



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 1566 of 1999

DAVID KAMAU PLAINTIFF

VERSUS

SAVINGS & LOAN KENYA LTDDEFENDANT

RULING

This Notice of Motion is expressed to have been brought under the Provisions of Order XLI Rule 4 of Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It primarily seeks two orders:-

- (a) **A stay of further advertisement and**
- (b) **A stay of execution of the order made on 29.9.2004**

pending the hearing and determination of an intended appeal against the order of 29.9.2004.

The main reasons for the Application are:

- (i) **That the Applicant intends to appeal against the said order;**
- (ii) **That the Applicant has an arguable appeal against the said order**
- (iii) **That the Respondent has advertised the Applicant's property and it is inequitable to proceed with further advertisement and sale of the said property before the intended appeal is heard and determined.**
- (iv) **That substantial loss may result to the Applicant and intended appeal rendered nugatory unless a stay of the proceedings herein is granted.**
- (v) **That the Applicant has filed this Application without delay.**
- (vi) **That the Applicant is ready and willing to abide by any order as to security for costs.**

Application is supported by an affidavit sworn by the Applicant in which the above grounds are substantiated. The Respondent has filed Grounds of Opposition.

The Application was canvassed before me on 5th July 2005 by Mr. Munyalo Learned Counsel for the Applicant and Mr. Koech, Learned Counsel for the Respondent. Counsel for the Applicant's recited the averments in the Supporting Affidavit and urged me to allow the Application.

Opposing the Application Counsel for the Respondent relied upon the said Grounds of Opposition emphasizing that the Applicant's Application was a disguised injunction application and was an abuse of the process of the Court. Counsel further submitted that the Applicant was guilty of inexcusable delay in filing this Application. He in turn urged me to dismiss the Application.

The grounds upon which an order of stay of execution may be made pending an appeal to the Court of Appeal are stated in Order XLI Rule 4(1) and (2) of the Civil Procedure Rules. They are:-

- 1). **The Applicant must establish sufficient cause;**
- 2). **The Court must be satisfied that substantial loss would ensure from a refusal to grant stay;**
- 3). **The Applicant must furnish security.**
- 4). **The Applicant must be made without unreasonable delay.**

The Applicant has sought stay of execution of the order I made on 29th September, 2004. The reason he gives for the delay in filing the Application is that there was previously no threat to advertise or sell his property. I am afraid I do not find that to be a sufficient reason for the delay in view of the fact that the Applicant filed a Notice of Appeal against the said order on 30th September, 2004,. The delay involved is of 9 ½ months which in the circumstances of this case I determine to be unreasonable.

Before considering the other requirements for granting stay, let me examine what I am being asked to stay. On 26th May 2004, the Applicant moved the Court for primarily an order of injunction to restrain the Respondent from selling, transferring, disposing or otherwise alienating or dealing with LR. No.3734/1142 pending the hearing and determination of the Application. By my order made on 29th September, 2004, I declined the injunction and dismissed the Application. It is that order that the Applicant seeks to appeal against. It is the order that the Applicant seeks to stay. That order did not direct either of the parties to do anything. The order dismissing an Application for injunction is not a positive order and is not capable of being executed. The Applicant's Application in so far as it seeks a stay of execution of the order of 29th September, 2004 is therefore clearly misconceived. The Applicant's Counsel maintained at the hearing of this Application that the Applicant was not seeking an injunction pending appeal but stay pending appeal. He goofed.

There are circumstances when an Applicant may be entitled to a temporary injunction pending an appeal. In my view for this order the inherent jurisdiction of the Court may be invoked. The Applicant in this Application has also invoked the Court's inherent powers. Even if I were to consider this Application under the Court's inherent powers, I am afraid I would still dismiss it. This is because the Applicant has not shown that the circumstances have changed since I dismissed his Application on 29th September, 2004. He has not demonstrated that he has now paid the sums he admitted to the owing to the Respondent. While dismissing the Applicant's Application on 29th September, 2004 I entertained no doubt at all as to the lack of merit of the said Application. I entertain no such doubt even now.

In the circumstances, it is not necessary to consider the other conditions for granting a stay of execution pending appeal under Order XLI Rule 4(2) of the Civil Procedure Rules.

In sum I find that the Plaintiff's Application dated 23rd June 2005 is misconceived. I dismiss it with costs to the Respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY, 2005.

F. AZANGALALA

JUDGE