

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Civil Suit 157 of 2003

SELKIM INVESTMENT LIMITED.....PLAINTIFF

VERSUS

KIMARU KIBIRIR SITTONI.....DEFENDANT

RULING

On the 9th of July 2004, this court allowed the application filed by the Plaintiff for summary judgment to be entered for it against the Defendant herein. The Defendant was ordered to vacate the suit land *Baringo/Perkerra/101/150* within thirty (30) days of being served with the order of this court. Being dissatisfied with the said ruling of this court the Defendant filed a Notice of Appeal indicating his intention to appeal against the said ruling to the Court of Appeal. Contemporaneous with filing the said Notice of Appeal, the Defendant, Kimaru Kibirir Sittoni, filed an application for stay of execution under the provisions of **Order XLI Rule 4 of the Civil Procedure Rules** pending the hearing and determination of the intended appeal to be filed in the Court of Appeal. After hearing the said application, this court disallowed the application for stay of execution filed by the said Defendant. It would have been thought that if the Defendant was dissatisfied with the decision of this court refusing him stay of execution pending the hearing of his intended appeal, the Defendant would have made an appropriate application before the Court of Appeal. Did the Defendant do so? No. The Defendant instead decided to make an application to this court under the provisions of **Order XLIV Rule 1 of the Civil Procedure Rules** to review the ruling of this court refusing the grant of stay of execution which had been sought by the Defendant. The grounds upon which the Defendant is basing his said application is that the Defendant was willing to deposit the entire purchase consideration in court or in the joint names of the advocates pending the hearing and determination of the intended appeal. In the undated affidavit annexed to the said application purportedly sworn by the Defendant, Kimaru Kibirir Sittoni, the Defendant has annexed two statements marked "KKS IV". The two statements are in the name of Kipkosgei Arap Sittoni and Sit N Move Limited. The Defendant has not given any explanation as to who Kipkosgei Arap Sittoni and Sit N Move Limited are and what relationship do they have with him to enable him pledge to the court the amounts that are in the said accounts. The Application filed by the Defendant has, naturally, been opposed by the Plaintiff.

Mr Kiplenge for the said Defendant, Miss Mathenge for the Plaintiff and Mr Githiru for the other defendants, submitted their respective clients case before me. I have considered their arguments. I have also considered the sequence of events that have taken place in this suit as stated at the beginning of this ruling. The issue for determination by this court is whether this court has jurisdiction to hear an application made in the guise of a review while in actual fact the Defendant is calling upon this court to give a determination on an issue which it had already given its ruling. As stated earlier, this court refused to grant the Defendant's application for stay of execution pending the hearing of the Appeal. The

Defendant declined to take up the application for stay of execution before the Court of Appeal and instead purported to make an application for review before this court. I hold that the Defendant is asking this court to sit on appeal on its own decision. No grounds have been advanced to persuade me to believe that the Defendants application fell within the ambit of the provisions of **Order XLIV Rule 1 of the Civil Procedure Rules**. The application is therefore an abuse of the due process of the court. The right forum for the Defendant to ventilate his application, if he was dissatisfied with this court's ruling dismissing his application for stay of execution (*as it appears to be the case*), if for the Defendant to make an appropriate application before the Court of Appeal. To purport to make the said application before this court in the guise of an application for review is vexatious and incompetent. The application for review being vexatious, incompetent and an abuse of the due process of the court is therefore dismissed with costs to the Plaintiff and the 2nd and 3rd Defendants.

DATED at NAKURU this 17th day of February 2005.

L. KIMARU

JUDGE