



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 622 of 2005**

**GILBERT MAINA..... APPELLANT**

**VERSUS**

**PORSHOTAM SINGH..... RESPONDENT**

**R U L I N G**

On 9/9/05, the applicant/appellant, under Order 41 Rule 4 (1) & (6) of the Civil Procedure Rules, sought the following orders:

1. Already spent
2. A temporary injunction restraining the Respondent, his agents, employee from distraining for rent, selling all those goods proclaimed on 30/8/05 pending the appeal herein,
3. Stay of Execution of the order of the RMCC 6932/05 pending this appeal.
4. [Subsumed in Order 41 rule 4]
5. Leave to deposit the monthly rent in court.
6. Costs to abide the outcome of the intended appeal.

The grounds are on the face of the application and include that the applicant filed the appeal on time, and the Respondent has proclaimed all the tools of trade of the applicant and unless restrained by an injunction the goods would be sold rendering the appeal nugatory.

In opposition the Respondent avers that the application is an abuse of the process as the lease referred to had been compromised by a surrender made on 18/8/05.

In the course of their submissions, it came out clearly that the alleged surrender of the lease by the applicant is not free of irregularities. Mr. Mungu, Counsel for the Respondent, had acted for both parties, and then turned round to represent the Respondent in the suit/appeal herein. The Appellant/applicant, through his lawyer, Mr. Mungu whom he alleged to have been realizing documents to the applicant by instalments, thereby prejudicing the applicants case against the Respondent.

On 14/11/05, this Court ruled that there was potential conflict of interest in Mr. Mungu's actions and conduct.

On 30/11/05 when the hearing resumed, Mr. Oduk took over from Mr. Mungu, who had withdrawn from the matter because of the potential conflict of interest.

Perusing the pleadings and listening to the submissions by both counsels, it is evident that the so called surrender document which the applicant purportedly signed was not dated and was signed in the belief that Mr. Mungu, who was acting for both sides, would give the applicant the document for the purposes of surrendering the lease signed in April, 2005.

That never happened and as on 14/11/05 when this application was heard, the applicant had not been given the purported surrender by Mr. Mungu.

This, in my view, is using a disputed document in favour of one client and against the other, both of whom were represented by Mr. Mungu earlier on.

I have considered the submissions by Mr. Oduk, for the Respondent, and I find the same very interesting. He submitted that the matter before this court had been fully canvassed but the application had been dismissed by the Milimani Court. He further went on and submitted that the dismissal of the application at Milimani also dismissed the suit. I find that strange and I am not inclined to believe such an anomaly that dismissal of the application also meant dismissal of the suit.

Looking at the entire pleadings, it is clear to me that the cause of the dispute, the lease, is shrouded in mystery and for justice to be done, the appeal herein should be fully heard. The surrender deed is suspect. The copy held by the appellant/applicant is not dated, while the copy with the Respondent is purportedly dated and signed. The document with the appellant does not state who made it.

The Respondent avers that no security has been offered by the appellant/applicant. That is not what I read in Clause 12 of the Supporting Affidavit of Gilbert Maina, filed in this court on 9/9/05. In that clause, the applicant clearly complies with the tenets of Order 41 rule 4 as regards security for the due performance of any decree that this court might ultimately pass.

All in all, and to preserve the substance of the appeal, I grant the following orders:

1. Prayer No. 2, in the Notice of Motion herein, filed on 9/9/05.
2. Prayers No. 5 and 6.

DATED and delivered in Nairobi, this 26<sup>th</sup> Day of June, 2006.

**O.K. MUTUNGI**

**JUDGE**