss that the defendants mentioned is that the plaintiffs are incapable of taking care of the suit property and will likely let it be in a dilapidated state and that tenants will get confused with change of management of the suit property and the rental income will be lost.

The order granted on 21st September 2005 very specifically stated that the court will appoint a third party to collect the rent. That means that the question of the plaintiff running down the suit property does not arise. Once the court does appoint a third party to collect rent, the court does not see how there will be confusion on who is collecting rent. The court's finding is that the defendants have not proved that they will suffer substantial loss if stay is not granted.

The defence counsel's argument that stay cannot be granted because the order of 21st September 2005 is not an order capable of execution under order 21 of the Civil Procedure Rules is misplaced. Order 41 Rule 4 (1) provides that stay can be granted, for sufficient cause, of execution of decree or order. What was granted on 21st September 2005 was an order. The defendants are seeking stay of execution of that order. Execution is the putting into force that order. Therefore stay of that order of 21st September 2005 can be granted.

The court's finding is that the defendant's application fails to satisfy the conditions of Order 41 Rule 4 and the same shall be dismissed.

The issue of rent collection on the suit property remains in unsatisfactory position, because although there is an order that the rent income be deposited in a joint account it is important that the management and collection of rent of the suit property be committed in a particular person or body to ensure that there is no loss of rental income and to ensure that the property remains in good repair. The court will require the parties to either agree on such a person or body and failure to so agree the court will appoint such person or body. The court will require this be done within 7 days from the reading of this ruling.

The orders of the court are: -

- (1) That the Notice of Motion dated 16th November 2005 is dismissed with costs to the plaintiff.**
- (2) That this court will deliver a further ruling to the one hereof dated 21st September 2005, on 24th March 2006, at 9.00 am whereby the court will appoint a person, company or body to collect rent on the suit property, parties will be at liberty to file within 7 days an affidavit indicating the person, body or company they wish to be appointed such a person, body or company shall indicate in writing their willingness to be so engaged**

MARY KASANGO

JUDGE

Dated and delivered on 13th March 2006.

MARY KASANGO

JUDGE