



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 1048 OF 1994**

TIMBER MANUFACTURES AND DEALERS LTD.....PLAINTIFF

VERSUS

JOSEPH KIARIE MBUGUA.....1ST DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....2ND DEFENDANT

RULING

This Notice of Motion has been brought under Order XLI Rule 4, Section 63 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and All other enabling provisions of the Law. It primary seeks stay of execution of part of the decree given on 15th March 2005 pending the hearing and determination on appeal which the Applicant intends to lodge to the Court of Appeal. The Application is supported by an affidavit sworn by one Rosiello Bruno a Director of the Applicant and is based on the following primary grounds:-

- 1). That the Applicant is dissatisfied with the judgment delivered on 15th March 2005 and intends to appeal to the Court of Appeal and if stay is not granted the Applicant will suffer irreparable harm as the intended appeal will be rendered nugatory.***
- 2) That execution will effectively evict the Applicant from the suit premises which property will be sold unless stay is granted.***
- 3) That the Applicant will suffer irreparable loss as the value of the property is way above the money the 1st Defendant is required to pay.***
- 4) That this application has been brought without unreasonable delay.***

The Application is opposed and there is a Replying Affidavit sworn by one Mwinyi Faki Khatib a Manager at the 2nd Defendant bank.

The Application was canvassed before me on 28th April, 2005 by Mr. Kilonzo Learned Counsel for the Applicant and Ms Malik Learned Counsel for the 2nd Defendant. In his oral submission in support of the application, Counsel for the Applicant argued that if the Title to the suit property is released to the 2nd Defendant as ordered by the Court, the 2nd Defendant is likely to proceed to exercise its power of sale to recover sums allegedly owed by the 1st Defendant. If this happens the Applicant stands to be evicted from the suit property where it has been in possession since 1994. In Counsel's view the 2nd Defendant will suffer no prejudice if a stay is granted. The said Title document has after all been out of the hands of the 2nd Defendant for over 11 years and a stay will keep the title from the 2nd Defendant for only a little while.

Reliance was placed upon the case of **Indar Singh, Gill Ltd –v- Njoroge Gichora: Nairobi HCCC No.2411 of 1990 (UR)** in which Pall J. as he then was held that when an unsuccessful litigant who has appealed is in possession of immovable property and claiming a right to it, such possession should not be disturbed for he may establish his right in the appeal.

Before her response to the above submissions, Counsel for the Respondent applied to cross examine the Manager of the Applicant Rosiello Bruno on his affidavits sworn in support of this application. I allowed the application and on cross-examination, the said Rosiello Bruno denied knowledge of the contents of his affidavits stating that it was his son who knew what was contained in the affidavits.

I hold that the Affidavits sworn by the said Rosiello Bruno have no probative value. They are indeed non-affidavits. I will therefore ignore the same as they offend Order 18 Rule 3(1) of the Civil Procedure Rules.

Turning to the merits of the Application, Counsel for the Respondent submitted that the Applicant had not satisfied the tests set out under Order 41 Rule 4(2). Reliance was placed upon the case of **Kariuki –v- Kariuki (1990) LLR 5010** in which Hayanga J. restated the conditions for the grant of stay under Order 41 rule 4.

Further reliance was placed upon the case of **Kenya Shell Ltd –v- Benjamin Karuga Kibiru and Another (1882 – 88) KAR 1018** in which the Court of Appeal reaffirmed the same conditions for the grant of stay pending appeal.

Counsel further argued that on the material availed to the Court it is the Respondent who will suffer substantial loss if a stay is granted as the amount owed by the 1st Defendant will continue to rise.

I have now considered the Application, the Respondent's affidavit the submissions of Counsels appearing and the authorities cited. Having done so I take the following view of the matter The grounds upon which an order of stay of execution of decree can be sought are stated in Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules. They are:-

- (a) Establishment or showing by the Applicant of sufficient cause.*
- (b) Establishment by the Applicant that substantial loss may result if the order is not granted.*
- (c) Evidence that application has been made expeditiously.*
- (d) The giving of security by the Applicant.*

Regarding delay, the record shows that judgment was delivered on 15th March 2005 and this Application was lodged on 14th April, 2005. In my view the Application has been made without unreasonable delay.

The other requirements which in my view are of a fundamental nature have not been established by the Applicant. I have found that the affidavits upon which the Applicant would have relied upon are non-affidavits and worthless. The Applicant has therefore not established that substantial loss may be occasioned to it if the order of stay is not granted. In the absence of affidavit evidence also the applicant could not show sufficient cause. As regards the giving of security I would have ordered for the same if the Applicant had satisfied the other tests despite the Applicant being totally silent with regard to this aspect of the Application. In the result no basis has been established for the grant of the orders sought and consequently the Application must fail. Accordingly it is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2005

F. AZANGALALA

JUDGE

Read in the presence of: