



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE No 34 OF 2006**

**B E T W E E N:**

**GEOFFREY KURIA GITHAMBO ..... PLAINTIFF/RESPONDENT**

**Versus**

**HOUSING FINANCE COMPANY LTD .....1<sup>ST</sup> DEFENDANT**

**RUEBEN WARUI MWANGI .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MERCY WANJIRU WARUI ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**R U L I N G**

1. This Matter comes before the Court on the Application of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In the main those two Defendants are seeking a stay of proceedings pending an appeal from the decision of Hon Mabeya J delivered by Hon Havelock J on 5<sup>th</sup> March 2014. It seems the Applicants were not present in Court nor represented when that Ruling was delivered.

2. The Court file did not contain a copy of the Application itself. A copy was provided by the Advocates for the 2<sup>nd</sup> Defendant on 19<sup>th</sup> September 2016.

3. That Ruling dismissed the Application by the two Defendants (2<sup>nd</sup> and 3<sup>rd</sup>) to set aside the interlocutory judgment entered against them on 13<sup>th</sup> March 2007. The Application was made on 29<sup>th</sup> July 2006. That is more than six years later. The Applicants put forward 8 Grounds in support of their application including:

*1. That their current advocates came on the record on 25<sup>th</sup> April 2013;*

*2. That the Plaintiff seeks to unconstitutionally deprive them of their property without compensation; and*

*3. That it would be a miscarriage of justice for such interlocutory judgment to stand.”*

The Application was supported by the Affidavit of the 2<sup>nd</sup> Defendant Reuben Warui Mwangi. The Affidavit records that the 2<sup>nd</sup> Defendant and his wife the 3<sup>rd</sup> Defendant are bona fide purchasers for value and acquired good title to the Suit Property. It also records that the 2<sup>nd</sup>

and 3<sup>rd</sup> Defendants do not own the Suit Property any longer. It is the Plaintiff's complaint that the two Applicant/Defendants disposed of the Property during the currency of the suit. It is also recorded that the Second Defendant was an employee of the 1<sup>st</sup> Defendant at the relevant times.

4. The Application is brought by a Notice of Motion. It is dated 16<sup>th</sup> September 2014 and was filed on 18<sup>th</sup> September 2014. It is brought on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and it seeks orders that:

*1. This Honourable Court be pleased to grant a stay of proceedings in this matter pending the hearing and determination of the intended appeal from the decision and order of learned Judge Mabeya delivered on 5<sup>th</sup> March 2014*

*2. The Court do direct the Registry to expeditiously type the proceedings for purposes of lodging the intended appeal*

*3. Costs be in the Cause.*

5. The Application is grounded on the Affidavit of Reuben Warui Mwangi (2<sup>nd</sup> Defendant). The Grounds set out in the Application are:

*a. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have filed a Notice of Appeal dated 10<sup>th</sup> March 2014 against the said decision of learned Judge Mabeya delivered on 5<sup>th</sup> March 2014 on his behalf by Learned Judge J. B. Havelock.*

*b. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are aggrieved by the decision of the Learned Judge not to set aside the interlocutory judgment obtained by the Plaintiff and grant leave to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to defend the suit.*

*c. The consequence of the said Ruling is that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant will be condemned unheard.*

*d. The reliefs sought by the Plaintiff are draconian as the Applicants are at risk of being condemned to pay general damages for alleged fraud, breach of contract and trespass as well as mesne profits without being heard.*

*e. The default to file a defence by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was due to lapse on the part of their erstwhile advocates.*

*f. Mistake of advocates should not be visited on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants bearing in mind the overriding objectives of this court is to do substantive justice to the Parties.*

*g. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are exercising their Constitutional Right to Appeal.*

*h. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are desirous to prosecute their Appeal in the Interest of Justice and have excellent grounds of Appeal.*

*i. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will be denied their Constitutional Right to be heard if the proceedings are not stayed pending hearing and determination of the Intended Appeal.*

*j. The Applicants are entitled to fair Administrative action as protected under Article 47 of The Constitution.*

*k. The Plaintiff in any event cannot suffer any prejudice which cannot be remedied by way of*

damages.

*l. This Honourable Court has unlimited inherent jurisdiction to grant the orders as prayed.*

*m. The Plaintiff has taken a hearing date of 2<sup>nd</sup> October, 2014 in Court of Appeal.*

*n. The Intended Appeal has high chances of success especially noting that only interlocutory judgment was entered subject to a full hearing and evidence.*

6. The Supporting Affidavit is sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. It adds little to the Grounds set out in the Application. What is said is that a Notice of Appeal has been filed on 10<sup>th</sup> March 2014 and by a Letter dated 11<sup>th</sup> March 2014 the Deputy Registrar was asked to provide certified copies of proceedings “*for purposes of lodging and appeal..*”. It is also said that a Defence was not filed due to “*a lapse on the part of erstwhile advocates*”. In the circumstances, it is argued that the mistake of the advocates should not be visited on the Defendants. The Application was filed on 18<sup>th</sup> September 2014. Paragraph 14 of the Supporting Affidavit states that; “*The Application is material because the Plaintiff has taken a Hearing date of 2<sup>nd</sup> October, 2014*”.

7. Any analysis of those Grounds would benefit from a recap of the background and history of these proceedings. The claim is brought by a client of the 1<sup>st</sup> Defendant Bank who obtained a loan that was charged to his Property. He defaulted and the Property was sold. There is a dispute as to when and how the property was sold. The Plaintiff alleges that he was not given the proper and adequate notices before the sale and in particular was denied an opportunity to redeem the loan. The Bank asserts that the uncontested fact is that the buyers at auction were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff challenged the sale on the basis that the buyer was at all material times an employee of the Bank. That raises obvious questions as to whether the sale was a true arm’s length transaction by a bona fide purchaser for value. The Plaintiff also alleges a sale at an under value.

8. The background facts are that the Plaintiff was filed on 2<sup>nd</sup> February 2006. At that time there was only one Defendant, the Bank. The Bank filed its Defence on 16<sup>th</sup> February 2006. Subsequently, the Plaintiff filed an Amended Plaintiff adding the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Parties ( 5<sup>th</sup> December 2006). The prayers sought in the Plaintiff were:

*“(a) That an Order be made under the Section 52 of the Indian Transfer of Property Act (Amendment) Act 1959 that during the pendency of this suit THAT ALL FURTHER REGISTRATION or change of registration in the ownership leasing subleasing allotment user occupation or possession or in any kind of right title or interest in AL THAT parcel of land known as L.R. NO. NDUMBERI/NDUMBERU/1594 be and is hereby prohibited*

*(b) A declaration that the purported auction and Transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendants is also null and void and of no effect*

*(c) A declaration that the purported Charge of the suit property to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendants is also null and void and of no effect.*

*(d) General Damages for fraud, breach of contract and trespass.*

*(e) An order directing the Defendants to deliver up to the Plaintiff the suit property’s documents of Title re-transferred to the Plaintiff duly released and discharged from all encumbrances....”*

9. In the meantime the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sold the suit property on to a third party thereby obstructing any order in particular prayer (e) that had the Court been minded to grant that Order, and

thereby placing the property beyond the reach of the Court. The 1<sup>st</sup> Defendant continued to defend the suit and oppose the application for an injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Third Respondents. Such defence suggesting that their interests were being protected by the same Advocates, that is the Bank's Advocates.

10. On 30<sup>th</sup> March, 2007, Messrs Oraro & Company Advocates wrote to the Plaintiffs' Advocates seeking time to file their clients defences out of time. However, Interlocutory Judgment had been entered on 13<sup>th</sup> March 2007 pursuant to a request dated 26<sup>th</sup> March 2007. The 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant were added to the suit pursuant to Chambers Summons dated 24<sup>th</sup> November 2006 following sale. The Plaintiff alleges a conspiracy between the Bank and its employee to prevent redemption. The 2<sup>nd</sup> Defendant had instructed a firm called Miller & Company in his dealings with the property since around 8<sup>th</sup> February, 2011 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were represented by Issa & Company Advocates. On 5<sup>th</sup> September 2012 they made an Application to cease acting because "The suit was initially scheduled for hearing on 6<sup>th</sup> July, 2011 but the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants failed to give adequate instructions to enable us to prepare for hearing" ( Paragraph 4, Affidavit Mansur Issa 5<sup>th</sup> September 2012). In or around 2012, the file went missing or became untraceable at the Registry. The Plaintiff made an Application to have it reconstructed. On 20<sup>th</sup> November, Justice Mabeya gave directions for the filing of List, Bundle and Witness Statements. The Parties were directed to file a Statement of Agreed Issues. There is a copy of that Statement of Agreed Issues on the file suggesting the directions were complied with. The Order was served on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 10<sup>th</sup> December 2012. Shortly thereafter ( 25<sup>th</sup> April 2013), the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appointed their current Advocates M/s Walker Kontos Advocates. The Defendants ( 2 and 3) did not file an application to set aside interlocutory judgment until 29<sup>th</sup> July 2013. That is more than 6 years after Judgment was entered (13<sup>th</sup> March 2007). At the time the Firm of Messrs. Oraro & Co Advocates were acting. They continued to act until 8<sup>th</sup> February 2011, On the Court file, is a letter from them dated 11<sup>th</sup> December 2007 addressed to Plaintiffs' Advocates asking them to consent to the 30<sup>th</sup> March 2007 Letters, asking for leave to file defence out of time and setting aside the Judgment to obviate the need for a formal application.

11. The Application is now before the Court. It is not brought under a Certificate of Urgency. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are quite candid when they say the Application was necessitated not by a delay in obtaining the typed proceedings but in fact that the Plaintiff succeeding in having the matter listed for hearing. That (hearing) is the outcome they wish to stop. The Court record shows that on 30<sup>th</sup> May 2014. The Representatives of the Plaintiff and 1<sup>st</sup> Defendant attended to obtain a date for Hearing. That date was 2<sup>nd</sup> October, 2014. The reason is not recorded but, the file did not come before a Judge. On 19<sup>th</sup> January, 2015, it was again listed for hearing on 23<sup>rd</sup> February 2015. On that date this Application was brought to the attention of the Court by counsel for the 1<sup>st</sup> Defendant. The Applicants themselves were not ready to proceed. Mr. Kimani informed the court that he had just taken over the file. The Plaintiff was ready and keen to proceed with the hearing. A Hearing date had been given by the Registry. Mr. Tugen for the Bank informed the Court that there had been no pre-trial or Case management. The record refers to an Application dated 16<sup>th</sup> December. in fact the Application was filed on 18<sup>th</sup> September. It seems the Applicants neglected to fix a date for hearing before 23<sup>rd</sup> February 2015. In fact they refused an attempt to fix the matter for hearing on 14<sup>th</sup> January 2015 notwithstanding an invitation to do so.

12. As stated Interlocutory Judgment was entered on 13<sup>th</sup> March, 2007. The Applicants had legal representation. Even as late as 30<sup>th</sup> March, 2007 they were seeking the Plaintiff's indulgence to file a Defence out of time. These Advocates carried on being on the record for another 3 years and 11 months. That does not suggest that their Clients were dissatisfied with the service they were receiving. Subsequent Advocates representing complained about the absence of Instructions and ceased acting.

13. In the circumstances, the Ground that the Defendants' Advocates were insolvent, in the absence of any corroboration, is implausible in the extreme. In any event the Applicants thereafter proceeded to sit on their hands for six years. Mabeya Judge has dealt with those issues in his Ruling. Interlocutory Judgment was entered on 13<sup>th</sup> February 2007.

14. Even this Application , of the 2<sup>nd</sup> Defendant's own admission, was triggered not by a need for access to Justice - as a Constitutional right but by a need to prevent the matter being heard. The Parties herein, being the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have filed Written Submissions.

15. It is clear the Applicants have had ample opportunity to participate in the suit had they wished to do so. It is also clear that they have acted and/or colluded with others to place the suit property beyond the reach of the Court. That demonstrates an absence of clear hands. In any event the case against them is based on collusion and/or conspiracy. The suit against the first Defendant continues and is defended there is a further opportunity to challenge the Plaintiff's version of events.

16. The Court takes into account Article 50, 159 and the Overriding objectives as well as the rights of Plaintiff to access to justice. In the circumstances the Application for a stay is dismissed with costs. In relation to the prayer for proceedings to be certified, there is no evidence that that Order is necessary. There is no indication that there was a request for proceedings to be typed between 3<sup>rd</sup> March, 2013 and September, 2013 - a period of almost 6 months. Nevertheless out of an abundance of caution that direction will be given. As to costs, the Court has a wide discretion on the issue of costs under **Section 27 Civil Procedure Act Cap 21**. In addition the overriding objective places on the Court, the Parties and their Advocates the responsibility for efficient and cost effective use of the resources of the Justice system. The Applicant's conduct has been very far from that ideal. The Applicant's conduct is characterised by delay and prevarication and has led to an inordinate delay in the hearing and determination of this suit. For those reasons the Court orders the Applicants to pay the Plaintiff / Respondents costs of this Application and the costs of the adjourned hearing on January 2015 including getting up fees to be taxed if not agreed and to be paid as a pre-condition of the Defendants bringing anymore Applications. Further matter to be listed for direction and to take a date for hearing. The Court considers Case Management is not appropriate for the circumstances of this case due to the age of the suit.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Signed and Delivered on this 28<sup>th</sup> day of September 2016.**

**In the Presence of:**

Otieno: Court clerk

Applicants/2<sup>nd</sup> and 3<sup>rd</sup> Defendants: Mr Omino Holding Brief for Mr Karumbu

Respondents/Plaintiffs: Mr Kariuki Holding Brief for Mr Okeyo

1<sup>st</sup> Defendant: Messrs Oraro & Co