



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 1026 of 2001**

**MICHAEL MUNGAI .....**  
**PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. OF KENYA LTD. .... 1<sup>ST</sup> DEFENDANT**

**KENYA BUILDING SOCIETY LTD. .... 2<sup>ND</sup> DEFENDANT**

**TAIFA AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**CHRISTOPHER AVISA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

On 28/5/2009 the plaintiff/applicant wished to argue his 3 applications at the same time namely; Application dated 4/5/2007. This application is brought under Order XXXI, Order XXXV, Order XXXIX Section 3A Civil Procedure Code and Section 23, 51 and 52 Sale of Goods Act, Cap. 31, Laws of Kenya. The application was headed: "Request for judgment". The prayers sought:-

- 1. Court grant 6 prayers contained in undefended further plaint dated 19/10/2001;*
- 2. The court do order defendants to immediately vacate the suit premises;*
- 3. The court do admit the accounts and bills filed by plaintiff and accepted by defendants.*

It is to be noted that the further undefended plaint dated 19/10/2001

was struck out on 25/2/2003 by order of court (Osiemo, J.) as against 4<sup>th</sup> defendant. To this application, an affidavit is filed by Joseph Kania, Legal Officer, Housing Finance Company of Kenya Ltd.. The 6 prayers stated are:-

- 1. Declaration that the sale of L.R. No. Nairobi/Block 111/530 was illegal;*
- 2. A declaration that the defendant's actions before providing the statement as requested by plaintiff were illegal;*
- 3. Order that 1<sup>st</sup> and 2<sup>nd</sup> defendants acted illegally and order the transfer of property Nairobi/Block 111/530 to the plaintiff;*

4. *Order punitive and compensatory damage or general damages for their misdeeds;*
5. *Order for accounts to be done and 1<sup>st</sup> and 2<sup>nd</sup> defendants to refund all sums that the plaintiff has paid to them above sale price of house No.283 in 1989.*
6. *That costs be granted to plaintiff.*

There is a party and party bill drawn by 4<sup>th</sup> defendant dated 11/3/2003.

It is not clear if it is taxed. To this application is filed a replying affidavit sworn by Joseph Kania as mentioned above sworn on 16/6/2007. The deponent narrates the history of the relationship between the defendants, Housing Finance Company of Kenya Ltd. and the plaintiff and his wife Nancy Wanjeri Nguni since 22/5/1991 when they were jointly advanced a loan of Kshs.282,060/= for security of a charge on property Nairobi/Block 111/530. The charge is exhibit as "JK1".

Later chargee issued statutory notice to the wife Nancy Wanjeri Nguni under Section 74 Registered Land Act, Cap.300 on 13/7/1999. On the ground of default of payment the notice is exhibited as "JK2". Thereafter third defendant made arrangements and auctioned the property on 28/6/2001 when the 4<sup>th</sup> defendant, Christopher Avisa purchased the property. Exhibited is:-

1. *Certificate of sale*
2. *Certificate of lease*

The plaintiff thereafter filed this suit which was duly struck out with

costs under decree exhibit "JK 5". Attached exhibit is a copy of a decree made on 25<sup>th</sup> February 2003 and issued on 19/11/2003. In that document this suit was struck out against 4<sup>th</sup> defendant with costs to 4<sup>th</sup> defendant. I do not see any appeal filed against the dismissal.

In the circumstances, no orders can be issued against 4<sup>th</sup> defendant who is now registered owner of the property on a suit which is already dismissed against him. There is no appeal filed against the dismissal. I have already pointed out that the Further Amended Plaintiff was dismissed. In addition, it has to be pointed out that no judgment is given without evidence. Even in undefended cases where the court is asked to assess the amount to be awarded. In this application there is no evidence adduced either at the trial or in formal proof. Therefore no judgment can be entered. This application is for dismissal.

Regarding application dated 15/6/06 which is brought under Order XXI of Civil Procedure Act seeks orders:-

1. *That court do order first defendant HFCK Ltd. to release Kshs.944,000/= deposited with them to cover part of the costs and alternative accommodation pending the reinstatement of the status quo of his matrimonial home on plot No. L.R. Nairobi/Block 111/530 as ordered by court;*
2. *Order directed to Land Registrar to release the lease certificate of the suit property to plaintiff/decree holder and the Police Commissioner be ordered to remove the intruders from the plaintiff's home;*
3. *Pending the final assessment and apportioning of the bills the court issue a warrant to Nyalugunga Traders or any other auctioneers to attach the properties and shares belonging to the defendants for sale to settle the accumulating bills;*
4. *That alternatively the court do appoint receivers to defendant's business premises to settle the bills accruing to plaintiff;*

5. *Costs of this application.*

The grounds are stated. The application is supported by affidavit of plaintiff and annexures. He has attached an order of this High Court dated 13/7/1998 and issued on 10/3/06 in Civil Appeal 335 of 1997 in which the order of Hon. Magistrate, Mrs. Rashid made on 11/12/1997 was set aside. And the court ordered status quo and the said orders shall be reinstated and maintained thus until divorce petition is heard with costs to appellant.

The order of the said magistrate is also attached. Let it be noted that the parties in that appeal are not the same in this application. The defendants named intruders/judgment debtors and are not concerned with the said appeal. Furthermore the plaintiff filed another civil suit HCC No.17/2001 (OS) – Nancy Wanjeri – Petitioner/respondent vs. Michael Mungai – applicant. When the matter appeared before Aluoch, J., the (plaintiff herein) informed the court that his property was sold by his wife to the 4<sup>th</sup> defendant in this case by in June 2001.

It was ordered that application cannot be heard without several interested parties. This was in December 2005. Other annexures are letters to the Managing Director, HFCK Ltd., KCB Ltd. and Christopher, claiming various sums which as of 2/6/2006 amounted to kshs.3.5 billion. These are in respect of HCC No.17 of 2001 (OS). The defendants here were not a party to HCC No.1026/2001 (this case) and execution order in HCCA 335 of 1997. The defendants here were not a party to this suit.

People who are not parties to suit are not liable to pay costs. In addition, in this suit there is no order attached awarding costs to the applicant/plaintiff. Moreover, the facts stated in the grounds stated and presentations attached are not evidence they need to be proved. Therefore, this application is for dismissal. There remains the application dated 23/6/2006 is brought under Order XXI and Order 1 Rule 7, 10 (2) and 21 of Civil Procedure Rules and Civil Procedure Act, Cap. 21 seeking orders as prayed under prayer (a) ..... in breach of High Court process and orders faked and forged documents to transfer a charge and ownership of suit property without consent or authority to oppress the plaintiff prayer (b) the plaintiff prays that the defendants and KCB Ltd. be cited punished for this contempt and other stated crimes be granted to the plaintiff.

Application is supported by documents attached. There is no evidence of order that is breached by the defendants. The provisions invoked are not appropriate and therefore the application is not competent. The defendants were not ordered to restore status quo and the order was made in a divorce appeal. The defendants were dealing with a mortgage property under a charge and did not require any court orders to sell the property. There are no orders served upon the defendants which they failed to obey. Penal notices were not served.

The provisions warranting issuing punishment are not complied with and therefore no orders are made. The application is dismissed. In conclusion the 3 applications filed by the applicant are dismissed with no order as to costs. As I see it from the record, the suit against the 4<sup>th</sup> defendant was dismissed. He is the purchaser of the suit property. However, the prayers contained in Further Amended Plaint dated the 19/10/2001 are still pending against the 4<sup>th</sup> defendants remaining on record which arise out of fraud and misrepresentation need to be set down for hearing as soon as possible.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 21<sup>st</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**