**Mediratta v Kenya Commercial Bank and others**

[2006] 2 EA 194 (CCK)

**Division:** Milimani Commercial Court of Kenya at Nairobi

**Date of ruling:** 19 May 2006

**Case Number:** 21/05

**Before:** Emukule J

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Civil practice and procedure – Execution – Stay of Execution of Order – Applicable principles.*

**Editor’s Summary**

By ruling delivered on 9 May 2005, the High Court dismissed with costs the plaintiff’s application for an

injunction to restrain the first and second defendants from transferring, charging, taking possession of or

otherwise howsoever from exercising proprietary rights over a certain parcel of land. Following the

delivery of the ruling the plaintiff sought a stay of execution of that order pending preparation of an

intended appeal on that ruling to the Court of Appeal. The application was made orally pursuant to the

provisions of Order XLI, rule 4(5) of the Civil Procedure Rules. The application was declined. The

plaintiff then filed a formal application to the High Court seeking a stay of the order.

**Held** – The principles for grant of a stay of execution at the High Court as set out in Order XLI, rule 4(2)

and which the applicant must satisfy are:

(i) Substantial loss may result unless the stay is given.

( ii) The application for stay had been lodged without delay; and

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(iii) The applicant has furnished security for due performance.

Order XLI, rule 4(5) of the Civil Procedure Rules implies that following an informal (verbal) application

and there is a response or an order from the court or judge presiding over the matter, the pronouncement

by the judge or court, whether “there be a stay” or “there be no stay or the order granted” is final and

binding upon the parties and the court is *functus officio* thereafter.

Application dismissed.

**Cases referred to in ruling**

***East Africa***

*Century Oil Trading Company Limited v Kenya Shell Limited* [2003] 1 EA 41

*Kenon Court v Giro Commercial Bank Limited* Nairobi Milimani Commercial Courts, High Court civil

case number 789 of 1999

*MM Butt v The Rent Restriction Tribunal (Respondent) and ZN Shah and SM Shah* civil appeal number

Nairobi 6 of 1979

***United Kingdom***

*Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448

**Ruling**

**Emukule J:** By a ruling delivered on 9 May 2005 my brother Mr Justice Azangalala dismissed with

costs, the plaintiff’s application for an injunction to restrain the first and second defendants from

transferring, charging, taking possession or otherwise howsoever from exercising proprietary rights over

Land Reference number 209/5535, Ralph Bunch Road Nairobi until this suit is heard and determined.

Following the delivery of the said ruling the plaintiff sought through her learned Counsel Mr Gichuki

*Kingara*, a stay of execution of that order pending his preparation of an intended appeal on that ruling to

the Court of Appeal. That application was made orally pursuant to the provisions of Order XLI, rule 4(5)

of the Civil Procedure Rules, which provides that “An application for stay of execution may be made

informally immediately following a judgement or ruling”. My brother Mr Justice Azangalala declined to

grant the plaintiff’s application for stay of the order dismissing the injunctive application. This decision

upset the plaintiff’s Counsel, who accused the said Judge of bias against his client by dismissing both her

application for injunction, and declining to grant a stay of that order.

Subsequent to those events on 9 May 2005, the plaintiff filed the current application on 10 May 2005,

under a Certificate of Urgency and seeking a stay of the order of Mr Justice Azangalala. The application

first went before Mr Justice Waweru, the Presiding Judge, who ordered that the matter be placed before

Honourable Mr Justice Azangalala. However when this matter went before Mr Justice Azangalala, the

plaintiff’s counsel felt apprehensive that his client would not receive sympathy from the same Court

which had just dismissed her application, for injunction, and the order of which he was seeking a stay.

My brother Justice Azangalala being a decent and a judge of high integrity,

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and not worthy of being accused of bias, in his humble mien declined to hear the application at the

request of the plaintiff’s counsel. That is how this matter landed on my desk.

Thus when this matter was urged before me on 12 May 2005, Mr Gichuki *Kingara* was passionate

that his client be granted just a stay of 10 days to enable him prepare his papers for the intended appeal

for the Court of Appeal. He told the court that the plaintiff was very concerned about the validity of the

Charge, which he said did not conform with the provisions of section 46 of the Registration of Titles Act

(Chapter 281). The plaintiff had given the suit property on the understanding that the Borrower would

give other securities to secure the loans, and would not endanger her property and that the plaintiff was

completely discharged from her guarantee the moment the first defendant increased the facilities to the

Borrower.

Those arguments are appropriate perhaps on appeal but hardly in this application.

Counsel did however urge that even after refusing to grant an injunction, the Court may still grant an

order for stay. Counsel relied upon the decision of Megarry J in the case of *Erinford Properties Limited v*

*Cheshire County Council* [1974] 2 All ER 448 where that learned Judge held *inter alia* that “where a

Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful

applicant an injunction pending an appeal against the dismissal, that it is not necessary for the applicant

to apply to the Court of Appeal, and that there is no inconsistency in granting such an injunction after

dismissing the motion for the purpose of the order is to prevent the Court of Appeal’s decision from

being rendered nugatory should that court reverse the judge’s decision.”

Counsel also relied upon the decision of Mbaluto J in *Kenon Court v Giro Commercial Bank Limited*

(Nairobi, Milimani Commercial Courts, High Court civil case number 789 of 1999) in which the learned

Judge granted a stay of 60 days pending the preparation of the record for the intended appeal on the

ground that the value of the suit property in that case, then valued at over KShs 55 million would not

materially depreciate within those days.

Madan JA (as he then was) applied the decision in *Erinford Properties v Cheshire* County Council, in

the case of *MM Butt v The Rent Restriction Tribunal (respondent)* and *ZN Shah and SM Shah* civil appeal

number Nairobi 6 of 1979.

Counsel urged this Court to follow those decisions and the decision of Mwera J in the case of *Century*

*Oil Trading Company Limited v Kenya Shell Limited* [2003] 1 EA 41, where the Court after restraining

the defendant from calling in a guarantee from the plaintiff’s guarantor but went ahead and ordered the

plaintiff to furnish security for due performance of its obligations as it was not confortable to order that

the properties already charged to the Bank be subject of this security as was suggested by the plaintiff. (It

is noted that that decision is subject of appeal to the Court of Appeal which is yet to hear and render its

decision.)

The application was predictably opposed by Mr *Gichuhi* and *Lukadiru*, learned Counsel for the first

and second defendants respectively. Mr *Lukadiru* associated himself with the submissions by Mr *Gichuhi*

counsel for the first defendant. For the second defendant Mr *Lukadiru* submitted firstly that there

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was a doubt whether there was cause of action against the second defendant, and secondly that the

application, the subject of this ruling should have been made to the Court of Appeal.

Mr *Gichuhi*’s arguments were equally brief. Counsel submitted that the matters herein had been

canvassed by the three counsel, and the plaintiff’s application was dismissed. The subsequent application

made under rule 4(5) of Order XLI was also dismissed. The Court was *functus officio*. The matter was

*res judicata*, under section 7 of the Civil Procedure Act. The same issue, between the same parties had

been determined by a court of competent jurisdiction.

There was no evidence that the first defendant was oversecured to the tune of KShs 1,0 billion. The

essence of Mr Justice Azangalala’s ruling at 17 was that the plaintiff was guilty of material

non-disclosures and her conduct did not meet the approval of a Court of equity, and was consequently not

entitled to the equitable remedy of injunction.

The debt currently stood at over KShs 280 million. The property in issue was valued at KShs 125

million according to the Further Replying Affidavit of John Oringo, sworn on 11 May 2005 filed on 11

May 2005. There is no offer to pay or add security in consideration of the orders sought. A Court of law

may have sympathy for a party but it must remain first and foremost a Court of law.

That is what the parties told the Court. I set out my opinion in the paragraphs following.

Order XLI, rule 4(1) of the Civil Procedure Rules empowers this Court for sufficient cause to order a

stay of execution of its decree or order. The same rule confers upon the Court of Appeal the same powers

to stay execution. For the Court of Appeal to grant a stay of execution, the applicant must satisfy the

provisions of rule 5(2)(*b*) of the rules of that Court, that:

“(i) The intended appeal is arguable and not frivolous at all;

( ii) That if the injunction or stay order is not issued and the intended appeal eventually succeeds, it will be

rendered nugatory by the refusal of the grant of such injunction or stay.”

We are not here concerned with the principles for grant of stay or injunction in the Court of Appeal,

although as observed by Mwera J in *Century Oil Trading Company Limited v Kenya Shell* (*supra*),

counsel often mix up these principles with those applicable for grant of stay in this Court. The principles

for grant of a stay in this Court are set out in Order XLI, rule 4(2) and which the applicant must satisfy

the Court that:

“(i) Substantial loss may result unless the stay is given;

( ii) The application for stay had been lodged without delay; and

(iii) The applicant has furnished security for due performance.”

The application herein was lodged promptly in fact on the next day following the dismissal of the

interlocutory application. There was no delay in filing the application for stay. I cannot however say that

the plaintiff/applicant has satisfied the conditions for grant of stay by this Court, that the plaintiff will

suffer substantial loss unless the stay order is given and the applicant has made it clear that it will not

furnish any security to the first defendant.

For these reasons, the plaintiff has failed to satisfy this Court on the cumulative grounds for granting

of stay under Order XLI, rule 4(2) as set out above.

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There is however another reason why this application should fail. Order XLI, rule 4(5) of the Civil

Procedure Rules which I set out again provides:

“An application for stay of execution may be made informally immediately following the delivery of a

judgment or ruling.”

My understanding of that rule is that following such an informal (meaning verbal) application, there is a

response or an order from the Court or Judge presiding over the matter, the pronouncement by the Judge

or Court whether “there be a stay” or “there be no stay of the order granted” or as in this case:

“Counsel of the plaintiff has sought an interim injunction pending the filing of a formal application. I am

afraid I have already ruled on this matter. There is nothing to prevent the plaintiff from filing a Notice of

Appeal and formal application today. The stay or interim order sought is refused.”

That order is final and binding upon the parties, and the Court is *functus officio* thereafter.

The only recourse, as my brother Justice Azangalala clearly indicated is for the aggrieved party in this

case, the plaintiff is to file an appeal for stay to the Court of Appeal in terms of Order XLI, rule 4(1) of

the Civil Procedure Rules, and of course the Rules of that Court.

For these reasons, the plaintiff’s Notice of Motion dated 10 May 2005 is dismissed with costs.

For the appellant:

Mr Gichuki *Kingara*

For the respondent:

Mr *Gichuhi* and *Lukadiru*