



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

Civil Appeal 06 of 2010

JOHN WAMBUA KIILU.....APPELLANT

VERSUS

CAPTAIN JAMES NYONGESA WAFUBWA.....RESPONDENT

RULING

1. By a notice of motion dated 15th January, 2010, John Wambua Kiilu who is the appellant in this appeal seeks an order of stay of execution of the order issued on 6th January, 2010 in Milimani CMCC No.4964 of 2009 pending the hearing and determination of his appeal. The appellant also seeks an order of temporary injunction restraining the respondent Captain James Nyongesa Wafubwa from trespassing onto or taking over possession of or being on LR No.209/10481/85 or the house built thereon (hereinafter referred to as the suit property), pending the hearing and determination of his appeal.

2. The appellant maintains that the order issued on 6th January, 2010 in the subordinate court was ambiguous, unclear and incapable of execution. The appellant is alarmed that the respondent whose title to the suit property has been extinguished through the exercise of the chargee's statutory power of sale is attempting to use the order issued on 6th January, 2010 to regain entry into the suit property. The appellant contends that he is the registered proprietor of the suit property, and that the respondent was evicted from the suit property on 21st August, 2009 pursuant to orders issued in Milimani CMCC No.4964 of 2009.

3. The appellant further depones that the ruling issued on 6th January, 2010 directed the status quo obtaining in the premises as at 21st August, 2009 to be maintained. The appellant maintained that the status quo obtaining was that he was in possession. The appellant further contends that he has a good appeal and therefore the respondent should be restrained from taking possession of the suit premises pending the hearing and determination of the appeal.

4. In response to the application, the respondent filed grounds of objection and a supporting affidavit. The respondent maintained that he was the registered proprietor of LR No.209/10481/85, and that the appellant had him evicted from the suit property through an ex-parte order. He maintained that the appellant had caused the lower court file to disappear. In his submissions before me the respondent maintained that the order issued by the lower court on 21st August, 2009 was null and void as the court lacked jurisdiction to hear the matter. He maintained that the appeal before this court was also a nullity.

5. The respondent further submitted that jurisdiction to hear a dispute between a chargor, chargee and a purchaser is one vested in the High Court by virtue of Section 3(1) of the Mortgages Special Provisions Act (Cap 304). The respondent contended that the trial magistrate lacked pecuniary jurisdiction as provided under Section 5(1) of the Magistrate's Courts Act to hear the dispute as the suit property was valued at over Kshs.4.5 million.

6. The respondent further pointed out that the appellant ought to have brought his suit by way of an originating summons under Order XXXVI Rule 3 of the Civil Procedure Rules and not by way of plaint as he did. The respondent referred the court to Section 12 of the Registered Land Act Cap 300, under which he claimed all titles issued under the Registration of Titles Act Cap 281 are deemed to be titles under Cap 300 and therefore that Act applies to the suit property which was registered under the Registration of Titles Act. The respondent submitted that under Section 73 of the Registered Lands Act, the bank had no right to transfer his property, and that the transfer had to be done by himself as the proprietor. He maintained that Housing Finance Corporation of Kenya as a Mortgage Finance Institution was limited in law and could not transfer the certificate of title to a purchaser.

7. The respondent contended that under Section 15 of the Banking Act Housing Finance Company of Kenya had only powers to finance land. He maintained that in this case, the bank only transferred the charge to the appellant and not the land. Finally, the

respondent submitted that Housing Finance Company of Kenya having exercised its powers of sale on 8th November, 1996, the transfer of the charge to the appellant was illegal as Housing Finance Company of Kenya's only recourse was to sue the respondent for recovery of the money. The respondent therefore urged the court to dismiss the application and strike out the appeal.

8. In reply to the respondent's submissions counsel for the appellant submitted that the jurisdiction of the High Court to quash proceedings was only available in judicial review. He pointed out that the dispute in the lower court was not ownership, as the issue of ownership of the suit property and the bank's right to sell the suit property was settled in High Court Miscellaneous No.660 of 1997. Counsel for the appellant maintained that the bank could only charge or discharge the suit property but it could not transfer the charge. This court was urged to address its mind to the order of 6th January, 2010 and grant the application sought.

9. I have given due consideration to the application and the submissions made before me. I find that it is clear from the annexures to the affidavit and the replying affidavit that the respondent was the registered owner of the suit property and that the suit property was charged to Housing Finance Company of Kenya. On 21st April, 2009, a transfer to the appellant freed and discharged from all encumbrances was registered. That transfer is still in effect. It is also apparent that the appellant sued the respondent in the magistrate's court at Nairobi in CMCC No.4964 of 2009 seeking orders of vacant possession of the suit property and that pursuant to orders issued by the lower court, the respondent was evicted from the suit premises on 21st August, 2009.

10. It is evident that a lot of issues have been raised concerning the order issued on 6th January, 2010 in Milimani CMCC No.4964 of 2009. Neither party appears to be happy with the order. I do note however that the appeal which is pending before this court raises issues concerning the jurisdiction of the court, and the competence and propriety of the order of 6th January, 2010. Although these issues were addressed by the respondent at length, it would be premature at this stage to deal with the issues.

11. Further, in the light of the ambiguity of the order of 6th January, 2010 an order of stay of execution would not be of much use. I am satisfied however that the appellant has satisfied this court that the status quo as of now is that the appellant is the registered proprietor of the suit property and is also in possession. It is therefore fair and just that that status quo be maintained pending the hearing and determination of the appeal.

12. Accordingly, I make the following orders:

- (i) That an order of temporary injunction restraining the respondent from trespassing onto, or taking over possession of the suit property shall issue pending the hearing and determination of the appeal.
- (ii) That the appellant shall file and serve a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.
- (iii) That in the event that the appeal is not disposed of within 12 months from the date hereof, the order of temporary injunction shall lapse unless otherwise extended by the court.
- (iv) Costs of this application shall be in the appeal.

Dated and delivered this 16th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Respondent present in person

Eric - Court clerk