



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 270 of 2004**

**GILBERTO AGOSTA ..... PLAINTIFF**

**VERSUS**

**LICINUS INVESTMENTS LTD & CANOBBIO PIERO ..... DEFENDANTS**

**Coram: Before Hon. Justice Mwera**

**Kilonzo for Applicant/Defendants**

**Ochwa for Respondent/Plaintiff**

**Court clerk – Kazungu**

**R U L I N G**

The defendants filed a notice of motion dated 28-4-05 under O.41 r 4 Civil Procedure Rules and S.3A Civil procedure Act for the principal order:

- 1) That there be a stay (of execution) of this court's orders following the ruling of 13-4-05

The 2nd defendant swore an affidavit in support and Mr. Kilonzo argued the 3 grounds stated. That the defendants had filed a notice of appeal against the ruling of 13- 4-05. That they were exercising their right in this regard and so this court should be inclined to preserve the status quo because its ruling of 13-4-05 may as well be overturned on appeal. And that if that was done and yet stay orders had not been granted "the appeal would have been rendered nugatory." The court sat wondering whether that phraseology featured under O.41 r. 4 Civil Procedure Rules but it was told that defendants would suffer substantial loss if the stay orders do not issue. That first, the plaintiff would make to reenter the subject premises which the defendants were already in the process of selling to a third party. That in fact plaintiff/respondent was not on the premises because he was resident in Italy and in any case the plot has not been transferred to him. Seemingly, because this application was filed only some 2 weeks after the ruling in question, Mr. Kilonzo did not see the need to argue whether there was delay in bringing it or not. But he told the court that his clients undertook not to transfer the property to any third party in the meantime and added that they were even ready to deposit in court the purchase price (whole or in part) which the plaintiff paid, as security for due performance.

Mr. Ochwa opposed the application on the basis that granting the stay could render the plaintiff position here ineffective. That he had shown the merits of his case and that even after he paid the purchase price, the defendants were not transferring the property to him at all. That he had taken possession and yet his workers on site were being thrown out by the defendants. That the defendants could sell the place to a 3rd party. And that the defendants had not proved what substantial loss they would suffer – the most basic thing to be substantiated under ). 41 r. 4 Civil Procedure Rules.

After hearing the parties as above, this court is not inclined to grant the stay of the injunction orders it gave on 13-4-05. The court restrained the defendants from selling the portion of their land for which they had received (part or all of) purchase price to any third party. They had shown it to the plaintiff. The court also directed that the defendants should not interfere with the plaintiff's enjoyment of the portion he

was buying. The plaintiff was to undertake as regards damages, which Mr. Ochwa said that that had been done.

No substantial loss has been shown to be waiting to befall the defendants unless the stay orders are granted. They still hold the purchase price as well as the land. There is an undertaking as to damages. In this court's view under O. 41 r. 4 Civil Procedure Rules and in these circumstances a party cannot claim to furnish security for due performance by offering that it will not dispose of the land – itself in dispute, and / or that it will deposit the purchaser's money in court.

In sum this application is dismissed with costs.

**Delivered on 22nd July, 2005.**

**J.W. MWERA**

**JUDGE**