



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO.763 OF 2009**

**SUSAN WAMUCII.....PLAINTIFF**

**VERSUS**

**EAST AFRICA BUILDING SOCIETY.....DEFENDANT**

**RULING**

The Applicant in the Chamber Summons dated 30<sup>th</sup> November 2010 is the Defendant in this suit. It has moved the court **under Order VI rule 13 (1) (d) of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act** seeking orders for the striking out of the Plaintiff and the dismissal of the Plaintiff's suit, which was filed to restrain the Applicant from exercising its statutory power of sale over Land parcel **NO. NAIROBI/BLOCCK 82/2615 GREENFIELDS**, which property had been charged by the respondent's husband to the Defendant/Applicant.

The application, which is premised on 4 grounds as set out on the face thereof, and supported by the affidavit of Caroline Mbenge, the Legal Manager of the Defendant, is intended for the final determination of the suit herein on the basis that the same is an abuse of the process of the court. The Plaintiff's position is that the Respondent has no right and/or interest in the suit premises which have since been transferred to and registered in the name of a third party subsequent upon an order of this court, dismissing the Respondent's injunction application dated 15<sup>th</sup> October 2009.

The Ruling of the Honourable Justice Koome in this regard is annexed to the Supporting Affidavit as **annexture CM1**. The Applicant contends that since in the said Ruling of the Honourable Judge held as a fact that the Respondent had not established a prima facie case against the Applicant, for reasons that the suit property had already been sold at the time the suit was filed and also that the Plaintiff/Respondent

had not proved any interest in the said property to the satisfaction of the court, the pendency of this suit is unjustified, since, to have the same proceed to hearing is an exercise in futility. The Applicant has argued before me that the relief sought in the Plaint is not available to the Respondent whose claim, if any, ought to be directed at the Chargor or be addressed, if at all, in a pending suit between the Chargor and the Applicant namely **HCCC NO. 287 OF 2007, DANIEL KAMAU MUGAMBI -VS- EAST AFRICAN BUILDING SOCIETY** where the rights of the Applicant under the charge have been challenged

The application is opposed on the strength of for grounds of opposition filed 26<sup>th</sup> January 2011 to the effect that the application is premature, unmerited, and an abuse of the process of the court. Submitting on behalf of the Respondent learned counsel Mr. Wanjau told this court that the suit should be sustained in view of the fact that the Plaint seeks a declaratory order to the effect that the Applicant's action in disposing of the suit property was unprocedural. She submitted that such a declaration is available where a party such as the Respondent has an equitable interest. Counsel did not however define what equitable interest the Respondent herein has, as would defeat the Applicant's rights under the charge. If, as was noted by the Honourable Lady Justice Koome, the Respondent claims entitlement to the suit property under a trust, then her claim should be directed at the Chargor.

I have read the Ruling of Justice Koome delivered on 23<sup>rd</sup> April 2010 which clearly supports the submissions by the counsel for the Applicant herein. I have also perused the Plaint wherein the following prayers are sought.

- a) **A declaration that the Defendants action is unprocedural.**
- b) **A temporary injunction to restrain the Defendants from selling, alienating and or interfering with Plaintiff's matrimonial property NO. LR NAIROBI/BLOCK 82/2616 GREENFIELDS.**
- c) **Costs of the suit.**
- d) **Any other relief the court will deems fit to grant.**

Considering the findings and the decision of Justice Koome, which I totally agree with, I am of the view that the matters raised in the Plaint are *res judicata*. As the Plaint sought a temporary injunction, I am of the view that Lady Justice Koome's order dismissing the application for such relief brought these proceedings to an end and there is nothing pending between the Applicant and the Defendants to warrant the suit being sustained. Furthermore the property in issue, having been transferred to a third party, the Respondent's cause of action, if any, against the Applicant has been overtaken by events. In the circumstances, the application succeeds and the orders sought therein are hereby granted in terms of prayer 1. I order that each party bears its own costs of the application.

**DATED ,SIGNED and DELIVERED at NAIROBI this 17<sup>TH</sup> DAY OF JUNE 2011.**

**M.G. MUGO**

**JUDGE**

In the presence of:

For the Applicant

For the Respondent