



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

**AT NAIROBI**

**CIVIL CASE NO. 1026 OF 2001**

**MICHAEL MUNGAI.....PLAINTIFF**  
**VERSUS**  
**HOUSING FINANCE COMPANY OF KENYA....DEFENDANT**

**RULING**

On 13<sup>th</sup> September, 2011, the Applicant Mr. Michael Mungai, acting in person brought an application expressed to be under the provisions of Section 1 of the Civil Procedure Act, as read with the Penal Code, Section 22 of the Sale of Goods Act, Section 22 of the Transfer of Property Act, Sections 14 and 15 of the Registration of Documents Act, the Registered Lands Act, (“the RLA”) and the Constitution of Kenya. The particular provisions of the Penal code, the RLA, RTA and the Constitution under which the application was premised were never cited.

The application basically sought two prayers:-

- a) that the Hon. Court order the Chief and the police to immediately remove the 3<sup>rd</sup> parties i.e. Cleophas Ogutu and or anybody else claiming through him from the Plaintiff’s/Applicant (Decree holder) matrimonial home situated on Nairobi Block 111/530**
- b) that the Hon. Court order 3<sup>rd</sup> parties Cleophas Ogutu and his lawyer to pay the costs of this application together with any other relief the Hon. Court deems fit to grant the Plaintiff/Applicant (Decree holder) against the 3<sup>rd</sup> parties.**

The application was, inter alia, grounded on the Affidavit of Michael Mungai sworn on 13<sup>th</sup> September, 2011. Mr. Mungai appeared in person and submitted that documents made by transferees lite pendente are void, null and void, illegal, unlawful and actionable, no transaction can take place in the lands office on a property wherein a court has issued orders for maintenance of a status quo and those orders have been duly registered, that in his case there were orders that had been registered against his property, he referred to a faint copy of a search dated 16/10/07, that he had served those orders upon the original Defendants, that the 3<sup>rd</sup> parties Mr. Cleophas Ogutu and Miller & Co. Advocates were intruders because the Chief ( whose name he did not disclose) and the police had facilitated the entry of Mr. Cleophas Ogutu to the property, that the intruders had used forged documents. He confirmed that he had not joined Mr. Ogutu to the proceedings and he never intended to join him or the firm of Ms Miller and Company.

Referring to pages 7 to 17 of exhibit “MM3” as well as page 36, Mr. Mungai submitted that Khaminwa J had found that the documents used by the 3<sup>rd</sup> parties intruders were a fraud and a misrepresentation, that in the Replying Affidavit of Rose Onsare sworn on 29/9/2011, the 3<sup>rd</sup> parties had admitted that they had trespassed to the suit property, that he had demanded that Mr. Ogutu vacates the premises but he had declined to and that is why he had made the present application.

On their part the “3<sup>rd</sup> parties intruders” Mr. Cleophas Ogutu and Miller and Company filed a Replying Affidavit sworn by Rose Onsare on 29/9/2011. Ms Onsare learned Advocate for the “3<sup>rd</sup> parties intruders” opposed the application and submitted that neither Mr. Ogutu nor Miller & Co. were parties to the suit but had only been served with the application, that Miller & Co. (“the advocates”) had only been approached by HFCK to prepare a charge on behalf of Mr. Cleophas Ogutu in January, 2011, that they only acted as agents commissioned to facilitate the conveyance, that they were unaware of the court orders being referred to in the application, that Miller and Ogutu were unable to respond to allegations made in respect of other cases touching on the property, that Ogutu had only purchased the subject property from the registered owner Mr. Christopher Arisa. She therefore asked the court to dismiss the application.

I have read and considered the application, the Affidavit in support, the exhibits attached to the Affidavit in support together with the submissions made by the respective parties.

To begin with, the orders are being sought against persons who are not parties to this suit. The Applicant himself agreed that he had not yet joined Mr. Ogutu or the firm of Ms. Milller and Company to these proceedings. Indeed he insisted that he did not wish to join Mr. Ogutu to the proceedings. Can a court of law properly applying its mind to both substantive and procedural law entertain an application against persons who are not yet parties before it? I think not. Order 1 of the Civil Procedure Rules has given extensive provisions as to who can be parties to proceedings, joinder of parties, 3<sup>rd</sup> parties as well as subsequent parties. The Plaintiff should have first applied to join the persons he refers to as “3<sup>rd</sup> party (intruders/transferee lite pendente) and 3<sup>rd</sup> party (Intruders)” as parties to the suit before seeking to have orders made against them. Seeking orders against persons by only naming them in an application such as the one before me, in my view is not only grossly irregular but would be an abuse of the process of court. Rules of procedure are handmaids of justice, they are enacted for a purpose and until Parliament does away with them, they must, in my view, be strictly complied with for there to be certainty and uniformity in the administration of justice. For the Applicant to fail to join the parties against whom he seeks orders and insist that he does not need to join them, in my view, is not seeking justice but rather clogging it all together. A party must be brought before Court in a regular manner before orders can be sought against such party. On that ground alone the application dated 13/9/011 fails.

On merit, can the orders sought be granted?

I have looked at **Section 1 of the Civil Procedure Act**, the same has no relevance to the prayers sought. **Section 22 of the Sale of Goods Act** deals with the issue of the passing of risk in property. I doubt whether that Act deals with immovable property. In any event, the section does not confer me with any jurisdiction to grant the prayers sought. They relate to the issue of transfer of property to members of a class, execution of registration and refusal to register documents by the registrar. Obviously, they have no relevance to the application before me and if they have, it was not shown.

I have looked at the exhibits referred to as pages 7 to 17 and 36 of “MM3”, nowhere in those orders did Khaminwa J hold that the documents used by the so called 3<sup>rd</sup> parties/intruders were a fraud or misrepresentation.

I have also read **Sections 22 of the Transfer of property Act** as well as **sections 14 and 15 of the Registration of Documents Act Cap 285** of the Laws of Kenya. The said pieces of legislation do not authorize the granting of the prayers sought in this application.

For the foregoing reasons, I hold that the application is bad in law and is accordingly dismissed with costs to Cleophas Ouma Ogutu and Miller and Company Advocates. The Applicant is advised to seek legal advise and if he cannot afford, he could approach legal aid organizations operating in Kenya for assistance. Filing multiple applications will, in my view, do the Applicant no justice but will continue delaying the hearing of the substantive suit from which he can derive substantive justice.

Dated and delivered at Nairobi this 4<sup>th</sup> day of November 2011.

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**JUSTICE**

**A. MABEYA**