



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Civil Case 176 of 2005**

**RAMESH DATT VASHIST .....1<sup>ST</sup> PLAINTIFF**

**ANITA SHARMA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FINA BANK LIMITED.....DEFENDANT**

**R U L I N G**

The plaintiff previously made an application for interlocutory injunction to stop the defendant from selling the charged property. A ruling was delivered by this court on 15<sup>th</sup> June 2005.

The plaintiffs by their application dated 29<sup>th</sup> June 2005 seek a temporary injunction to stop the sale of the charge property, pending an intended appeal. The application is based on the ground that the intended appeal will be rendered nugatory.

The second plaintiff in the supporting affidavit stated; that a notice of appeal had been lodged that an application for injunction had been filed pending the final determination of an intended appeal; that the plaintiffs were apprehensive that the defendant could sell the suit premises at any time, which would render the application before the court of appeal nugatory; that the suit property means a lot to the plaintiffs and their family.

Plaintiffs counsel in support of the application stated that the plaintiff had filed, in the court of appeal, an application for injunction No. 9183 of 2005, which had been given a hearing date on 13<sup>th</sup> October 2005. He therefore said that the purpose of the present application was to preserve the subject matter pending the hearing of the injunction application. Counsel submitted that there were obvious contradictions, between two cases of appeal on the effects of non attestation of signatures on a charge document; and accordingly the plaintiff should be allowed an opportunity to test this area of contradiction. The two cases counsel was referring to are CIVIL APPLICATION NAI 165 OF 2000 LALCHAND FULCHAND SHAH AND INVESTMENT & MORTGAGES BANK LTD (unreported) and WELFRED KOINANGE V GALO AK FINANCE LTD & ANOTHER CIVIL APPL NAIR 209 OF 2003. Counsel submitted that the jurisdiction to grant an injunction to prevent an appeal being rendered nugatory was recognized in the cases MADTHUPAPER INTERNATIONAL V KERR [1985] KLR 840 which also approved the case of ERINFORD PROPERTIES LTD V CHESIRE COUNTY COUNCIL [1974] 2 ALL ER 448.

The application was opposed and some of the grounds of opposition were; that the application was seeking a review through the back door; that it sought the court to sit on appeal of its own decision; and that it was an abuse of the court process. In opposition counsel submitted that this court could only grant an injunction, after dismissal of an injunction application, under section 3A of the Civil Procedure Act. That the plaintiffs having failed to invoke that section meant that their application was defective. He was also of the view that the application is misconceived because, what the plaintiff's sought was an injunction pending an injunction application in the court of appeal. Counsel said that such an application was not envisaged in the law. Counsel therefore, was of the view that the plaintiffs needed to elect their forum. He further submitted that in an application such as the one before the court, a party needs to satisfy the two requirements; firstly the appeal is an arguable appeal, that is it is not frivolous; secondly that the appeal will be rendered nugatory. He submitted that the plaintiffs had not satisfied those requirements because what they stated was that the property meant a lot to them. On whether the appeal will be rendered nugatory, defence counsel said that there was no pending appeal.

The plaintiffs counsel disagreed with those requirements outlined by defence counsel. He said that the test is as found in the ERINFORD PROPERTIES LTD case (Supra); that is an injunction ought to be granted on the basis that the court of appeal may vary the findings of the High Court.

Those the arguments presented before me. I will start by considering the last point arguments first. The test to consider when an application such as the one before is brought is as clearly stated in the MADHUPAPER case on page 846. The court of appeal having stated that the High court has jurisdiction to hear an injunction pending appeal stated:

**“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”**

But I think the more important issue for my consideration and one which was raised by the defendant's counsel, is that what the plaintiffs have done is file on 28.6.2005 an application for injunction in the court of appeal which is slated for hearing on 13<sup>th</sup> October 2005, and then on 29<sup>th</sup> June 2005 filed the present application for temporary injunction pending the intended appeal. I think there is in some sense an abuse of the process of court. The plaintiff ought to have filed the present application and if unsuccessful then could have moved the court of appeal. The plaintiffs needed to chose which forum he wished to use and not have their 'feet' in both forums, in the High Court and the court of appeal.

It is noteworthy that the plaintiff did not annex a copy of the application in the court of appeal and therefore the court was unable to determine whether the appeal arguable or not. The 2<sup>nd</sup> plaintiff stated that the property means a lot to her and the family. To answer that argument I can do no better than repeat my finding in the ruling of 15<sup>th</sup> June 2005 “...**from the moment the property was charged it became a commodity for sale and it has not been argued that the defendant would not be in a position to compensate the plaintiff.**”

The plaintiff's application is not merited and the same fails.

The order of this court is that the application dated 29<sup>th</sup> June 2005 is hereby dismissed with costs to the defendant.

Dated and delivered this 23<sup>rd</sup> day of August 2005.

**MARY KASANGO**

**JUDGE.**