



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 563 OF 2006

PAUL HUDSON KAMAU.....PLAINTIFF

- VERSUS -

**HOUSING FINANCE COMPANY OF KENYA
LTD.....DEFENDANT**

RULING

1. On 5th December 2008 this court issued an order in favour of the plaintiff in the following terms;

1. That an injunction be and is hereby issued restraining the Defendant, their agents and/or servants from selling the Plaintiff's property L.R. No.Nairobi/Block 72/2265 Uhuru Gardens pending the determination of this suit.
2. That the Plaintiff do deposit with this court within 30 days from now the sum of Kshs. 166,739/54 which he has admitted is the amount owing to the Defendant.
3. That the Plaintiff to continue paying the agreed monthly repayment of Kshs. 19,445/- until further orders of this court or on application.
4. That this suit be set down for hearing on priority.

On 19th March 2009, the defendant filed a notice of motion of even date praying that the above order of injunction be discharged and that the defendant be at liberty to proceed with the sale of the plaintiff's property known as LR No Nairobi/Block 72/2265 Uhuru Gardens by private treaty.

The defendant has a charge over the property and thus wishes to exercise its statutory power of sale. The defendant also prays for costs.

2. The gist of the matter and as buttressed by the affidavit of Joseph Kania of the same date is that the plaintiff has failed to comply with orders number 2 and 3 above. The plaintiff in particular has not paid the sum of Kshs 166,739.54 within the 30 days set out in the order and has only paid 6 of the accrued 19 monthly installments of Kshs 19,445 in contravention of the order. The defendant avers that the debt herein continues to pile up while the plaintiff continues to enjoy the interlocutory injunction and without meeting his part of the bargain in the order. A further affidavit sworn by Migui Mungai on 12th October 2010 attaches a statement of account of the mortgage to support the above assertions by the defendant.

3. The plaintiff opposes the application. I have perused the replying affidavit of the plaintiff sworn on 8th May 2009. He says he has paid the sum of Kshs 166,739.54 into court as required by the order of court of 5th December 2005. A court receipt number B 54790 of 21/1/09 is attached. The writings on it show it was paid by a bankers cheque number 695960 dated 20.1.09. At paragraph 4, the deponent again annexes receipts marked "PHK II" being copies of receipts to show he has been paying and is up to date on the monthly payments of Kshs 19,445. Accordingly, the plaintiff sees no justification for the defendant's application and prays for its dismissal with costs.

4. I have heard the rival arguments and submissions. I have also considered pleadings and record of the court. I take the following view of the matter. It is common ground that that the court order of 5th December 2008 granting a temporary injunction was conditional in that it also required that the plaintiff pay into court the sum of Kshs 166,739.54 within 30 days and to continue paying the sum of Kshs 19,445 per month until further orders of the court. And it has to be because he admitted owing the earlier sum and undertook to continue servicing the mortgage debt. That is why the court found it deserving to grant the injunctive relief. Clearly, if the defendant has not met his part of the bargain in the order, the court would be entitled to discharge the injunctive order. Simply put, the plaintiff cannot have his cake and eat it.

5. The record of the court however shows that the plaintiff did pay into court the sum of Kshs 166,739.54 on 21/1/2009 vide a cheque number 695960 dated 20/1/2009 through his advocates S.W. Ndegwa & Company. That on the face of it may seem outside the 30 days set by the court but I am alive to the provisions in the Civil Procedure Rules of order 50 rule 4 that freeze time on the 21st December every year to 13th January of the coming year. So that amount seems to have been paid in compliance of the order and that limb of the defendant's application fails.

6. With regard to the monthly installments, I note that the plaintiff only annexed 2 receipts for Kshs 19,445 each for 30th January 2009 and 31st March 2009. That replying affidavit annexing those receipts was sworn on 8th May 2009 and filed on even date. But the further affidavit of Migui Mungai sworn on 12th October 2010 has attached a statement of the mortgage account. The column reflecting credits shows the defendant has only paid 6 such installments of Kshs 19,445 on 30th January 2009, 31st March 2009, 30th April 2009, 5th May 2009, 3rd June 2009 and 31st August 2009. The mortgage statement thus gives the plaintiff a credit of Kshs 116,700 for those 6 installments.

7. It is clear that by the time of the filing of the further affidavit of Migui Mungai aforesaid the plaintiff was in default, for a number of months, of the sums specified in the order of court of 5th December 2008. I thus find that the plaintiff is in contravention of the order numbered 3 in the order of court of 5th December 2008. Even by the time of the notice of motion dated 19th March 2009, the plaintiff had defaulted on his payment for February 2009. I am of the considered opinion that the plaintiff's conduct in defaulting on the monthly payments that were ordered by the court disentitles him to the prerogative and discretionary order of injunction granted to him on 5th December 2008. The overriding objective of

the court is to do substantial justice to the parties in every case. The dictates of justice in this case demand that the plaintiff, in the circumstances, be denied enjoyment of the injunctive relief which was conditional upon his payment of the sums at clauses 2 and 3 of the order of 5th December 2008.

8. For all the above reason I allow the defendant's notice of motion dated 19th March 2009 and order that the interlocutory injunction granted by this Honourable court on 5th December 2008 be and is hereby discharged. The defendant is at liberty to take further action to realize its security over LR No Nairobi/BLOCK 72/2265 Uhuru Gardens. Costs of the motion are awarded to the defendant in any event.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 4th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Ms Nyoike for Ndegwa for the Plaintiff.

No appearance. for the Defendant.