



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 96 OF 2019 (FORMERLY ELC APPEAL NO. 93 OF 2019)

MICHEAL KUNGU KIGIA.....APPELLANT

VERSUS

AGRICULTURE FINANCE CORPORATION & 5 OTHERS.....RESPONDENTS

RULING

1. By a Motion on Notice dated 17/7/2019, Michael Kungu Kigia (“the appellant”) sought, *inter alia*, the following orders: -

“1) ...

2) THAT this Honourable court be pleased to declare that the purported auction and transfer of land LR. NO. ABOTHUGUCHI/LOWER KAONGO/700 and LR. NO. ABOTHUGUCHI/LOWER KAONGO/701 on 3rd August, 2018 as null and void as the 2nd respondent used none existent law firm that is not on the record in the Law Society of Kenya in the memorandum and forged signatures and stamps of unknown advocates in order to defeat justice.

3) THAT after this Honourable court issues order 1 and 2 the Honourable court do issue an order to 1st defendant herein to release the title deeds to the appellant”.

2. The application was supported by the affidavit of the appellant sworn on 15/7/2019. He contended that the 2nd respondent misled the trial magistrate and Judges by filing a defective memorandum. That on 13/1/2004, the 1st respondent had admitted that the appellant had no loan arrears and had ordered for the release of the title deeds.

3. The appellant further contended that there was no transfer and/or auction of L.R. Abothuguchi/Lower Kaongo/700 and L.R. Abothuguchi/Lower Kaongo/701 hence the 1st respondent had conspired to defeat justice by alienating land through corrupt means.

4. The application was argued orally on 30/10/2019. The applicant relied on his written submissions which restated the grounds of appeal. He stated that since the respondents had not filed any document in opposition to his application, the same should be allowed. It was submitted by Mr. Ringer for the respondents on a point of law that the prayers sought in the Motion are the substance of the appeal and cannot therefore be granted at this stage.

5. The court has considered the submissions of the applicant and the respondent.

6. The application was brought under **Order 51 Rule 3 of the Civil Procedure Rules and Section 3 3A and 63 of the Civil Procedure Act**. The said provisions are procedural in nature and they provide for the overriding objectives of the Act which grants this court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

7. This is an interlocutory application based on the pending appeal. The appeal is yet to be argued yet the prayers sought are mandatory or final in tenure. If they are granted, the appeal would have been spent. I know not of any procedure where a Court of law will conclusively determine a substantive proceeding through an interlocutory application such as the present one.

8. Although there was no Replying Affidavit in opposition, the application is a non-starter. It cannot be allowed. It is bad in law and cannot lie. The application seeks to determine the appeal summarily without it being heard. That will be unlawful as the parties would not have been heard on merit.

9. Accordingly, the application is hereby dismissed. Since the respondents were served and Mr. Ringera appeared and opposed the same, the

costs of the application are awarded to the respondents in any event.

Signed at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. ONG'INJO

JUDGE