



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 2 OF 2003**

**JOHN M. KAMIA ..... PLAINTIFF**

**VERSUS**

**GIRO COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

Order 41 Rule 4(6) of the Civil Procedure Rules states as follows:

*“(6) Notwithstanding anything contained in Sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with .”*

Application by way of Notice of Motion dated 8th January 2003 has been brought under the same provisions of the law and the main prayer of the same application is prayer 2 which seeks orders to restrain the Respondent from disposing off the applicant’s property situate at Plot No. Kwale/Ukunda/3137 until final determination of the appeal – i.e. Civil appeal No.203 of 2002 dated 23rd December 2002. The grounds for the same application are two and these are that the Applicant’s property is up for Public Auction and were to be sold on 10th January 2003 and that the applicant had already filed an Appeal against the decision of the Chief Magistrate’s Court. There is an Affidavit in support of the same Application. That Affidavit states in brief that the applicant filed a suit in the subordinate court CMCC No.3873 of 2002 which is still pending. Together with the suit he filed an application for injunction which was dismissed as his counsel was not available to prosecute it. He filed an application for reinstatement of that application but the same Application for reinstatement was also dismissed. He is now appealing against the same dismissal and has filed the appeal H.C. Civil Appeal No.203 of 2002. He has applied for copies of the proceedings. In the meanwhile, the Respondent is threatening to dispose of his property above. He has annexed several exhibits mainly touching on the documents that were filed in the subordinate court.

The Respondent opposed the application and in its Grounds of opposition, the Respondent maintains that the application is not brought in good faith as the Applicant has failed to pay the loan to the Respondent; that the applicant has failed to disclose vital information to the court and that the application lacks merit and is vexatious. The Respondent has also filed Replying Affidavit in which it states that the Applicant’s application in the subordinate court was dismissed for want of prosecution and the suit property has been advertised for sale; that Applicant made another application for stay and reinstatement which was also dismissed, and now this application. All these, have according to the Respondent meant considerable costs to the respondent. The Respondent contends further that the applicant is truly indebted to the Respondent and feels if the court were to grant a temporary injunction it should be on condition that the Applicant pays KSh.2.1 million to the Respondent.

I have perused the application before me. I have considered the same. I have also considered the Affidavit in support of it and the annexures as well as the Grounds of opposition and the affidavit filed by the Respondent. Lastly I have considered the able submissions by the learned counsels. There is already an appeal on record. That is High Court Civil Appeal No.203 of 2002. Although the proceedings in the lower court are not yet on record, I do feel by the nature of this case that the same proceedings cannot be lengthy and I do not think it would take long to prepare the same and have the appeal heard. The Respondent has not refuted an allegation that this scenario arose from facts some of which were

made known to its counsel i.e. the applicant's allegation that he told Respondents counsel that he was going to be before Hon. Justice Onyancha when the application which was dismissed for want of prosecution came up. If that were so, then I cannot rule out the feeling that the appeal filed may be arguable. That being the case, the outcome of the same Appeal may be rendered nugatory if the property, the subject matter of the entire case is sold before the appeal is heard.

However, I also do agree that the applicant who has not denied the allegation in the Respondent's Affidavit (particularly, the allegation that he is indebted to the Respondent to the tune of KSh.2,060,525/-) should be made to honour his obligations while the appeal is proceeding, so that the loan outstanding may not outstrip the value of the mortgaged property for if that came to be so, the Respondent would also suffer loss should the court in the end dismiss the Applicant's appeal.

Doing the best I can in the circumstances, I will grant injunction as prayed but on condition. The condition is that the applicant deposits with the Respondent a sum of KSh.150,000 which will meet auctioneer's charges and part of the debt. This amount is to be paid within fifteen (15) days of the date hereof. Further I also direct that the appeal be prepared and be set down for hearing at the Registry within sixty (60) days of the date hereof. To facilitate this, I do direct the Registry to have the proceedings in the subordinate court prepared urgently and be availed to all parties on payment. Subject to these orders being complied with, there shall be injunction till the appeal is heard. In any event status quo will be maintained for 15 days from the date hereof to enable applicant deposit the amount ordered herein.

Applicant to pay costs of this application in any event. Orders accordingly.

**Dated and delivered this 28th Day of January, 2003.**

**J.W. ONYANGO OTIENO**

**JUDGE**