



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

CIVIL SUIT 536 OF 1997

- 1. GEOFFREY MAN ASANYO..... 1ST PLAINTIFF**
2. JOSEPH MONYOGORO ONCHONGA..... 2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD..... .DEFENDANT

RULING

I gave a Ruling in this matter on 13th April, 1999. The plaintiffs/applicants were not satisfied with my orders and have given notice of Appeal to appeal to the Court of Appeal against the whole of my said decision.

They have filed an application for stay of execution of the orders pending the hearing and final determination, of the appeal. The application is brought under order XLI r.4. of the Civil Procedure Rules. It is supported by an affidavit and annexure.

I have perused the same.

The application is strenuously opposed. Grounds of opposition have been filed and a replying affidavit.

The position here is that the applicants/plaintiffs wish to have the defendant restrained from exercising its right and power of sale pending determination of the appeal. I take it that once a party has a right of appeal and wishes to appeal and sets its right of appeal, on motion then the proceedings between the parties are not concluded. Unless there are good reasons or conditions set out under order XLI r.(4) are not satisfied orders of stay cannot be refused.

The respondent is well secured as it is holding all the securities. It is a matter of setting the date of sale if the applicants are not successful on appeal.

For these reasons I feel that the application is merited. The application dated 14th June, 1999 is allowed. Costs will be in the intended appeal. Dated and delivered at Nakuru this 22nd day of September, 1999.

IN THE HIGH COURT OF KENYA AT NAKURU CIVIL SUIT NO.536 OF 1997

- 1. GEOFFREY MAKANA ASANYO..... 1st PLAINTIFF**
2. JOSEPH MONYONCHO ONCHONGA..... 2nd PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD..... DEFENDANT

1/12/97

Mr. Githiru for Mr. Gekonga for the. plaintiffs/applicants

W. K. TUIYOT

DEPUTY REGISTRAR

GITHIRU: I apply for the certificate of urgency so that the matter can be placed before the Judge for hearing.

W. K. TUIYOT

DEPUTY REGISTRAR

ORDER: I hereby certify that the matter is urgent and that it be placed before the Judge for hearing.

T. K. YUIYOT

DEPUTY REGISTRAR

1/12/97

Before D.M. Rimita, J.Cheche for the applicant N/A for the respondent CC Ole Kisonko

MR. CHECHE: We are instructed in prayer 2 of the application. The sale is on 2/12/97.

D. M. RIMITA

JUDGE

COURT: Orders in terms of prayer 2 of the application dated 1st December, 1997. Application be served for hearing on 16/12/97.

D. M. RIMITA

JUDGE

16/12/97

Before D.M Rimita, J.Gekonga for the applicant Mwangi for the respondent CC Ole Kisonko

COURT: By consent the application is adjourned to 26/1/98 at 9.00 a.m. Interim orders are extended.

D. M. RIMITA

JUDGE

19/12/97

Memorandum of appearance filed in by Hamilton Harrison & Mathews .advocates for the defendant.

W. K. TUIYOT

DEPUTY REGISTRAR

8/1/98

Statement of defence filed in by Hamilton Harrison & Mathews advocate for the defendant.

W. K. TUIYOT DEPUTY REGISTRAR

26/1/98

Before D.M. Rimita, J.

Nyangi for the respondent

Gekonga for the applicant

CC Ole Kisonko

COURT: By consent application dated 1st December 1998 is adjourned to 18/3/98. Interim orders are extended.

D. M. RIMITA JUDGE 18/3/98

Before D.M. Rimita JKamau for the plaintiff Nyangi for the defendant CC Ole Kisonko COURT: Application to proceed on 19/5/98. Interim orders are extended.

D. M. RIMITA JUDGE 19/5/98

Before D.M. Rimita, J. Gekonga for the applicant Mahida for respondent CC Ole Kisonko

COURT: By consent the matter is adjourned to 10/6/98 to mention. Interim orders are extended.

D. M. RIMITA JUDGE

10/6/98

Before D.M. Rimita, J.

Gekonga for the applicant

Mahida for the respondent

CC Ole Kisonko

COURT: Chief Justice's letter to be made available to court. Further mention 6/7/98.

D.M. RIMITA

JUDGE 6/7/98

Before D.M. Rimita, J. Gekonga for the applicant N/A for the respondent CC Kisonko

COURT: I still wish to see the letter from Hon. The Chief Justice to enable me consider the matter further. Mention on 18/9/98. Interim orders are extended.

D. .M. RIMITA

JUDGE

19/10/98

Mitei, J.

Gitonga for respondent Gekonga for plaintiff Kisonko CC

MR. GEKONGA: In applying for an adjournment. Mr. Ochieng Oduol is leading me in this case. I cannot proceed in his absence. My client has a right to choose counsel of his choice. Mr. Oduol wrote to court 15/10/98 indicating that he was not available today. He copied it to defendant's lawyers.

J. K. MITEI JUDGE MR. GITONGA: I oppose the application. This matter was convened by certificate of urgency in 1/12/97. Initially the applicant had indicated he was seeking services of Oraro & Rachier. It has been the policy of the application to delay the matter for as long as possible to obstruct the defendant from realizing the charged property. On 6/7/98 this matter was listed for hearing. The respondent was absent but the applicant took a hearing date. No good reasons were given for that. This is an urgent matter. It has stopped the bank from selling the charged property. The issue of representation should have been encouraged a year ago. The amounts involved is in excess of 100 million. It is in the interest of both parties that this matter is disposed as soon as possible. I and Mr. Nyamu indicated to Mr. Oduol that we would not consent to any further adjournment. Mr. Gekonga has been on record all along. Adjournment should be denied because the plaintiff engaged leading counsel only on 15/10/98. Mr. Oduol should have indicated a nearer date and not a far date.

J. K. MITEI JUDGE MR. GEKONGA: This matter was listed for mention today and not hearing. I was not the one who requested the court to have the matter mentioned today. It has never been the wish of the applicant to have the matter delayed. The respondent has all along applied to have the matter transferred to Nairobi. They did this through the firm of Jones & Jones on 6/7/98 the date was taken in the court motion. There is a court order for a Nairobi Suit which Hon. Justice Rimita. The date was taken so that defendant could produce it in court. Even though the amount is colossal, it does not mean that the applicant owes that amount.

J. K. MITEI JUDGE RULING

When the matter came up for hearing Mr. Gekonga applied for an adjournment on the ground that the leading counsel in the matter, Mr. Ochieng Oduol was not available. He contended that he could not proceed without his leading counsel. According to him this fact was communicated to court and the lawyers for the defendants vide Mr. Ochieng Oduol's letter dated 15/10/98. Mr. Gitonga for the defendant/respondent opposed the application. He submitted that the plaintiff has persistently ensued that the hearing of the application is delayed. He submitted that the Bank is being denied its right to realize the charged property. On the issue of representation Mr. Gitonga submitted that the same should have been sorted out earlier. The plaintiff should not have waited till October 1998 to appoint a leading counsel, he stressed.

I have perused the earlier proceedings in this case. On 10/6/98 Hon. Justice Rimita ordered that the matter be mentioned before him on 6/7/98 and that a letter from the Hon. The Chief Justice be availed to it. On 6/7/98 the learned judge indicated that he wished to see the letter from the Hon. The Chief Justice to enable him consider the matter further. He ordered a further mention on 18/9/98. When the matter came up before Hon. Justice Mulwa on 18/9/98 it is not clear whether he listed the matter for 19/10/98 for mention or hearing.

What is apparent is that Hon. Justice Rimita could not proceed without the letter from the Hon. the Chief Justice. He appears more seized of the matter and would be in a better position to deal with the application after the letter referred to in his orders is availed. I will therefore grant the application and order that this

matter be mentioned before Hon. Justice Rimita on 4/11/98. Costs in cause. Interim orders extended.

J.K.MITEI

JUDGE

4/11/98

Before D.M. Rimita, J.

Gekonga for the applicant

Wamasa for the respondent

CC Kisonko

COURT: By consent the application is fixed for hearing on 11/12/98.

Interim orders are extended.

D. M. RIMITA

JUDGE

11/12/98

Before D.M. Rimita, J. Gekonga for the applicant, Gitonga for the respondent, CC Kisonko

MR. GEKONGA: Mr. Ochieng Oduol is leading me. When I took instruction from the applicant, we made an application for amendment. It was served upon the respondent. The application was served on 8th December, 1998. I understand the application is not being opposed.

Paragraphs 8, 9 and 10 of the application have raised important issues. The application dated 8th December 1998 be heard first.

D. M. RIMITA JUDGE MR. GITONGA: We were served with the application for amendment of the plaint. Mr. Oduol is not on record. He is being brought as a delaying tactic. I am prepared to proceed this afternoon.

D. M. RIMITA JUDGE MR. GEKONGA: Mr. Oduol is leading me in the case. After the plaint is amended we may need to amend our plaint.

D. M. RIMITA

JUDGE

RULING:

I agree with Mr. Gitonga that this matter has taken too long to be disposed of. But I note from the record that the respondent is partly to blame for the delay. The applicant is also to blame to-day for bringing up this application for amendment at the eleventh hour. The application should have been brought when my brother Justice Mitei dealt with the matter.

But it would appear that the application for amendment of the plaint is not being opposed. Mr. Gitonga's concern which I share with him is that further delay in disposing of the application. However it is important that the matter is dealt with once and for all.

I will give the applicant/plaintiff leave to amend the plaint. The amended plaint be filed within the next 7 days from to-days date. The defendant may file amended defence within 14 days upon service of the amended plaint if it so desires.

I wish to make it clear that I will not entertain further adjournments in the matter.

To-days costs will go to the defendant/respondent.

D. M. RIMITA

JUDGE

11/12/98

COURT: By consent the applicant may put in an amended application within the next 7 days from to-days date. Each party may put further affidavits if need be. Hearing on 1/2/99. Interim orders are extended.

D. M. RIMITA

JUDGE

14/1/99

Amended defense and further replying affidavits filed by Harrison, Hamilton & Mathews advocates.

DEPUTY REGISTRAR

NAKURU

1/2/99

Before D.M. Rimita, J. Wagara with Gekong for plaintiff Gitonga for the defendant/respondent CC Kisonko

MR. WAGARA: The application coming for hearing to-day is the amended chamber summons. The application is basically an application for injunction. The grounds upon which the application is brought are set in application. It is also supported by the affidavit of Geoffrey Asanyo.

It is supported by a further affidavit, sworn by Mr. Geoffrey Asanyo. We are craving for an injunction. Sometime on 2nd December 1997, the defendant intended to sell various properties belonging to the applicant. (see application).

Interim orders were made and have been in place since then. The sum of money complained of was borrowed by Kwanza Motors Ltd. The applicants were guarantors. During the life of the debt, the applicants were never posted and have not been posted of what Kwanza Motors Ltd paid or the balance to be redeemed by the sale. The applicants are grasping in the dark.

They are in occupation of the properties. They have not been given chance to redeem. Where a charge is created the borrower or the guarantor has a right to redeem. We are completely left with a scenario we are unable to address. If the property is sold there will be no opportunity to redeem. We admit that Kwanza owes. What is owed needs to be communicated so that we know how to address it. Kwanza has been under receivership. A receiver was put in place. This confuses the record because there is a new manager.

The respondent agrees that it has not rendered the account. This has not been done. We are craving for an opportunity to pay. The principles on which injunction should be granted are well sorted out. The properties are family properties. The applicants will suffer irreparable loss. The family will be rendered homeless.

There will be a deep trauma inflicted on the family.

The suit stands a high chance of success. On that score the suit stands a high chance of success. See the prayers in the application and pleadings.

D. M. RIMITAJUDGE MR. TIGONGA: I oppose the application. I will go to the arguments of my learned friend. The applicant is basing his prayer on morals and not law. Emotions have been raised without supporting the same in law. The power of sale has been raised. This property was given as security. They did not think of the consequences. The securities became commodities of sale. The personal appeal should be disregarded. A demand was made to each of the applicants. The right of redemption fell on the day of the demand. There cannot be sale until 6 months after date of demand.

See exhibit G.M.I. Affidavit of George Mutua. The guarantors have no access to the account. They should have gone to the bank to check why there were so much unpaid debt. Statements are with Kwanza Motors. See my affidavit sworn on 12th January, 1999. The plaintiffs did not request for the statements.

See my ground of objection. 1. From paragraph 1 to paragraph 13 of the amended plaint does not reveal any breach.

The only ground is that accounts were not supplied. Accounts are for the principal debtor. They say that they were not given an opportunity to redeem. That is an equitable right. When there is default and demand the debtor or guarantor has the right of redemption. Demands were made on 10 May 1996. From then onwards no payment has been made. They did not ask for accounts. On 1st December 1997 they rushed to court ex-parte and got an injunction. The sale was postponed from that date to date the ex-parte order is in place. No payment of even a single cent. No request for statements. They are not entitled to say that they have not been given chance to redeem. That would be observed. No efforts shown to redeem. See case of Giella v/s Brown (1973) E.A. 358. No particular point of law has been argued. The application should fail totally. Majority of these properties were commercial properties. If the case succeeds damages would suffice. Injunction does not lie. See High Court case No. 434/96. The case was decided conclusively. The case touched the points before the court. The application is res-judicata. The substance of the suit and the application are the same. They did not disclose this to the court. They are out to vex the respondent.

I have filed a list of the authorities. I rely on the affidavit of George Mutua. He has set out the notices. On a balance of convenience the applicants have failed to establish a case for injunction. The respondent needs sympathy more than the applicant.

D. M. RIMITAJUDGE The parties in other suit are different. It would not be res judicata as far as the second defendant is concerned. The sales to be stopped are different. There is nothing difficult in giving the accounts. Why sell. One of the notices is not signed. It is not addressed to Kwanza or second plaintiff. The 2nd defendant is entitled to the statutory notice. The issue of accounts is important to the parties.

D. M. RIMITAJUDGE COURT: ruling on 8/3/99

D. M. RIMITAJUDGE 8/3/99

Before DM. M. Rimita, J.N/A for the applicant Oregu for Gitonga for respondent CC Kisonko

COURT: Ruling on 13/4/99

D. M. RIMITAJUDGE

COURT: Read in absence of the parties and their advocates.

D. M. RIMITAJUDGE 17/6/99

Before D.M. Rimita, J.Achola for the applicantCC Kisonko

MR. ACHOLA: We pray for stay as we are applying against the court'sruling.

D. M. RIMITA

JUDGE

COURT: Say ordered pending hearing inter partes on 22/7/99 at 9.00 a.m.

D. M. RIMITA

JUDGE

22/7/99

Before D. M. Rimita, J.Konosi for the applicantGitonga for the respondentCC Kisonko

MR. KONOSI: Notice of Motion dated 14th June 1999. The application is under order 41 of the civil procedure rules. We are seeking stay of execution of the orders of the court. We have set out ground in the body. The application is also supplied by an affidavit sworn by me. When the ruling was delivered the parties and advocates were absent. I was instructed to file application. There is an application in the court of appeal. This second application stands to suffer loss if the orders are executed. He should have been allowed to know the amount and redeem. We pray for stay of the orders. We pray for costs of the applicant.

D. M. RIMITA

JUDGE

MR. GITONGA: I do oppose the application. I have filed a set of grounds of opposition. I entirely rely on the grounds and the affidavit. The first plaintiff does not intend to appeal. His case was res-judicata. As far as the first plaintiff is concerned it has not been said that he intends to appeal. His appeal should be in 434/98. The second defendant should have been served with 3 months notice. He was given 3 months notice. He has had time. The purpose of the application is to delay collection of a debt that stands at Shs.175 million.

No security has been offered. No settlement of debts as yet. The application has been brought late. The ruling was for 13/4/99. The most probable assumption was that they learnt of the ruling changed advocates and made the application. NO orders are capable of execution. The defendant was not ordered to realise the property. No substantial loss will be suffered. Each is required to Offer security. See the authorities. Discharge the order. Application be dismissed with costs.

D.M. RIMITA JUDGE MR. KONOSI: We are dealing with an application for stay of execution. The applicants are prepared to deposit security. D. M. RIMITA JUDGE COURT: Ruling on 22/9/99 D. M. RIMITA JUDGE 22/7/99