



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVILCASE NO. 128 OF 2003

PROTEIN AND FRUIT

PROCESSORS LIMITED :::PLAINTIFF

VERSUS

CREDIT BANK LIMITED :::1ST DEFENDANT

LINCOLN IRUNGU KAMAU :::2ND DEFENDANT

JOSEPH M. GIKONYO

T/A GARAM INVESTMENTS :::3RD DEFENDANT

RULING

This is an application expressed to have been brought under orders XLIV Rules 1,2,3 and 4 L of the Civil Procedure Rules, Sections 3A and 80 of the Civil Procedure Act and all enabling provisions of the Law. It is by the Defendants and they seek to review, vary and/or set aside the Ruling and Order of Justice Ondeyo made on 18th September, 2003 on the following main grounds:-

- 1. That the said order clogs the charge’s right under the charge instrument.**
- 2. That the Plaintiff is indeed indebted to the Defendant**
- 3. That it is not in the interest of justice to render impotent all efforts by the 1st Defendant to realize its security.**
- 4. That in the interests of justice the said order should be reviewed and varied to restrict the injunctive order to the auction of 18.2.2003.**

In support of the application the Defendants/Applicants have filed an affidavit sworn on 17th March 2004 by Mr. Ashitiva B. Mandale Advocate for the Defendant.

Having looked at the documents filed herein including the application by way of Notice of Motion, the affidavits, the annextures the grounds of objection, it has emerged that the Defendants have lodged a notice of Appeal against the said Ruling of Ondeyo J. This Notice of Appeal was lodged on 1st October, 2003. In the course of his submissions Counsel for the Defendants/Applicants intimated that the Defendants/Applicants are still desirous of pursuing their appeal against the said ruling of Ondeyo J.

In my view, it is not open for a party to invoke both jurisdictions of appeal and review at the same time. The Defendants/Applicants opted to pursue the appeal when they lodged their Notice of Appeal on 1st October, 2003. The filing of this notice unless withdrawn excluded the procedure under Section 80 and order XLIV of the Civil Procedure Act and Rules.

This application to my mind is incompetent. I do not therefore have to consider the rest of the issues canvassed before me. Accordingly the Defendants' application dated 16th March 2004 and filed on 17th March 2004 is struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of: