



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

**CIVIL DIVISION**

**CIVIL CASE NO. 532 OF 1996 (O.S)**

**CANNON ASSURANCE KENYA LTD.....PLAINTIFF**

**VERSUS**

**FREDRICK GATHITHI KABUE .....DEFENDANT**

**R U L I N G**

1. The Defendant in this case Fredrick Gathithi Kabue died on 8<sup>th</sup> January 2011. By an order entered on 10<sup>th</sup> November 2011 his legal representative, Eunice Wanjiru Gathithi (his widow) was substituted in his place.

2. By this suit the Plaintiff sought an order of vacant possession for an immovable property registered in the name of the Defendant. The Defendant had given the same as security for a loan granted to a third- party by the Plaintiff, which loan was not serviced. The Plaintiff then issued a due statutory notice for exercise of its statutory power of sale. It was apparently unable to exercise that power of sale and therefore sought vacant possession in order to be able to do so. Judgment was entered for the Plaintiff on 16<sup>th</sup> July 2003 (Mbitio, J). An application to set aside that judgment was dismissed with costs on 10<sup>th</sup> March 2006 (P. Kihara Kariuki, J).

3. The Defendant then filed suit against the Plaintiff vide **Nairobi HCCC No. 151 of 2008 (Milimani)** challenging the statutory notice by the Plaintiff for exercise of its statutory power of sale. In that, suit the Defendant, in an interlocutory application, sought a temporary injunction to restrain the Plaintiff from selling the property pending hearing and determination of the suit. The court (M. A. Warsame, J) dismissed that application with costs. The court also noted that that was the third suit the Defendant had filed in respect to the same subject-matter.

4. The Defendant then filed in the present suit a **constitutional petition** alleging contravention of his fundamental rights and freedoms under **sections 77, 82 and 84** of the now repealed **Constitution of Kenya** in respect to the mortgaged property. That petition was decided in his favour in a ruling dated and delivered on 30<sup>th</sup> December 2011 (R. N. Nambuye, J). The court declared, *inter alia*, that the Defendant “is entitled to be heard on his application challenging the proceduralism of the originating summons leading to the order of vacant possession of 16<sup>th</sup> July 2003” notwithstanding that the said decree for vacant possession was still in place, and also notwithstanding the dismissal of the Defendant’s application to set aside that decree. That application is apparently the notice of motion dated 14<sup>th</sup> of April 2008.

5. Subsequently, the Defendant applied by **chambers summons dated 6<sup>th</sup> February 2012** seeking the main order that this file be transferred to the **Commercial & Admiralty Division** of this Court for hearing and determination of the notice of motion dated 14<sup>th</sup> April 2008. The application is the subject of this ruling.

6. The main ground for the application is that the dispute in this suit is a commercial matter which ought to be dealt with by the Commercial & Admiralty Division. There is a supporting affidavit sworn by the substituted Defendant, Eunice Wanjiru Gathithi, in which she set out the history of the dispute.

7. The Plaintiff opposed the application by **replying affidavit filed on 17<sup>th</sup> February 2012**. The affidavit is sworn by one JOHN NGANGA, the Financial Director of the Plaintiff. Grounds of opposition emerging from the affidavit include –

- i. That the application is an abuse of the court process intended only to delay hearing of the Plaintiff's application seeking dismissal of the Defendant's suit (Milimani HCCC No. 151 of 2008).
- ii. That in any case no useful purpose will be served by the transfer sought.

8. In oral arguments on the application, learned counsel for the Defendant pointed out that there were then seven Judges in the Commercial & Admiralty Division and that there were only two Judges in this Division (Civil Division): as the suit is a commercial dispute anyway it ought to be transferred to the appropriate division. On her part, learned counsel for the Plaintiff urged that the suit should remain in this division.

9. I have considered the application in light of the submissions made. I must point out that a formal application of this nature was really not necessary. An informal application made from the bar would have sufficed.

10. The various divisions of the High Court are not separate courts. They are merely administrative units established by the Chief Justice for the better management of the business of the High Court. There is only **one** High Court in Kenya, and all judges of that Court have equal and co-ordinate jurisdiction. That means that a judge of any division is competent to try any issue pending in any division as long as the High Court otherwise has jurisdiction to try it.

11. In his **Circular dated 18<sup>th</sup> November 1997** made upon establishment of the **Commercial Division** of the High Court, the then Chief Justice classified commercial matters suitable for trial by the Division as follows -

**“1. All proceedings in which an injunction is sought to restrain the realization of securities whether debentures or charges.**

**2. All company matters and applications including winding-up, excluding cases in which a company is suing or being sued as an entity.**

**3. All Bankruptcy matters.**

**4. All matters relating to arbitration other than enforcement of awards; excluding any matter relating to land affected by the Land Control Board.**

**5. All intellectual property matters.**

**6. All claims for the recovery of unsecured debts (but including claims against guarantors) due to a bank or other financial institution in which a defence is filed. On the filing of the defence, the matter to be automatically**

**transferred to the Commercial Court.**

**7. Such matters as are certified by a Judge of the Commercial Court as being suitable for determination in the Commercial Court having regard to the amount involved; the need for a speedy hearing and the nature of the case. It was felt that in considering the nature of the case the Judge could be guided by the wording similar to the definition of a commercial action in the English Order 72 Rule 1 (1), namely: “arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage.”**

**12.** The original dispute in this matter concerned exercise by a mortgagee of its statutory power of sale. It was clearly a commercial dispute suitable for trial by the Commercial & Admiralty Division. Although the judgment of 16<sup>th</sup> July 2003 was made by this Division, in light of the ruling of 30<sup>th</sup> December 2011 (Nambuye, J), this matter is far from over. It is therefore meet that all outstanding issues be dealt with by the Commercial & Admiralty Division. I will allow the application and transfer this matter to the Commercial & Admiralty Division of the High Court. Costs of the application shall be in the cause. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST 2013**