



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

**CIVIL CASE NO. 149 OF 2008**

**CYRUS NYAGA KABUTE.....PLAIANTIFF**

**VERSUS**

**HOUSING FINANCE CO. LTD.....1<sup>ST</sup> DEFENDANT**  
**JACINTA W. MACHARIA... ..2<sup>ND</sup> DEFENDANT**  
**GARAM INVESTMENTS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Application at bar is the one dated 31.10.08 in which the Applicant seeks the following orders.

1. ***That the defendant/Respondents by themselves, their agents and/or servants be restrained by way of an injunction as against transferring and/or making any further dealings on land parcel No. LR. GICHUGU/SETTLEMENT/SCHEME/232 Kirinyaga District pending the hearing of this Application inter partes and thereafter the main suit.***
2. ***That the honourable court be pleased to order an independent valuation of land parcel No. GICHUGU/SETTLEMENT SCHEME/232 Kirinyaga District in an alleged exercise of power of sale which had not accrued.***

The same is premised on five grounds on its face and the supporting affidavit of the Applicant dated 3.11.08. His affidavit and the said grounds appear to raise 2 issues. Firstly that he cleared the loan which he says he had borrowed from the 1<sup>st</sup> defendant on 4.03.1998. He says that the said loan was cleared in **Civil Case No. 4610 of 1990**. He is therefore denying owing the 1<sup>st</sup> defendant any outstanding loan.

Secondly, he deposes that he was not given the statutory 90 days notice before the 1<sup>st</sup> defendant purported to exercise it's power of sale over the property; and thirdly, that the property was sold at a throw away price of 3.1. million instead of 11.5 million which he says is the current market value. The 1<sup>st</sup> defendant "**HOUSING FINANCE CO-OP OF KENYA**" through its manager legal services Mr. Joseph Kania in his replying affidavit dated 11.12.08 has deposed that this matter has been arbitrated on severally before up to the Court of Appeal level and the Plaintiff/Applicant has always lost. He has annexed several pleadings and orders from the other courts showing that the matter has been heard and determined before. I have painstakingly gone through the said cases and other than changes in the defendants, the subject matter has been exactly the same. The 1<sup>st</sup> Respondent therefore maintains that the application should be dismissed as the Applicant is misusing or abusing the court process. In one of the cases referred to by the 1<sup>st</sup> Respondent which I believe is the latest one i.e. **COURT OF APPEAL CIVIL CASE NO. 288/2007**, whose Ruling was delivered on 29.05.09 (when this application was still pending), the Court of Appeal dismissed a similar Application for injunction seeking injunctive orders.

In his further affidavit dated 9<sup>th</sup> October 2009, the representative of the 1<sup>st</sup> defendant annexed a copy of the statutory notice and notification of sale and the 45 days redemption notice which 3<sup>rd</sup> Respondent is said to have served, on the Applicant herein. The second respondent urged that the

Application should be dismissed and cited several authorities in support of their argument. The plaintiff/Applicant's submission were to the effect that the applicant was not properly served with the notification of sale. The Applicant's counsel has also submitted that the 1<sup>st</sup> Respondent's power of sale does not accrue unless and until there is a default in payment. On this point however, I believe that the matter was settled by the Court of Appeal in No HCCC No. 4610/1990 when it found that the applicant herein still owed the 1<sup>st</sup> Respondent and that the only way he could redeem his property was to pay the balance of the loan together with the accrued interest.

Hon. Judge Kasango in her judgment delivered on 14.12.06 in respect of the same property made a finding to the effect that

***“The plaintiff did not prove to this court that he paid the amount at the time it was stated to be owed...”***

even as of now, that the plaintiff/Applicant truly owes money to the 1<sup>st</sup> Respondent is not in dispute. Indeed even as at the time the Court of Appeal delivered its judgment in Civil Appeal No. 158/1996 the property in question was in possession of the 1<sup>st</sup> Respondent pursuant to the decree dated 22.07.97 which the Court of Appeal declined to upset. All the subsequent cases which have been annexed here show that the Applicant still has not settled the loan. In those circumstances then, should the mortgagee be restrained from exercising his power of sale? In the case of **MIRAO VS FIRST AMERICAN BANK OF KENYA & 2 OTHERS, (2003) KLR 127**, the Court of Appeal held:- ***“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has began redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however, if the mortgagor pays the amount claimed into court ... that is the amount which the mortgagee claims to be owed to him, unless on the terms of the mortgage, the claim is excessive”***

In Judge Kasongo's judgment, she mentioned obiter that the Applicant owed KSh.16,116,417.35 as at 31.12.05. That is a large amount of money and five years down the line, there is no evidence that the Applicant has done anything to off set it. According to the notification of sale, the amount claimed is KShs.21,436,586.45. Even, as the plaintiff/Applicant asks for Accounts – which were indeed availed before Judge Kasango and there is no evidence that he has paid any money since then, he has not made any undertaking to off set the debt. All he wants is the court to grant the injunction and thus perpetuate this matter ad infinitum as he continues to file a multiplicity of suits.

I am not satisfied that the Applicant has established a prima facie case with any probability of success as required. He does not deserve any injunctive orders. On the prayer that the court orders a valuation of the property, I note that there is no such prayer in his suit and he cannot therefore seek the same by way of an interlocutory application.

After considering the application in question along with the rival affidavits and the annexures thereto and the very able submissions by counsel herein, I find myself completely and totally unable to exercise my discretion in favour of the Applicant. He clearly does not deserve it. I find his application unmerited and I hereby dismiss the same with costs to the Respondents.

**W. KARANJA  
JUDGE**

Delivered, dated and signed at Embu this 13th day of October 2010.

**In presence of:- Mr. Njage for Plaintiff/Applicant, Mr.**

**Magee for Mr. Nyaga for 2<sup>nd</sup> Respondent.**