



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 21 OF 2005

MRS SURINDER KUMARI MEDIRATTA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

**THE REGISTERED TRUSTEE OF
NAIROBI
PENTECOSTAL CHURCH/CHRIST IS
THE**

ANSWER MINISTRIES.....2ND DEFENDANT

COMBINED INDUSTRIES.....3RD DEFENDANT

R U L I N G

By a Ruling delivered on 9.05.2005 my brother Mr. Justice Azangalala dismissed with costs, the Plaintiff's application for an injunction to restrain the 1st and 2nd Defendants from transferring, charging, taking possession or otherwise howsoever from exercising proprietary rights over L.R. No. 209/5535, Ralph Bunch Road Nairobi until this suit is heard and determined.

Following the delivery of the said Ruling the Plaintiff sought through her learned Counsel Mr. Gichuki Kingara, a stay of execution of that order pending his preparation of an intended appeal on that Ruling to the Court of Appeal. That application was made orally pursuant to the provisions of Order XLI rule 4(5) of the Civil Procedure Rules, which provides that **"An application for stay of execution may be made informally immediately following a judgement or ruling."** My brother Mr. Justice Azangalala declined to grant the Plaintiff's application for stay of the order dismissing the injunctive application. This decision upset the Plaintiff's Counsel, who accused the said Judge of bias against his Client by dismissing both her application for injunction, and declining to grant a stay of that order.

Subsequent to those events on 9.05.2005, the Plaintiff filed the current application on 10.05.2005, under a Certificate of Urgency and seeking a stay of the order of Mr. Justice Azangalala. The application first went before Mr. Justice Waweru, the Presiding Judge, who ordered that the matter be placed before Hon. Mr. Justice Azangalala.

However when this matter went before Mr. Justice Azangalala, the Plaintiff's Counsel felt apprehensive that his Client would not receive sympathy from the same Court which had just dismissed her application, for injunction, and the order of which he was seeking a stay. My brother Justice Azangalala being a decent and a judge of high integrity, and not worthy of being accused of bias, in his humble mien declined to hear the application at the request of the Plaintiff's Counsel. That is how this matter landed on my desk.

Thus when this matter was urged before me on 12.05.2005, Mr. Gichuki Kingara was passionate that his Client be granted just a stay of 10 days to enable him prepare his papers for the intended appeal for the Court of Appeal. He told the Court that the Plaintiff was very concerned about the validity of the Charge, which he said did not conform with the provisions of Section 46 of the Registration of Titles Act (Cap. 281).

The Plaintiff had given the suit property on the understanding that the Borrower would give other securities to secure the loans, and would not endanger her property and that the Plaintiff was completely discharged from her guarantee the moment the 1st Defendant increased the facilities to the Borrower.

Those arguments are appropriate perhaps on appeal but hardly in this application.

Counsel did however urge that even after refusing to grant an injunction, the Court may still grant an order for stay. Counsel relied upon the decision of Megarry J. in the case of **ERINFORD PROPERTIES LTD vs. CHESHIRE COUNTY COUNCIL [1974] 2 ALL E.R. 448** where that learned Judge held *inter alia* that “where a Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal, that it is not necessary for the applicant to apply to the Court of Appeal, and that there is no inconsistency in granting such an injunction after dismissing the motion for the purpose of the order is to prevent the Court of Appeal’s decision from being rendered nugatory should that court reverse the judge’s decision.”

Counsel also relied upon the decision of Mbaluto J. in **KENON COURT VS. GIRO COMMERCIAL BANK LTD** (Nairobi, Milimani Commercial Courts H.C.C.C. No. 789 of 1999) in which the learned Judge granted a stay of 60 days pending the preparation of the record for the intended appeal on the ground that the value of the suit property in that case, then valued at over Kshs. 55 million would not materially depreciate within those days.

Madan JA (as he then was) applied the decision in **Erinford Properties vs. Cheshire County Council, in the case of M. M. BUTT vs. THE RENT RESTRICTION TRIBUNAL (RESPONDENT) AND Z.N. SHAH and S.M. SHAH (Civil Appeal No. NAI. 6 of 1979)**.

Counsel urged this Court to follow those decisions and the decision of Mwera J. in the case of **CENTURY OIL TRADING CO. LTD vs. KENYA SHELL LTD [2003] 1 EA 41**, where the Court after restraining the Defendant from calling in a guarantee from the Plaintiff’s guarantor but went ahead and ordered the Plaintiff to furnish security for due performance of its obligations as it was not comfortable to order that the properties already charged to the Bank be subject of this security as was suggested by the Plaintiff. (It is noted that that decision is subject of Appeal to the Court of Appeal which is yet to hear and render its decision.)

The application was predictably opposed by Mr. Gichuhi and Lukadiru, learned Counsel for the 1st and 2nd Defendants respectively. Mr. Lukadiru associated himself with the submissions by Mr. Gichuhi Counsel for the 1st Defendant. For the 2nd Defendant Mr. Lukadiru submitted firstly that there was a doubt whether there was cause of action against the 2nd Defendant, and secondly that the application, the subject of this Ruling should have been made to the Court of Appeal.

Mr. Gichuhi’s argument were equally brief. Counsel submitted that the matters herein had been canvassed by the three Counsel, and the Plaintiff’s application was dismissed. The subsequent application made under rule 4(5) of Order XLI was also dismissed. The Court was **functus officio**. The matter was *res judicata*, under Section 7 of the Civil Procedure Act. The same issue, between the same parties had been determined by a court of competent jurisdiction.

There was no evidence that the 1st Defendant was over- secured to the tune of Ksh. 1.0 billion. The essence of Mr. Justice Azangalala’s Ruling at p. 17 was that the **Plaintiff was guilty of material non-disclosures and her conduct did not meet the approval of a Court of equity**, and was consequently not entitled to the equitable remedy of injunction.

The debt currently stood at over Ksh. 280 million. The property in issue was valued at Shs. 125 million according to the Further Replying Affidavit of John Oringo, sworn on 11.05.2005 filed on 11.05.2005. There is no offer to pay or add security in consideration of the orders sought. A Court of law may have sympathy for a party but it must remain first and foremost a Court of law.

That is what the parties told the Court. I set out my opinion in the paragraphs following.

Order XLI rule 4 (1) of the Civil Procedure Rules empowers this Court for sufficient cause to order a stay of execution of its decree or order. The same rule confers upon the Court of Appeal the same powers to stay execution. For the Court of Appeal to grant a stay of execution, the applicant must satisfy the provisions of Rule 5(2) (b) of the Rules of that Court, that:-

(i) the intended appeal is arguable and not frivolous at all,

(ii) that if the injunction or stay order is not issued and the intended appeal eventually succeeds, it will be rendered nugatory by the refusal of the grant of such injunction or stay”

We are not here concerned with the principles for grant of stay or injunction in the Court of Appeal, although as observed by Mwera J. in *Century Oil Trading Co. Ltd vs. Kenya Shell (supra)*, Counsel often mix up these principles with those applicable for grant of stay in this Court. The principles for grant of a stay in this Court are set out in Order XLI, rule 4(2) and which the applicant must satisfy the Court that:-

“(i) substantial loss may result unless the stay is given, (ii) the application for stay had been lodged without delay, and

(iii) the applicant has furnished security for due performance,”

The application herein was lodged promptly in fact on the next day following the dismissal of the interlocutory application. There was no delay in filing the application for stay. I cannot however say that the Plaintiff/Applicant has satisfied the conditions for grant of stay by this Court – that the Plaintiff will suffer substantial loss unless the stay order is given and the Applicant has made it clear that it will not furnish any security to the 1st Defendant.

For these reasons, the Plaintiff has failed to satisfy this Court on the cumulative grounds for granting of stay under Order XLI rule 4(2) as set out above. There is however another reason why this application should fail. Order XLI rule 4(5) of the Civil Procedure Rules which I set out again provides:-

“An application for stay of execution may be made informally immediately following the delivery of a judgment or ruling”

My understanding of that rule is that following such an informal (meaning verbal) application, there is a response or an order from the Court or Judge presiding over the matter, the pronouncement by the Judge or Court whether “there be a stay” or “there be no stay of the order granted” or as in this case –

“Counsel of the Plaintiff has sought an interim injunction pending the filing of a formal application. I am afraid I have already ruled on this matter. There is nothing to prevent the Plaintiff from filing a Notice of Appeal and formal application today. The stay or interim order sought is refused.”

that order is final and binding upon the parties, and the Court is functus officio thereafter.

The only recourse, as my brother Justice Azangalala clearly indicated is for the aggrieved party in this case, the Plaintiff is to file an appeal for stay to the Court of Appeal in terms of Order XLI, rule 4(1) of the Civil Procedure Rules, and of course the Rules of that Court.

For these reasons, the Plaintiff’s Notice of Motion dated 10th May 2005 is dismissed with costs.

Dated and delivered at Nairobi this 19th day of May 2005.

ANYARA EMUKULE

JUDGE