



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**FORMERLY CIVIL APPEAL NO. 237 OF 2017**

**CIVIL APPEAL NO. 5 OF 2017**

**JAMES KIMINDA NDEGWA.....PLAINTIFF**

**-VERSUS-**

**HOUSING FINANCE CO. LTD.....1ST DEFENDANT**

**KENYA RAILWAYS CORPORATION.....2ND DEFENDANT**

**RULING**

1. **James Kiminda Ndegwa**, the appellant has filed a notice of motion dated **22nd May 2017**. By that application, he seeks an injunction pending the hearing of this appeal to restrain housing finance, the 1st respondent, from selling by public auction or private treaty the appellant's property **LR. No. 2641/SEC.11/MN/Kiembeni Estate Phase 11** (the suit property). The 1st respondent has a legal charge over the suit property.

2. The appellant filed his claim before the High Court being Milimani HCCC No. 526 of 2004. That suit was transferred to Milimani Chief Magistrate Court and was assigned CMCC No. 3242/2008.

3. When the suit was transferred to the Chief Magistrates Court, because the matter was not prosecuted, the 1st respondent sought and obtained an order for dismissal of the suit for want of prosecution.

4. The appellant applied for reinstatement of the suit and the principal magistrate by her ruling of **9th May 2017** declined to reinstate the suit.

5. The appellant has filed this appeal against that refusal to reinstate the suit.

6. The appellant's application for an injunction pending appeal is made on the ground that if an injunction is not granted he stands to suffer irreparable loss because the suit property provides him and his wife their livelihood since he is now retired. The appellant deponed that he had fully repaid the loan through his then employer Kenya Railway Corporation. He deponed further that he is infact owed an overpayment on his loan account.

7. I have considered the party's affidavit evidence, the submissions and authorities. Having done so, I form the opinion that the appellant has shown that his appeal is not frivolous. He alleges non service of the application before the Chief Magistrates Court for the dismissal of his suit for want of prosecution. It was in that suit before the Chief Magistrates Court where an injunction restraining the sale of the suit property was subsisting. Since in my view there is a likelihood that the appellant was unaware of the application that resulted in the dismissal of his suit, this then is a proper case to grant an injunction. I am however concerned that the appellant, for whatever reason, did delay in prosecution of that dismissed suit. He will therefore not be granted a blanket injunction, it shall be limited.

8. In the end I grant the following orders:

*a. An injunction is hereby granted for only six months from today's date restraining the 1st respondent from selling either by public auction or by private treaty parcel no. **LR. No. 2641/SEC.11/MN/Kiembeni Estate Phase 11**.*

*b. Before expiry of 6 months the appellant shall ensure that this appeal is heard.*

*c. The cost of the notice of motion dated **22nd May 2017** shall abide with the outcome of the appeal.*

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of October, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

**MARY KASANGO**

**JUDGE**