

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 241 OF 2000

OCEANIC VIEW HOTEL LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANKDEFENDANT

RULING

The applicant is the plaintiff in this suit. He made an application for interlocutory injunction which was rejected by this court. He has since filed a Notice of Appeal to the Court of Appeal and he fears that pending the said appeal the defendant may dispose of subject matter of appeal (by selling the charged property) and thus render the appeal nugatory. He says he has good chances of success and that he will suffer substantial loss if the application is not granted. At this stage I say that this court has already made a finding that no substantial loss would be suffered that cannot be compensated in damages.

In paragraph 9 of the supporting affidavit the applicant discloses that negotiations to settle the matter are in progress and that the respondent is likely to use pressure by threatening sale thereby prejudicing the negotiations. The respondent admits that these negotiations are in progress and indeed hints at an agreement reached already between the parties. Both parties have submitted considerable number of authorities. For the applicant Civil Application No 206 of 1996 *Abok J Odera vs Kenya Posts & Telecommunications Corporation*. The Court of Appeal held that there are 2 conditions which the applicant must satisfy before he is granted stay of execution pending appeal (the Court was dealing with rule 5 Court of Appeal Rules) that the intended appeal is not frivolous, that it has an arguable ground to canvas during the intended appeal and that the intended appeal if it is successful would be rendered nugatory if stay of the order is not granted. Again in Civil Application No 432 of 2001 *Attorney Genral vs Equip Agencies* it was said where the applicant has a right to appeal the amount of money involved in the dispute constitutes special circumstances meriting a stay of execution. Also in the case of *Indar Singh Gill Ltd vs Njoroge Gichana* HCC No 2411 of 1990 GS Pall J as he then was said:-

“In a discretionary matter like this the court should take into account all the circumstances including the merits of intended appeal. But I think a judge of the High Court whose order or decree is being appealed against on an application for stay of execution under order 41 rule 4

... So far as the High Court is comparative an unsuccessful party has an undoubted right to appeal and Order 41 rule 4 assumes that the decree holder must always recognize that its decree or order may be reversed.”

In *Erinford Properties vs Cheshire County Council* [1974] 2 ER 448 Megary J said at 454-

“A judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision recognize that his decision might be reversed and that the comparative effects of granting or refusing an injunction are such that it would be right to preserve the status quo pending the appeal.”...

It is true that ----- My judgment was based on Court of Appeal judgments ---- But the Court of Appeal being the highest court in the country can always reverse its previous decisions ---”.

On the other hand the respondents list of authorities tends to support the proposition that in case of charged property the respondent being a reputable bank will be able if appeal is successful to compensate

the applicant in damages for any amount found due and that the proof that it cannot do so lies on the applicant. Also that it is for applicant to show that if the Order was not granted his appeal would be rendered nugatory. In the present case there is an admission that some money is unpaid. The counsel for the respondent also pointed out that there is no order capable of execution here as there was only a dismissal. That may be so but the applicant was seeking to stop the sale of the property. After dismissal of the application for injunction the respondent would be free to stage another sale. Seeing that the applicant has a right to appeal even against the order of dismissal he is entitled to the preservation of the status quo to enable him to exercise that right.

In the circumstances I am inclined to grant order staying any further proceedings herein touching on the sale of the property subject of this suit until the proposed appeal is heard and determined. I have taken into consideration as special circumstances that the amount of money in dispute is substantial and also that the applicant company could easily find all its assets sold and its establishment closed down. The order is given on terms that the applicant shall pay to the respondent interest due on the admitted sum of Shs 140 million (see par 20 of the plaint) on monthly basis at contract rates of interest as from 1.6.2002 until the appeal is heard and determined. The costs of this application shall be in the cause.

Dated and delivered at Mombasa this 3rd day of May , 2002

J.N KHAMINWA

JUDGE