



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.68 OF 2006

MESHACK OCHARA APPLICANT

VERSUS

NATIONAL BANK OF KENYA RESPONDENT

RULING

The notice of motion dated 16th January 2012 is made pursuant to provisions of **Order 42 rules 31 (2)** and **Order 51 rule 1 Civil Procedure Rules 2010** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, seeking:

1. That pending interpartes hearing of the application orders do issue of injunction against the defendant restraining it by itself, its servants and/or agents from selling by public auction on 24th January 2012 all that property known as **Nakuru Municipality Block 25/338** (Nakuru Teachers).
2. That this appeal be reinstated for hearing on merit and upon such reinstatement the court orders that the orders issued on 20th March 2007 are still operational.
3. The costs of this application be provided for.

The application is premised on grounds that the applicant's appeal was dismissed on 11th October **2010** under **Order 41 rule 3(2) Civil Procedure** Rules which provision required the Deputy Registrar to serve notice to the parties upon listing the appeal before a judge in chambers for dismissal.

The notice in the court file was never served on either the appellant or Respondent otherwise the appellant would have shown cause why his appeal should not have been dismissed. If the orders are not reviewed/set aside, and the orders of 20th March 2007 reinstated, appellant stands to suffer irreparable loss as the suit property is likely to be disposed off thus rendering him and his family destitute.

In the supporting affidavit sworn by the applicant he depones that he filed CMCC No.942 of 2005 against the Respondent seeking orders of injunction – the same was dismissed on 29th March 2006 and he filled an appeal on 20th March 2006. he obtained orders of injunction pending hearing and determination of his appeal. He was served with documents by the Respondent indicating that Respondent intends to exercise statutory powers of sale fixed for 24th January 2012 outside National Bank of Kenya. When he checked

the position in the court file, he realized that the appeal was dismissed on **11th December 2010** under **Order 41 Rule 3(2) Civil procedure Rules**. His advocate Mr. Konosi informed him that he had not been served with any notice to show cause and there is no evidence of service.

The application proceeded *ex parte* as the Respondents did not attend court for hearing of the application. The order dated **11th October 2010** and duly signed by Hon. Justice Wendoh stated that:

“After the inordinate delay of 3 years since the last step was given herein on 20/03/07 with a view to proceeding with the appeal, the court in exercise of the powers conferred upon it by Order 41 rule 31(2) of the Civil Procedure Rules hereby orders this Appeal dismissed.”

In the court file is a copy of the notice duly signed by the Deputy Registrar and addressed to Konosi & Company Advocates who were on record for the applicant and to Yano & Company Advocates for the Respondents.

Order XLI Rule 31(2) provides:

“(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the Registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

The provision does not state that service must be personal – in this instance service was effected on counsel representing the applicant. Once Mr. Konosi entered appearance on behalf of the applicant then it meant that any processes to be effected would have to be made through his counsel. Mr. Konosi has not sworn an affidavit denying ever being served with the notice and such silence speaks volumes. My perception is that applicant wishes to delay conclusion of the matter which begun in the lower court in the year 2005, concluded in 2006, appealed against in 2007 and so long as he had injunctive orders, he was contended obviously doing nothing. He has only been jolted from his slumber because of the looming sale but he has no one to blame for such indolence except himself and his counsel.

I find no reason to review the orders issued by Hon. Wendoh, J or to reinstate orders issued in March 2007 whatsoever.

The upshot is that the application has no merit and is dismissed with costs to Respondent.

Delivered and dated this 6th day of February, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**