



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

**MILIMANI LAW COURTS**

**Civil Appeal 714 of 2005**

**BERNARD MBUGUA KINYANJUI.....APPELLANT**

**AND**

**GEORGE GATHITU WAINAINA.....RESPONDENT**

**RULING**

1. This ruling relates to a Preliminary Objection dated 14/10/2009 to the effect that the Appellant herein does not have a cause of action against the Respondent. The Respondent contends that the suit premises herein were bought by the Respondent at a public auction conducted on behalf of the Barclays Bank of Kenya Limited and that thereafter the Appellant who was in occupation of the suit premises was evicted therefrom. Title of the suit premises was then transferred into the Respondent's name and a new title issued in the Respondents favour.
2. The argument put forth to support the Respondents Preliminary Objection is that the only remedy available to the Appellant is against Barclays Bank of Kenya Limited as mortgagee who sold the suit premises in the exercise of its statutory power of sale. It was submitted further that in the circumstances of this case, this court cannot interfere with the Respondents title. Counsel for the Respondent relied on **Nairobi Civil Appeal No. 254 of 1999 between Downhill Limited and Harith Ali El-Busaidy & Another (Court of Appeal)**. In the case, the High Court (Mitey, J) restrained the Appellant from transferring alienating or otherwise dealing with or interfering in any manner with **Harith El-Busaidys** possession or occupation of a piece of land known as plot LR No. 1870/IV/175 Pilipili Road Westlands Nairobi (the suit premises) pending the hearing and determination of the suit filed by Harith El-Busaidy.
3. Harith El-Busaidy was a borrower who until 21/07/1997 was the registered proprietor of the suit premises. In August 1994 he borrowed some money from Barclays (BBK) Bank of Kenya Limited and secured the loan with a charge over the suit premises in favour of BBK under the provisions of the Transfer of Property Act, 1882 (the TPA). The borrower defaulted in loan repayments and was accordingly notified by BBK of its intention to realize its security by the exercise of its power of sale. The suit premises were sold to the Appellant at a public auction on 12/06/1997. The Appellant was the highest bidder.
4. It was the sale and the subsequent attempts at eviction that prompted the borrower to commence proceedings against the Respondents in that case. On appeal against the High Court ruling in favour of the borrower and applying the provisions of Section 69 B(2) of the TPA, the Court of Appeal held that the borrower had no claim against the Respondents in the case, whether or not there was fraud and that the law gave the borrower only one remedy against BBK for the specific relief of damages, and not any other relief.
5. There are on this file two pending applications. One of the applications is a chamber summons 28/04/2008 brought by the Appellant herein under the provisions of Section 5 of the Judicature Act, seeking to commit the Respondent herein to civil jail for contempt

of court orders made by this Honourable Court on 30/09/2005. That application is yet to be prosecuted.

6. The second application is the chamber summons dated 25/04/2009 brought under Order 3 Rule 12(1) of the Civil Procedure Rules by M/s Kaai & Mugambi & Co. Advocates seeking to be granted leave to cease from acting for the Appellant in this matter. That application is also yet to be heard and determined.
7. The two applications have been fixed for hearing at different times but for one reason or another they have never been heard. On the 20/11/2009, representatives of counsel for both parties appeared at the registry and fixed the Preliminary Objection dated 14/10/2009 for hearing on the 01/02/2010. On 01/02/2010 the Appellant and his counsel failed to turn up to defend the Preliminary Objection.
8. Taking all the circumstances of this case into account, and the fact that the Appellant seems to have lost interest in his case, and also considering the law as set out in the **El-Busaidy case**, I find no justification for keeping this appeal alive on the court records.
9. Accordingly, the Respondent's Preliminary Objection dated 14/10/2010 is sustained. I find that the Appellant did not and does not have a cause of action against the Respondent herein.
10. The appeal is hereby struck out with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of May, 2010.**

**R.N. SITATI**

**JUDGE**

**Read and Delivered in the presence of:-**

M/s Kaai Mugambi (absent) duly served for the Appellant

Mr. K.G. Mwangi (present).for the Respondent

Weche – court clerk