



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 62 of 2007

SAMWEL ABDUL RUMO APPELLANT

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED 1ST RESPONDENT

MANAGER HOUSING FINANCE COMPANY (K) 2ND RESPONDENT

RULING.

In 1999, the appellant filed **Civil Suit No. 66 of 1999** in the Senior Principal Magistrate's Court at Migori. The defendants therein were named as Housing Finance Company of Kenya Limited and the Manager Housing Finance Company (k) Limited. He sought the following orders:

“1. A permanent injunction restraining the defendants from selling the plaintiff's parcel No. SUNA EAST/WASWETA I/6868.

2. Declaratory Order that the loan facilities advanced to the plaintiff is fully repaid.

3. An order directing the defendants to release the title documents of the said parcel of land to the plaintiff.”

The case was fully heard and a considered judgment delivered on 12th September, 2006 wherein the suit was dismissed with costs.

The court observed that the appellant was in substantial arrears of his loan repayment. As at the time of the hearing the loan account was in arrears of over Kshs. 5 million.

The appellant filed an appeal against the aforesaid judgment.

The same was filed on 4th May, 2007. The court had granted leave to file the appeal out of time. No step was taken by the appellant towards prosecution of the appeal. The appellant did not even file a certified copy of the decree appealed against as required under **Order XLI rule 1A** of the **Civil Procedure Rules** and as such the appeal has not even been admitted.

On 20th April, 2009 M/s Sadique Enterprises, Auctioneers, sent a notice to the appellant that they will sell by Public Auction the appellant's property known as **L.R. NO. SUNA EAST/WASWETA I/6868**,

herein after referred to as “**the charged property**” on 22nd May, 2009.

The appellant was further advised that the advertisement of the sale was scheduled to run in one of the daily newspapers on 4th May, 2009.

To forestall the intended auction, the applicant filed an application seeking stay of sale of the charged property. The application was filed on 19th May, 2009, barely 3 days from the date of the intended sale. In his purported affidavit in support of the application, the appellant alleged that no action had been taken on the appeal because his advocate, Mr. Charles Ochieng, has been ailing. The appellant had now appointed an additional advocate, Mr. Odero, to help Mr. Ochieng in the appeal. I call it a purported affidavit because the document that is entitled “**Supporting Affidavit**” is not signed by the appellant and cannot therefore qualify to be called an affidavit. An affidavit is a declaration in writing duly signed or thumb printed by the maker before a person authorized to administer Oaths. I do not understand how Mr. Kerario Marwa, Commissioner for Oaths, purported to Commission such a document. The purported affidavit must be struck out which I hereby do. The application by way of Notice of Motion cannot stand unsupported by an affidavit and must also fall.

But even if the purported affidavit was a valid one, the contents thereof cannot entitle the appellant to any discretionary relief as sought in his application. The appellant alleged that the appeal has high chances of success and that he has been making periodical deposits in cash. However, the only evidence of such payments amounts to Kshs. 16,500/= being Kshs. 10,000/= deposited on 2nd February, 2009 and Kshs. 6,500/= deposited on 26th February, 2009.

If any other deposit was made between the date of delivery of the lower court judgment in September 2006 and February 2009, no evidence to that effect was demonstrated. The appellant has not been diligent in servicing his loan.

There has also been undue delay in making an application for stay of the sale. Even if Mr. Charles Ochieng Advocate has been ailing, the appellant ought to have instructed another advocate much earlier. There is no demonstration of good faith when a party runs to court three days before the date of an intended auction and try to whip up court sympathy, when all along he was aware of the advertised sale.

For the aforesaid reasons, the appellant’s application is bad in law and wanting in merits and is struck out.

DATED, SIGNED AND DELIVERED AT KISII IN THIS 21ST DAY OF MAY, 2009.

D. MUSINGA

JUDGE.