



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case 336 of 1999

PRAFULA ENTERPRISES LTD.PLAINTIFF

-VERSUS-

NORLAKE INVESTMENTS LTD1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

Coram J. W. Mwera, Judge,

Odunga for Plaintiff,

Wasuna for 1st Defendant,

Raymond CC.

R U L I N G

The plaintiff' company filed an application dated 3/4/2006 under Section 3A, 63 of Civil Procedure Act and Order 39 rules 1, 2 Civil Procedure Rules, for the main orders that:-

- i) the 1st defendant be enjoined from selling/disposing of or interfering with its occupation of the suit premises known as PARCEL NO. 428 or 438 as borne in two conflicting maps.
- ii) the injunction holds until an intended appeal against the judgment herein delivered on 8/2/2006, is determined.

The grounds on which the application is based stated **inter alia**:

“(i) That a decree has been issued against the applicant who stands to suffer substantial loss unless there is a stay of execution,”

and that with the (notice of) appeal filed all in time and certified proceedings being awaited, the sought injunction ought to issue. Mr. Odunga presented the application as per the supporting affidavit sworn on 3/4/2006 and such other material as he could muster. Mr. Wasuna opposed it including the argument that in the light of ground (i) (above) what the plaintiff seems to seek here is stay of execution orders (as per Order 41 rule 4 CPR) yet it had filed a notice of motion while, in essence it was a temporary injunction (Section 63 (c) CPA) that was intended. That a chamber summons ought to have been the mode by which to approach the court, and not a notice of motion.

Mr. Odunga told the court that judgment herein was delivered in favour of the 1st defendant over the suit property which both parties claim. That in the meantime, the plaintiff' company was in occupation and plaintiff' company paying rents to the 1st defendant. That it filed a notice of motion because the plaintiff had cited Section 3A Civil Procedure Act and thus only a notice of motion should be used. That an appeal was a continuation of a suit and so this court should not accept Mr. Wasuna's contention that the suit ended with the judgment and thus the applicant has no basis upon which to file and argue for an injunction. That the intended appeal was not frivolous and so the **status quo** ought to be maintained by injunction until the Court of Appeal determines it. That no prejudice will befall the respondent. The supporting affidavit said that the 1st defendant intended to dispose of the suit property, which action would wipe away the substratum of the intended appeal. That this court should, in line with principles governing temporary injunctions, issue the sought order. Besides what has been attributed to Mr. Wasuna above, the court also heard that in the principles governing injunctions, which the applicant had not argued before the court, no injunction should issue if damages can compensate the applicant. That if the applicant desired a stay, it should have filed a stay application in the proper manner and proceeded to argue what falls under Order 41 rule 4 Civil Procedure Rules. And that the 1st defendant actually does not intend to sell the land.

Having heard both sides, it can be said that quite probably what the plaintiff had in mind is an order of stay pending appeal (see the ground reproduced above), even if it can also seek an injunction pending appeal. It did not, however, argue the substantial loss that would befall it or the applicable injunction principles (see Section 63 (c), Order 39 rules 1, 2 Civil Procedure Rules cited) for this court to better appreciate the type of relief sought. Indeed, the court was prepared to overlook the procedural defects of this application before it (whether a notice or motion or a chamber summons) in the course of doing justice. But it is quickly added that such "overlooking" should never be capitalized upon by litigants so that they fail to employ proper modes of approaching the court. The Rules setting out whether to file a notice of motion or a chamber summons are not meant to be ignored.

In this case, it is considered that with the judgment in favour of the 1st defendant which does not seem inclined, at least for now, to sell the land, the orders sought by the plaintiff will not issue. There was no sufficient material either for a stay order or an injunction adduced to warrant considering to issue either relief.

In summary, this application is dismissed with costs.

Orders accordingly.

Delivered on **16th day of May 2006.**

J. W. MWERA

JUDGE

JW/hao