



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 38 OF 2003**

HUMPHREY KILAMBO MCHARO PLAINTIFF

- V E R S U S -

1. KENYA COMMERCIAL BANK LTD.

2. JOEL TITUS MUSYA T/A. MAKURI

ENTERPRISES.....DEFENDANTS

R U L I N G

Before the court is an application dated 3.10.2002 (however it appears the year is not correct as the filing and swearing of affidavit were all dated in the year 2003). Orders sought are to restrain the respondent from advertising for auction sale property LR. 12/92/4 belonging to the applicant pending an appeal proposed against the ruling of this court rejecting a similar application made at interlocutory state in this case. The motion is made under Section 3A but at the hearing an amendment was allowed to include Section 63 (e) of Civil Procedure Act. Rule 3A Civil procedure Act saves the inherent powers of court and Section 63 thereof falls under part V11 of the Act regarding “supplemental proceedings” sub section (e) empowers the court

“to make such other interlocutory orders as may appear to the court to be just and convenient”

The reasons for the orders is that this court has inherent powers to preserve status quo so as not to render an appeal obsolete, null or nugatory and that advertisement and sale of property the applicant will lose his home and source of income. The case of Eniford Properties Limited -vs- Cheshire County Council 1974 2 All E.R. at page 448 has been brought to my notice on page 454 the court said regarding an application for injunction pending appeal against refusal to grant injunction.

“The question that have to be decided on the two occasions are quiet different.

Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial the question is whether the plaintiff has sufficiently proved his case. On the other hand where the application is for an injunction pending an appeal, the question is whether the judgment t hat has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be varied or reversed. Judges m ust decide cases even if they are hesitant in their conclusions, and that the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible and for none are there more public and authoritati ve explanations of their errors than for judges.....

There may, of course be many case where it would be wrong to grant an injunction pending appeal as where any appeal would be frivolous or to grant an injunction would inflict greater hardship than it would avoid and so on. But subject to that where a party is appealing exercising his undoubted right of appeal this court ought to see that the appeal, if successful is not nugatory”

Also the Court of Appeal decision in the Civil Application No. NAI 116/1985 Madhupaper International Limited –vs- Paddy Kerr and others in which Emnford Properties case quoted above was referred to where the appeal court was dealing with granting of injuctions pending appeal. The court said

“The test we have t o apply to this particular application is whether or not the company has made out its claim for injunction to preserve its sproperty until the appeal is heard or as it is the application ought to fail because the appeal is frivolous or it would be worse fo r the company if the injunction went forth or for any other reasons”.

An examination of this suit shows that the relationship of lender and borrower is admitted by the applicant. Also that the plaintiff charged his property as security against his indebtedness to the respondent. And that the only prayer in the plaint is an injunction against the sale and the taking of accounts in respect of account no. 223918159 held by applicant with the respondent bank.

I have perused the pleadings and considered the authorities above and the counsel submission. I am convinced that the proposed appeal is frivolous and if the injunction sought was to issue it would only create mere hardship to the applicant escalating interest payable by prolonging the day of reckoning. In the circumstance I dismiss the application with costs.

Dated this 10th day of November, 2004

J.KHAMINWA

JUDGE

10.11.04

Khaminwa- Judge

Cege- Court Clerk

Mr. Omondi - non appearance

Ruling read in open court.

J. KHAMINWA

JUDGE