



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.458 OF 2000

AMIN LADAK

alias AMIN JAFFER GULAMHUSEIN.....PLAINTIFF

V E R S U S

1. ROTHMAN'S HOLDINGS LTD.....1ST DEFENDANT

2. NAUSHAD JUMA.....2ND DEFENDANT

R U L I N G

On 9.1.01, I delivered a Ruling dismissing an application made by the Plaintiff for an injunction to issue restraining the Defendants from taking possession of Flat No.2 on LR MSA/Block XXVI/681. It is common ground that the Plaintiff is in physical possession of the plot and resides therein with his family. A Notice of Appeal was filed against that Ruling on 22.1.01.

Three weeks later on 15.2.01 the Plaintiff took out a Notice of Motion seeking a stay of execution to maintain the status quo pending the filing of the Appeal. That is the subject-matter of this Ruling.

In terms of O.41 r.4 of the Civil Procedure Rules it is incumbent on the Applicant to show sufficient cause for grant of such an order. The order will not be issued however, even if such cause be shown unless in terms of sub-rule 2 the court is satisfied that substantial loss may result and that there is security for satisfaction of any orders binding the Applicant. There should also be no delay in making the application. Again the onus of satisfying the Court on all these requirements is the Applicant's.

Learned counsel for the Applicant Ms. Osino was alive to these requirements and pleaded that the intended Appeal raises important issues of law and that it will be rendered nugatory if the status quo is not maintained. The Applicant seeks specific performance in the main suit. He will also be evicted from the property and will suffer destitution before the Appeal is heard. Citing C.Appl.NAI 22/94 Mugo Kirika & Anor. Vs. Walter Karanja (UR) and Joram Wairegi vs. Kenya Commercial Bank Ltd., C.Appl.NAI 122/00 (UR) which involved transactions on immoveable property she submitted that the Court of Appeal had the view that issues in such matters are not frivolous and the Appeals would be rendered nugatory if stay was not granted. As for security she submitted that the Applicant would abide by any orders made

by the Court in that respect.

Opposing the application learned counsel for the Respondent Mr. Devani went into great detail on the merits of the Respondent's case and the demerits of the Applicant's case. He invited me to find that the Appeal has no chances of success. He further submitted that on the strength of the acknowledgement by the Applicant that he was a licensee, there would be no substantial loss since there is no proprietary interest in the property. As for security he submitted that it will take a long time before the Appeal is heard and determined. That would mean that the Applicant will be occupying a house he does not own and is not paying rents for. A fair rent which the house could fetch is in the region of Kshs.65,000/- per month. Alternatively, there should be security to cover the balance demanded by the Respondent on the purchase price in the region of Kshs.5.8 million. He cited no less than 5 authorities to support his views, among them **HCC.282/98 M.A.Bayusuf Ltd. Vs Chemargo Ltd.**, for the proposition that the cornerstone of an application under O.41 r.4 is whether substantial loss will ensue; **CA.291/97 Carter & Sons Ltd –vs- Deposit Protection Board & Others** (UR) on the fetters on the exercise of the court's discretion among them the furnishing of security and **C. App. NAI.38/80 Rasiklal Patel –vs- Parklands Properties Ltd.**, (UR) on what substantial loss amounts to. That is to say prima facie that if the Appeal succeeds, the Respondent will not be in a position to make full restitution; not that the Applicant will suffer because he cannot continue the Appeal unless stay is granted.

Finally, Mr. Devani contended that the application ought to be one of an injunction and not stay since there is no decree issued for execution.

I think the latter is a fundamental submission and I must express my view on it. For it is correct to say that a stay of execution would ordinarily ensue where there was a judgment or an order which is capable of execution in favour of a successful party. In this case no such order was made. There was only a dismissal of an application for injunction sought by the Plaintiff. There was no order granted to the Defendants which was capable of execution. And I think the Applicant's counsel was alive to this dilemma when she amended the Notice of Motion initially seeking "*stay of execution*" to read "*stay of execution to maintain the status quo*", and invoked S.3A of the Civil Procedure Act in addition to Order 41 r.4. I also think it was a dilemma recognized by the Rules Committee when it recently amended Order 41 through LN. No.36/2000.

Order 41 still has the side-note "*stay in case of Appeal*". But it now has new sub-rules 5 & 6 with sub-rule 6 providing:-

"(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 subordinate court or tribunal has been complied with".

In my view the sub-rule was tailored to address situations as this where no execution, properly so called, is contemplated. But that jurisdiction though unfettered, is limited to this court sitting as an Appellate one. It is not clear why it was not found necessary to extend it to the ordinary jurisdiction of this court, but in my view it matters not. Order 41 covers not only stay of execution but also stay of proceedings. The net effect is to hold matters in statu quo to give the Appellant an opportunity to exercise his undoubted right of appeal. At any rate one of the functions of an injunction under O.39 r.1 is to "*stay*" other than "*restrain*", and I think the converse is also true of "*stay*" under O.41 r.4.

I find no substantial impropriety in the application as drawn since I am in no doubt about the order

sought.

The principles on which this court must proceed under O.41 r.4 have been set out and amply elaborated in decided cases. The authorities however do not formulate a uniform rule of practice and therefore each case must be decided on its own facts.

In this case, although there is a Memorandum of Appeal exhibited, it is not in my province to decide conclusively whether it will succeed on Appeal. I will grant the Applicant the view that it is not frivolous and he therefore has sufficient cause to appeal. I also grant the Applicant the view that the application was filed without unreasonable delay.

The subject matter in issue is immoveable property although there is an alternative prayer for money. On the facts the Applicant occupies the property with his family. After this court's earlier Ruling there is nothing to prevent the Respondent from evicting the Applicant from that property. If the Appeal succeeds on the main prayer the property may well have disappeared irretrievably although monetary compensation may be available. The respondent may not be capable of restituting the same property. In the circumstances substantial loss would ensue. I perceive on the other hand the injustice that would ensue if the Appeal does not succeed after taking a long time to determine whilst in the meantime the Applicant occupies the Respondents' property rent free.

I would in the circumstances grant the application on terms that the Applicant shall deposit in an interest earning joint Bank Account in the names of the Advocates of both parties, every month with effect from 1st day of August 2001 and on the 1st day of each month thereafter a sum of Kshs.40,000/-. If that condition is complied with there will be an order for stay for a period of 6 months. In default of payment of any one monthly deposit on due date, the stay shall be automatically discharged.

The Respondent shall have the costs of this application.

Dated this 27th day of July, 2001.

P. N. WAKI

J U D G E



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