



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 195 of 2005

CONSOLIDATED BANK OF KENYA1ST APPLICANT

DOLPHIN AUCTIONEERS2ND APPLICANT

CENTENARY VALUERS & PROPERTY CONSULTANTS3RD APPLICANT

AND

USAFI LIMITEDRESPONDENT

(An application for stay of execution pending the lodging and hearing of an intended appeal from the ruling and order of (Mr. Justice Mutungi) dated 27th may, 2005

in

MILIMANI COMMERCIAL H.C. C. NO. 413 OF 2003)

RULING OF THE COURT

This is an application by Notice of Motion dated 12th July 2005 (hereinafter referred to as “*the Motion*”) by the Consolidated Bank of Kenya Limited (hereinafter “*the Bank*”), Dolphin Auctioneers (hereinafter “*Dolphin*”) and Centenary Valuers and Property Consultants (hereinafter “*Centenary*”), the First, Second and Third applicants respectively.

The Motion is brought under **rule 5 (2) (b)** of the Court of Appeal Rules (hereinafter “*the Rules*”) seeking a stay pending the hearing and determination of an intended appeal from the Ruling and Order of the Honourable Mr. Justice Mutungi delivered at Milimani Commercial Court on 27th May 2005 in HCCC No. 657 of 2005.

The Motion before us sought one substantive order, namely:-

“1. THAT the Order of the High Court of Kenya (Mutungi J.) dated 27th May 2005 be stayed pending the hearing and determination of the intended appeal.

The **grounds** stated in the Motion for the application were that:-

“a) The learned judge of the superior court granted an injunction restraining the applicants from exercising the statutory power of sale over L.R. No 36/VII/272 owned by the respondent.

b) The injunction was granted on (sic) total disregard of the principles governing grant of injunctions in such circumstances and the applicants have an arguable appeal.

c) The applicants’ rights were unduly prejudiced by the undue and inordinate delay in delivering the ruling after hearing of the injunction application in the superior court.

d) That due to the growing interest rates on the loan account, which the respondent has since stopped servicing, the amount due and owing will soon outweigh the value of the charged property hence the intended appeal will be rendered nugatory.”

The order dated 27th May 2005, above referred to and sought to be stayed was made by the learned Judge pursuant to an application by Chamber Summons dated 1st July 2003 (hereinafter referred to as “**the Chamber Summons**”).

The Judge ended his ruling stating:-

“Taking into account all the above reasons, this court grants the following orders:-

1. Prayer No.2 of **the Chamber Summons** herein, dated 1.7.03, on condition that the plaintiff moves with speed and picks a hearing date for the suit, within this calendar year, or as soon as practically possible, but not later than the end of the first term of 2006.

2. Costs to be in the cause.”

Prayer No.2 of the **Chamber Summons**, shorn of irrelevances is as follows:-

“THAT the defendantsare hereby restrained by order of injunction from.....advertising, threatening to sell, offering to sell, selling or in any way dealingwith the plaintiff’s property known as Land Reference No. 36/VII/272 situated in Eastleigh.....currently advertised for sale on 4th July, 2003 or at any other time whatsoever pending the hearing and determination of this suit.”

This is the order of the superior court which the applicants now before us seek to stay pursuant to the powers of this Court under **rule 5(2)(b)** of the Rules. It is clear that what is now sought is the stay of an injunction ordered by the superior court. This raises the issue as to whether **rule 5(2)(b)** bestows on this Court the jurisdiction to stay an injunction. During submissions this issue was raised from the bench and Mr. Majanja, learned counsel for the applicants, briefly submitted that what was being sought was the stay of execution of the injunction and therefore fell within the scope of **rule 5(2)(b)** of the Rules.

The relevant wording of **rule 5(2)(b)** of the Rules is:-

“The Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings.”

We consider that under the rule in its present form there are only three types of orders permitted to be made under **rule 5(2)(b)** namely;

(i) a stay of execution.

(ii) an injunction.

(iii) a stay of any further proceedings

“A *stay of an injunction*” is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard. We do not consider the submission of Mr. Majanja that what he is seeking falls within “*a stay of execution*”. We are unable to appreciate how one can stay an order for an injunction and yet at the same time sustain it on record. The word “*injunction*” is defined in the Glossary to the White Book 2003 as:-

“A court order prohibiting a person from doing something or requiring a person to do something.”

We are of the view that once an injunction has been ordered it is in force and no further proceedings are required to give effect to it.

Having come to the conclusion that we have no jurisdiction under **rule 5(2)(b)** to grant the order sought we need say no more than that the **Notice of Motion** dated 12th July 2005 is incompetent and we order that it be and is hereby struck out with no order as to the costs thereof.

We must add that the delay in delivering the ruling by the learned Judge was, in the circumstances of the case, inexcusable.

Dated and delivered at Nairobi this 14th day of July, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR