



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 55 of 2005**

CHURCH ROAD DEVELOPMENT CO. LTD.PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT

DAVID MUTUKU2ND DEFENDANT

SAMUEL NJIHIA3RD DEFENDANT

RULING

By its application of the 29.9.2005 the Applicant seeks the following orders:-

“2. THAT the Honourable court be pleased to issue an injunction restraining the defendants jointly and severally or any of them either by themselves, servants, agents, employees or otherwise howsoever from interfering with the Plaintiffs enjoyment, occupation, management or other use of its LR. NO.1870/10/14, in any manner whatsoever pending the hearing and determination of an intended appeal to the Court of Appeal.

3. THAT in the alternative and without prejudice to the above, limited stay orders be issued against the defendants interference with the Plaintiff’s quiet possession, ownership, use and enjoyment of its land L.R. NO.1870/10/14 in any manner whatsoever pending the making of a formal application to the Court of Appeal for stay pending appeal.

4. THAT interim stay orders be issued in terms of prayer 2 above pending hearing and determination on this application interpartes.

5. THAT costs of this application be provided for.

The application is grounded on the reasons set out therein and the supporting affidavit of Mr. Francis K. Ngatia the Managing Director of the Applicant Company.

By his ruling of the 28.2.2005 Mr. Justice Emukule dismissed an application for an injunction by the Applicant herein seeking to restrain the Respondent from appointing receiver in respect of the Applicant’s property and from exercising its statutory power of sale.

This application is brought under the provision of Order 41 rule 4 of the Civil Procedure Rules. It , however, seeks injunctive relief.

The court is empowered to grant injunctive relief under Order 41 rule 4 (6). However, that jurisdiction

only arises where the High Court is exercising its appellate jurisdiction and does not arise in this case. Notice of Appeal has been filed against the said ruling.

The purpose of this application is to preserve the suit premises and maintain the status quo pending the hearing of the appeal. The status quo is that the Applicant retains possession of the suit premises, which is extensively developed with apartments that are let to tenants for payment.

In paragraph 20 of the supporting affidavit Mr. Ngatia depones as follows:-

“THAT the subject property is extensively developed with apartments currently occupied by tourists and other tenants. Any adverse step taken against the Plaintiff would lead to substantial loss in terms of loss of customers and income as well as its reputation in business circles. Annexed and marked FKN 5 is a valuation report on the property.”

I am not concerned with the merits of the appeal the only criteria is should I allow the applicant to continue in possession of the premises which it will do if the receivers are not allowed to take possession of the suit premises and also restrain the exercise of the statutory power of sale.

The jurisdiction to grant injunction relief was dealt with by Megarry J in the case of *Erinford Properties Ltd. v Cheshire County Council (1974) 2 All ER Page 448* in which it was held that there is jurisdiction in a judge to grant an injunction pending appeal to restrain that which the judge had refused to grant an injunction in respect of.

In his judgement Megarry J. made a number of observations at page 454 line (b) of the judgement he states:-

“On the other hand, where the application is for an injunction pending appeal, the question is whether the judgement that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal.”

And at line (e) of the same page

“There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where such appeal would be frivolous, or to grant the injunction would inflict greater hardship that it would avoid

I therefore hold that I have jurisdiction to grant injunctive relief if the merits of the case warrant it.

A great deal of submissions were made by both counsel before me as to respective positions of the parties. On the one hand Mr. Kingara pointed to what he considered excessive charges made against the Applicant by way of interest and other charges and on the other hand Mr. Gichuhi belaboured the fact that the Respondent had advanced a substantial amount of money some many years ago but had only been paid a very small part of it.

Mr. Kingara admitted and so did the Applicant that there was a substantial amount due to the Respondent if not the large sum claimed. Also both counsel referred to a number of authorities relating to the jurisdiction to grant injunctions similar to the application, which was before Mr. Justice Emukule. However, that is not the position as I am not dealing with such an application.

This application is brought for a stay but what is there to stay? Mr. Justice Emukule dismissed an application for an injunction to restrain the Receiver from being appointed and the Respondent from exercising its statutory power of sale.

I am of the view that it is not the status quo which is required to be preserved but the rights relative to the property the subject matter of the suit.

Whether or not to grant such relief is discretionary.

In this case it is unjust that the Respondent should not be restrained from exercising its right to recover its money. If the Applicant is left in possession of the suit premises he would continue to enjoy the benefit of the suit property to the prejudice of the Respondent which has a right to appoint a Receiver to collect the rents and profits. I, therefore decline to issue an injunction restraining the appointment of a Receiver.

With regard to the exercise of its statutory power of sale the Applicant may have a better claim to say that if the appeal succeeds on this aspect of the matter it will be prejudiced if the appeal succeeds.

However, I am not inclined to shut the Respondent out of its right to exercise its statutory power of sale for any length of time but only sufficient for the matter to be raised in the Court of Appeal.

I, therefore, grant an injunction for a limited period of six months expiring on the 31st May, 2006 restraining the Respondent from exercising its statutory power of sale. The Respondent having succeeded, costs will be for the Respondent in any event.

Dated and delivered at Nairobi this 25th day of November, 2005.

P. J. RANSLEY

JUDGE