**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Case 385 of 2011**

**CAPTAIN J. N. WAFUBWA.....PLAINTIFF**

**- VERSUS -**
**HOUSING FINANCE CO. OF KENYA.....DEFENDANT**

**R U L I N G**

**1.** Before the court are two **Notice of Motion** applications, the first one is by the Plaintiff. It isdated **16th May 2012**. It is filed under Order **45, Rule 1 (1), (2)** and **Section 3A** and **Section 80** of the **Civil Procedure Act**. The application seeks two orders namely that the court be pleased to review its Judgement dated **26th April 2012** and replace an award of **Kshs.4.5 million** as value of the property in **2009** with **Kshs.3,375,000/=** at **27.5%** interest from **9th February 1997** as residue balance till payment in full. The application also seeks that the costs herein be provided.

**2.** The application is premised on the following grounds namely:-

**a)** That review of this Judgment is absolutely necessary since from the face of it the Judgement dismissed the Court of Appeal's Judgement which was given by majority decision.

**b)** That since the Court of Appeal gave its Judgment on **11th February 2011**; the Defendant has never produced any evidence or any Court Order for setting aside the memorandum of sale made on the **8th November 1996** for reviving the Plaintiff's right of redemption.

**c)** That in the absence of any court order on record as stated in paragraph (b) herein above, this Judgement is limited to the accounts of the public auction dated **8th November 1996** as ordered by the Court of Appeal.

**d)** That it is the Defendant's obligation in law to supply the Court as stated in paragraph (b) and (c) herein above and NOT the trial Judge's duty to hunt for ways of reviving the Plaintiff's right of redemption as portrayed in the Judgement.

**e)** That however brilliant the dissenting Judgment may be, this Court is limited, it can only enforce the majority Judgement from the Court of Appeal by enforcing the proved residue balance of **Kshs.,375,000.00** as prayed in the Plaint.

**f)** That in the absence of any court order on record as stated above which proves beyond any doubt that the sale dated **8th November 1996** aborted, or was merely an attempted sale, the Plaintiff has no right of

appeal.

**3.** The application is supported by affidavit of the Plaintiff **CAPTAIN J. N. WAFUBWA** dated **16th April 2012** with its annextures. The application is opposed vide a replying affidavit sworn by **MIGUI MUNGAI** dated **28th May 2012**.

4. Briefly, the history of this application originates from my Judgement of **26th April 2012** which I delivered in favour of the Plaintiff/Applicant in the following terms:-

**(a) Kshs.26,662.80/=** with interests at **27.5% p.a**. with effect from **12th November 1996** till payment in full.

**(b) Kshs.4,500,000/=** with interest at **27.5% p.a**. with effect from **9th February 2009** till payment in full being the value of the suit premises from date of sale.

**(c)** Costs of the suit with interests thereon at court rates.

**5.** The Applicant now wants me to review the above Judgement and replace an award of **Kshs.4.5 million** as value of the property in **2009** with **Kshs.3,375,000.00** at **27.5%** interest per annum from February 1997 as residue till payment in full.

**6.** The Respondent has opposed the application mainly on two grounds. Firstly, the Respondent has submitted that the Applicant herein having preferred an appeal in this matter by filing a Notice of Appeal on **2nd May 2012**, lost the right to a review of the same. The instant application has been brought under *inter-a-alia* **Order 45 Rule 1** of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act**. A reading of the **Section 80** of the Act and **Order 45 Rule 1** it is apparent that a party can only make an application for review in the instances set out there under to wit.

**"a person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or a decree or order from which no appeal is hereby allowed.**"

**7.** The second ground raised by the Respondent is that the reliance and finding of the court was a substantive finding and not an error on the face of the record, but that such finding can be an issue of appeal.

**8.** I completely agree with the Respondent on these two grounds. Firstly, the Notice of Appeal by the Applicant is dated **1st May 2012**, and filed on **2nd May 2012** and issued under **Rule 74** of the Court of Appeal Rules while the instant application was filed on the **17th May 2012**.

**Order 42 Rule 6 (4)** of the **Civil Procedure Rules** provides that an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court a Notice of Appeal has been given. Consequently, the filing of the Notice of Appeal by the Applicant amounts in law to an appeal having been filed and it is only where an appeal has not been filed that the Applicant may make an application for review under the relevant provisions.

Lady Justice Okwengu in the case of **JULIA NJUNGE MACHARIA – VS – HOUSING FINANCE LIMITED [2005] e KLR** while establishing whether there was an appeal preferred by the Applicant found that there was a Notice of Appeal which according to the court stamp was filed earlier that the application for review and held that:-

**". . . the Applicant cannot claim that they had not preferred an appeal at the time of making the application for review as both were filed simultaneously. This is clearly a situation where the Applicant wants to have both ways by filing an application for review and an appeal at the same time. That is not provided for under Order XLIV Rule 1 and 2 of the Civil Procedure Rules. To this**

**extend, I will concur with the Respondent that the application is incompetent."**

From the above case it is clear that the instant application is incompetent.

In the case of **IN THE MATTER OF THE ESTATE OF ALAN NGUGI MUCHAI (DECEASED [2006] e KLR** the court at page 2 held that:-

**". . . on the issue of whether the Applicant can file an application for review notwithstanding the Notice of Appeal, my humble understanding of the provisions of Order XLIV Rule (1), the Applicant cannot file an appeal and at the same time pursue an application for review, he has to choose to file an appeal, the avenue for review should not be available to him. . ."**

The Court of Appeal in the case of **FRANCIS ORIGO & OTHERS – VS JACOB KUMALI MUNGALA [2005] e KLR** the Court at page observed that:-

**". . . in the present appeal, the Appellants preferred an appeal first from the Magistrates to the High Court and then to the Court of Appeal by filing a Notice of Appeal in essence the court considered the Notice of Appeal to the Court of Appeal as an appeal and the court dismissed the application for review on *inter-a-alia* that the Applicant had preferred an appeal not to mention that the same had been struck out and thus the option of review was not available to the Appellant."**

**9.** Secondly, even if an option for review were available to the Applicant I would still not grant the application. This is so because I am the person who wrote the Judgement and I know that there is no error on the face of the record. I gave reasons as to why I arrived at the sum of **Kshs.4.5 million**. That was my finding arising from evidence adduced by the parties before me. The Applicant is not obligated to agree with me on my finding. If in fact he is aggrieved with such finding, the option is not for me to review the same. In the case of **NYAMONGO & NYAMONGO ADVOCATE – VS – KOGO CA NO. 322 OF 2000**, the learned Court of Appeal cited with approval the following passage from Air Amenities on the Code of Civil Procedure by Chitaley & Rao (4th Edition) Volume 3 page 3227:-

**"a point which may be a good ground at appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."**

**10.** On the above grounds, this first application by the Plaintiff must fail, and I herewith dismiss the same.

**11.** The second application is by the Defendant. It is dated **6th July 2011**. It is filed under **Order 42, Rules 6 (1)** and **Rule 6 (2)** and **Order 51**, **Rule 1** of the **Civil Procedure Rules**, **2010** and **Section 3A** of the **Civil Procedure Act**, and it seeks the following orders namely:-

**1.** This application herein be certified as urgent and service of the same be dispensed with in the first instance;

**2.** There be a temporary order of stay of execution pending the *inter-parte* hearing and subsequent determination of the application herein;

**3.** That there be an order of stay of execution of the orders contained in the Judgement of this court delivered on the **26th April 2012** pending the hearing and determination of the intended appeal before the Court of Appeal;

**4.** The costs of this application be in the cause.

**12.** The application is premised on many grounds named therein among them:-

**a)** This Honourable Court delivered Judgement on this matter on the **26th April, 2012** in favour of the Respondent on the following terms:-

**i.** **Kshs.26,662.80/=** with interest at **27.5%** per annum with effect from **November, 1996 t**ill payment in full;

**ii.** **Kshs.4,500,000/=** with interest at **Kshs.27.5%** per annum with effect from **9th February 2009** till payment in full being the value of the suit premises from the date of sale; and

**iii.** Costs of the suit with interest thereon at court's rates.

**b)** The Applicant herein is aggrieved by the said decision and has preferred an appeal wherein the Applicant has already filed a Notice of Appeal to the Court of Appeal challenging the entire Judgement.

**c)** The temporary orders of stay execution issued on the 26th **April 2012** are lapsing on the **26th May 2012** and thereafter there will be nothing and/or order to bar the Respondent from executing against the entire judgement.

**d)** Indeed the Respondent has already demonstrated his intention of executing the orders of **26th April 2012** wherein on the **2nd May 2012** the Respondent filed his bill for taxation in preparation for execution of the decree for purposes of recovery of costs of the suit.

**e)** Consequently, the Applicant is apprehensive that the Respondent will at any time move to execute for the decretal amounts herein before the appeal before the Court of Appeal is heard and determined.

**f)** That should the Respondent execute against the Defendant before the hearing and determination of the appeal, the Respondent whose financial position is not known to the Applicant may not be in a position to refund the amounts which are quite substantial and in the circumstances substantial loss will be occasioned upon the Applicant.

**g)** There shall be greater hardship and/or injustice occasioned upon the Applicant should this Honourable court not stay the said orders as prayed for since the intended appeal if successful will be rendered a nugatory and the Applicant will also suffer substantial loss.

**h)** That the Respondent herein has also filed a Notice of Appeal to the Court of Appeal challenging the part of the judgment as well as an application for review which is a clear indication that both parties were aggrieved by the Judgement herein and in the circumstances that it is in the interest of justice that be stay of execution of the court orders to enable parties ventilate their appeal.

**i)** The Applicant has brought this application without unreasonable delay.

**j)** The Applicant herein shall comply with any orders of this Honoruable court for security for the due performance of such order or decree as may ultimately be binding upon it, and

**k)** It is just, fair and equitable for this court to allow this application as brought before it.

**13.** The application is supported by affidavit of **MIGUI MUNGAI** dated **25th May 2012** with its annextures. The affidavit mainly amplifies the above grounds. In opposition to the application the Plaintiff/Respondent filed grounds of opposition on **4th June 2012**. Both parties filed written submissions which covered the two applications herein.

**14.** I have carefully considered the application and the opposing submissions. The Defendant's application has been brought *inter-a-alia* under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** wherein the Application is obligated to satisfy the court that:-

**a)** Substantial loss may result unless the order is made and that the application has been made without unreasonable delay, and

**b)** Such security as the court may order for the due performance of such a decree or order as may be ultimately binding on the Applicant has been given by the Applicant.

The position was further stated in the Court of Appeal decision of **MUKUMA – VS – ABUOGA CIVIL APPL. NO. NAI. 195 OF 1987** where the court is considering the consideration by the High Court and the Court of Appeal in an application for stay of execution stated that:-

**". . . the granting of stay of execution in the High court is governed by Order XLI Rule 4 (2) the questions to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the Applicant has given security . . ."**

I have carefully considered the above issues. I have more so considered them in the light of this particular case which has a peculiar history of delay. I have also considered the application in the light of my Judgement the subject matter of the intended appeal. I have also considered the necessity to appear impartial and to render justice to all litigants regardless of their status in society. The matter at hand has been outstanding for several years. The submission by the Defendant/Applicant that it will suffer substantial loss unless the orders sought herein are given is erroneous and mischievous. Granted that the Defendant, a bank, is a person of great means, what gave it the authority to judge the Plaintiff/Applicant and to categorize him as a man of straw who should not be entrusted with his own Judgement? There is no evidence placed before the court to suggest that if the Plaintiff executes the Judgement, and the Defendant later succeeds in its appeal, then the Plaintiff would not be in a position to repay the money.

What is, however of more concern to me in this application is the state of apathy and mercilessness with which the Defendant has treated the Plaintiff in the entire history of this suit. Now, however, the Plaintiff has a regular judgement of this court. It will not be a justifiable act of this court, in the light to the facts of this case, to deny the Plaintiff the immediate enjoyment of the fruits of his judgement.

In addressing the issue of substantive loss, the Defendant should also consider that the Plaintiff lost his house due to reasons which the Judgement revealed were the Defendant's wrongdoings. A party who seeks a discretional or equitable remedy should be prepared to do the same. I find the Defendant guilty in equity and a court of equity, which this is, will not listen to the Defendant's plea to continue destroying the life of the Plaintiff.

**15.** In the upshot I herewith dismiss the Defendant's Notice of Motion application dated **6th July 2011**.

**16.** Both parties having so lost their various applications I shall make no orders on costs and allow parties to bear own costs.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 20TH DAY OF SEPTEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**
**PRESENT:**

*Captain Wafubwa in person*

*Mungai H/B for Mando for the Defendant*

*Teresia – Court Clerk*