REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 989 of 2005

JOSEPHINE KERUBO ONDIEKI……..….....……...PLAINTIFF

VERSUS

OAKDALE COMMODITIES LTD.…….....…….DEFENDANT

R U L I N G

This Notice of Motion, dated 22/2/06 and filed on 23/2/06, under Order 41 Rule 4: Order 39 rules 3 (2), (3) and 4 of the Civil Procedure Rules, seeks the following orders:-

1. Already spent.

2. Pending the interpartes hearing of this application, this court do set aside, vary and/or discharge its stay orders given on 20/12/05 by Mutungi: J.

3. The Respondent, being the valid registered owner of the suit premises be allowed to proceed with eviction pending any appeal, which appeal would not be rendered nugatory in any case.

4. Costs of this application.

The application is supported by an Affidavit by Abdi Rahman Haji Abass, and on the grounds that: the appellant has as of to date never served the Respondent with any application and/or pleading related to this suit but only a court order dated 23/12/05 which was served on the auctioneers when they were in the process of execution; the court's order is bound to occasion great and irreparable loss on the Respondent as it is ambiguous and too open to abuse by the appellant who has in fact not bothered to invite the Respondent for fixing a hearing date as ordered by the court; that the appellant has not complied with the procedure of instituting an appeal, nor demonstrated that she has an arguable appeal with any chance of success; that any consequent loss suffered by the appellant can sufficiently be compensated by way of damages as the issue in dispute is not about ownership of the suit premises but eviction orders and rent arrears.

In opposition, the Respondents, vide their Replying Affidavit, filed in Court on 13/4/06, and deponed by Josephine Kerubo Ondieki, aver as follows:-

The applicant herein, was served with the application for stay on 22/2/06 and it was an abuse of the court process for it to have filed the application for discharge of the said orders on 23/2/06, only a day after being served with the Respondent's application for stay; this shows that the applicant has moved to court in bad faith with the aim of defeating the application which was coming up for hearing on 9/5/06; if the

applicant was aggrieved by the **exparte** orders then the only avenue was by way of review or fixing the application of 22/2/06 for hearing and not filing another application. The application is fatally defective as it is brought under wrong provisions of the law and hence the prayers sought cannot be granted.

Upon reading the pleadings herein, and the submissions by the Learned Counsel for both parties, this court has reached the following findings and conclusions

The substantive issue in the appeal is marred by the two applications, one by the Respondent/applicant in the application dated 22/2/06 and filed on 23/2/06 and the other by the appellant/Respondent in this application, but applicant in the application dated 23/2/06.

On 6/6/06, after brief hearing of counsel for both parties – Mr. Kiengwe and Mr. Mwenda, I ruled that, the application dated 22/2/06 – which is this one – be heard on 21/6/06. Earlier on, on 20/12/05, I had extended, in the presence of counsel for both parties, the interim orders granted by this court, vide Njagi J, on 15/12/05. This was based on two reasons; First that the matter was listed for mention and hence could not be heard that day, 20/12/05, and secondly because the Christmas Vacation for the High Court was commencing the following day – 21/12/05.

Thirdly, on that day, 20/12/05, I ordered that parties take a hearing date from the Registry.

Accordingly, it is totally incorrect for the applicant to pray for setting aside, variation and/or discharge of my stay orders given by me – Hon. Justice Mutungi;- on 20/12/05. I made no orders on that day, and this court has no power to make orders on a mention date, which was the case on 20/12/05. The orders which I extended were those made on 15/12/05, vide Njagi, J. the then Duty Judge.

The above finding and conclusion is sufficient to dispose of the application before me. This is because the application is against a non-existent order, as no such an order was made by this court on the 20/12/05. Having held and concluded as above, it is superfluous to add that the pleadings that follow that prayer are untenable as they seek to support a void and untenable prayer based on wrong facts.

No further energy need be expended on the application.

However, there is one other issue which arises from the pleadings and the submissions by Learned Counsel for the Respondent. That is that upon obtaining the exparte orders of stay of execution on 15/12/05, it is on record and unchallenged that such an order was never served, by the appellant/applicant, on the Respondent until 23/2/06 when the said exparte orders were served together with the application of that date, by the appellant/applicant.

Finally, on the 20/12/05, this court had ordered, during the mention, that parties pick a hearing date from the Registry. Even though such an order is apparently addressed to both parties, it is primarily the duty of the appellant/applicant, as he/it is essentially the prosecutor of the matter. Unfortunately, no such date had been taken for the interpartes hearing of the application.

Be that as it may, this court is not in a position to vary an order it never made on 20/12/05.

On the provisions under which the application is brought that is Order 41 Rule 4 and Order 39 Rule 3(2) (3) of the Civil Procedure Rules, it is provided, and required under Order 39 rule 3(3) that;

“where the court grants an exparte injunction the applicant shall, within three (3) days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained.”

The pleadings before me from my earlier finding, and the exparte order of 15/12/05, were not served on the Respondent until the 22/2/06. Clearly that is a violation of the law and that is why the interim orders were not extended on 6/6/06.

For all the above reasons, the application herein is dismissed with costs to the applicant and in favour

of the Respondent.

DATED and delivered in Nairobi, this 1st Day of November, 2006.

O.K. MUTUNGI

JUDGE