



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION –MILIMANI**

Civil Case 558 of 2004

ANDREW OUKO PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD 1ST DEFENDANT

KENYA AIDS NGO CONSOTIUM 2ND DEFENDANT

PATRICK KAMUYU 3RD DEFENDANT

JAMES NJUGUNA 4TH DEFENDANT

RULING

The Notice of Motion dated 13th June 2005 is brought under Orders 1 Rule 10 (1) and 10 (2), 41 Rule 4 (1) and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and other enabling provisions of the Law. Prayer 1 of the Motion on Notice was granted by consent on 17th June 2005. The remaining prayer sought by the Plaintiff is as follows:-

“There be an order of stay of the Ruling/Order of this Court issued on 30th May 2005 until the hearing and determination of the appeal to the Court of Appeal against the said Ruling or Order under such terms as the Court may deem fit.”

The Respondents opposed the application and filed Grounds of Opposition.

The Plaintiff’s case was that because it intends to appeal against he ruling of this Court delivered on 30th May 2005, he should be granted a stay of the said order, otherwise his intended appeal will be rendered nugatory. The Plaintiff was of the view that he has an arguable appeal and unless the stay was allowed, the 1st Defendant is likely to effect transfer of the suit land to the purchaser.

In response to the submission made on behalf of the Plaintiff, Counsel for the 1st Defendant was brief and to the point that there was nothing to be stayed as the ruling of 30th May 2005 did not direct the doing of anything. The order merely dismissed the Plaintiff’s application for injunction. Reliance was placed upon the case of **Bavaria Hotel Management Ltd –v- S.V. Gidoomal & Two Others: HCCC No.1736 of 1998 (UR)** in support of the said proposition. Further reliance was placed upon the case of: **Venture Capital & Credit Limited –v- Consolidated Bank of Kenya: C.A. App. No NAI 349 of 2003 (UR)** for the same proposition.

Counsel for the 2nd Defendant supported Counsel for the 1st Defendant and further submitted that the Plaintiff had not satisfied the requirements for the grant of stay prescribed under Order 41 Rule 4

of the Civil Procedure Rules. In Counsel's view the Plaintiff had not shown substantial loss and had not made an offer of security.

I have now considered the Application, the supporting affidavit, the Grounds of Opposition and the Submissions of Counsels appearing. I have also given due consideration to the authorities cited. Having done so I take the following view of the matter.

I agree with Counsels for the Defendants that the order made on 30th May 2005 is not capable of being stayed. On that date I merely dismissed the Plaintiff's application for interlocutory injunction. I made no positive order in favour of either side that can be stayed. There is no prayer for an interlocutory injunction pending the intended appeal. In my view however, even if the Plaintiff had moved the Court for an interlocutory injunction pending the hearing and determination of the intended appeal,

I would still have dismissed the application since the circumstances obtaining at the time the order was made have not changed. Indeed the fact that the Plaintiff has thought it fit to have the 3rd and 4th Defendants struck off the record and to have the 2nd Plaintiff join the proceedings reinforces my view of the Plaintiff's application dated 12th October 2004.

As their Lordships said in the case of **Venture Capital & Credit Limited –v- Consolidated Bank of Kenya: Civil Application No. Nai 349 of 2003 (UR)**, *“the prayer for order of stay of executive of the ruling is misconceived as the Learned Judge never made any positive order in favour of the Respondent which is capable of execution. Rather, the Learned Judge merely dismissed the Application for interlocutory injunction with the result that neither party was given any interlocutory relief.*

In the end the Plaintiff's application for stay of the ruling of 30th May 2005 has no merit and is dismissed with costs to the Defendants.

DATED AND DELIEVERED AT NAIROBI THIS 13TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-