

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Commercial Civil Case 66 of 2001

GUADSON KIRAGU KARANI.....APPLICANT
VS
BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT
BELL & HAMMER GE. MERCHANTS LTD.....2ND DEFENDANT
WANJAMA KIHARA.....3RD DEFENDANT
KENETH CHUAGA.....4TH DEFENDANT
JOHN KIMWAMA.....5TH DEFENDANT
RULING

This is the Plaintiff's application dated 15/7/2003 which was heard by Justice Mitey in the same year. The Judge retired before he delivered the ruling. I have taken over the matter to write and deliver the pending ruling.

The application is brought under Order 37 Rule 2 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. It seeks for stay of proceedings in SPM CC No.150 of 2001 pending the hearing and determination of Bungoma HCCC No.66 of 2001. The facts leading to this application may be summarized as follows: The land of the Applicant East Bukusu/S. Kanduyi/1078 was charged by Barclays Bank of Kenya Ltd for a loan advanced to the Applicant. The Applicant defaulted in repayment and the bank sold the land. The Respondent herein bought the land through public auction on 26/5/2000. The Applicant has challenged the legality of the sale of his land in this suit. In his plaint dated 19th April 2001 and filed in court on 23rd April 2001, the Plaintiff prays for nullification of sale and cancellation of the Respondent's title. In the alternative, he prays for orders that the Respondent compensates him for the land at full market value. The Respondent has filed SPM CC No.150 of 2001 seeking for eviction orders against the Applicant. It is this lower court suit that, this application seeks to stay. Mr. Onyando argued the application on behalf of the Applicant.

The application was vehemently opposed by the Respondent relying on his replying affidavit. Mr. Ocharo submitted that the application is defective. It is in the form of Chamber Summons instead of Notice of Motion contrary to the provisions of Order 50 Rule 1. The sale by public auction was valid in that all the procedures were followed. The public auction has not been challenged. The two suits referred to were filed about 2 ½ years ago and as such this application has come a bit late

in the day.

The issue of Mr. Ocharo swearing the replying affidavit were raised by Mr. Onyando who argued that the respondent ought to have sworn it himself.

The order under which the application is brought does not provide for the manner in which the application to stay a suit should be brought. The Applicant ought to have resorted to Order 50 Rule 1 which provides that the mode should be through a Notice of Motion. Bringing it in way of Chamber Summons is erroneous. This is a defect that is not curable in that it relates to non-compliance with the law. The Applicant does not challenge the right of the 1st Defendant, Barclays Bank to foreclose the charge. The legality of the sale by public auction is not questioned in this suit. The Applicant instead, complains that his land was sold at a throw away price. I do not think that this allegation even if it is proved in the suit is likely to affect the title of the 3rd Defendant/Respondent herein. I am not convinced that there is any justification to say SPM CC No.150 of 2001.

For the foregoing reasons, I find no merit in the application and dismiss it with costs.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 29th day of April, 2010.
In the presence of Mr. Ocharo for the Respondent.