



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 108 of 2008**

1. Land and Environmental Law Division

2. Subject of main suit: Land

LR7752/226

i) Declaration that suit land that was sold privately such sale is null and void

ii) Orders sought by plaintiff/applicant is to nullify sale.

3. Application dated 14 March 2008.

i) Application brought under court vacation rules Wendoh J (19.3.08)

ii) Injunction application 14 March 2008 restraining defendants from selling leasing changing disposing plaintiffs property IR74678

LR7752/226

No orders granted Visram J 26.3.08

iii) Inter parties hearing

a) The two defendants acted in collusion and sold property by private treaty.

4. In reply:

a. The plaintiff/applicant cannot impeach section 69 (b) (2) of the Transfer of Property Act and have possession

b. No prima facie case made out for injunction.

5. Held: Application for injunction dismissed remedy lies in damages

S.69 of the Indian Transfer of Property Act.

6. Case law

a) Yosiya Sajabi v Musa Umar Amreliwalla & Another

b) Related case Hccc110/08

Samuel Githaiga & Ibrahim Kinyua Nganga

V

Njeru Nyaga & Nyaga Kivuti Patrick

7. Statute Law

Mulla on the Transfer of Property Act 1882. Section 69

5<sup>th</sup> Edition.

8. Advocates

F.N Wamalwa for Wamalwa & Co. Advocates for the plaintiff/applicant - present

N.M. Mungai for N.M. Mungai & Co. Advocates for the 1<sup>st</sup> defendant/respondent- present

No appearance for 2<sup>nd</sup> defendant/respondent - absent

**IBRAHIM KINYUA NGANGA ..... PLAINTIFF**

**VERSUS**

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

**NYAGA KIVUITI PATRICK ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Application for injunction dated 14 March 2008**

I: PROCEDURE

1. Ibrahim Kinyua Nganga the plaintiff here herein had a mortgage his property LR7752/226- land for Ksh.1.5 million on 6 July 1999. He default in the payment of the loan then proceeded to discover that his land was secretly sold to Nyaga Kivuti Patrick the 2<sup>nd</sup> defendant herein by the Housing Finance Company of Kenya the 1<sup>st</sup> defendant sometime in the year 2006.

2. He filed Hccc110/08 using the name Samuel Githaiga a person not related to this suit and his name now Ibrahim Kinyua Nganga on the file cover only the name of Samuel Githiga & Another appears. He sued the defendant Njeru M. Nyaga (no connection with this suit) and the buyer Nyaga Kivuti Patrick and the file reflected Njeru M Nyaga and another.

3. On the fact value when the two cases came before court it was difficult to see that they were related. The Hcc110/08 sought injunction against Nyaga Kuvuti Patrick who was the buyer of the plaintiff property from damaging property on the suit land. This application was rejected by court.

4. In this case the issue is one of a declaration that the said defendants sale of the plaintiff property was null and void and the said property should revert to the plaintiff herein. The grounds being that the Housing Finance Co. Ltd and the 2<sup>nd</sup> defendant buyer had colluded in a private treaty to sell the said

property.

II: Application for an injunction 14 March 2008.

5. The plaintiff filed a certificate of urgency to restrain the 1<sup>st</sup> ad 2<sup>nd</sup> defendants from:

**“Selling, leasing changing, disposing the said property LR 7752/226 IR 74678.”**

6. The vacation judge Wendoh J (19.3.08) and Visram J (26.3.08) gave no interim orders for an injunction. The matter was placed for inter parties hearing before this division.

7. The plaintiff applicant argued that he be awarded an injunction on grounds that the sale was null and void and reverts back to him after trial on the main suit. His advocate relied on the case of

**Yosiya Sajabi v Musa Umar Amreliwalla & Another (1956) EACA 71.**

In which it was established that there had been collision between the mortgage and the purchaser and the court held they were both liable in damages.

8. The applicant stated in this application he had made out a prima facie case and that the application be alienated.

9. In response, the respondent stated that the plaintiff/applicant obtained a statutory notice in 2004. The sale by private treaty occurred in 2006. The plaintiff/applicant has made no case to warrant an injunction to issue. Further under section 29 of the Transfer of Property Act 1882 the plaintiff/applicant remedy lies in damages.

## II: Opinion

10. In this matter there has been material non-disclosure by the plaintiff namely that he indeed filed another suit Hccc110/08 related to this current suit. His plaint and verifying affidavit disclose this.

11. Nonetheless the issue before me is whether the plaintiff is entitled to an injunction on grounds of a secrete sale to a third party without notice to him.

12. In the case law relied on of Yosiya Sajabi v Musa Umar Amreliwalla and another supra, the said secretive sale was made between the owner of the property who had taken out the mortgage and a third party. That is if the plaintiff in this present case had sold the property secretly to a third party then the mortgage in this instance would in effect be concerned and filed suit.

13. The court ruled that damages can be obtained from both the mortgage and the buyer by the mortgagor.

14. In the Indian Transfer of Property Act Section 69 (1) it state:-

**“A mortgage, or any person acting on behalf shall subject to the powers of this section, have power to sell or concur in selling the mortgage personally of any part thereof in default of payment of the mortgage money without the intervention of the court.**

a) \_\_\_\_\_

b) \_\_\_\_\_

c)

2)

a)

b)

**3) When a sale is made in professed exercise of such a power the title of the purchase shall not be impeachable on grounds that no case had arisen to authorise the sale or that due notice was not given on that the power was otherwise improperly or irregularly exercised, but any person ..... by an authorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power”**

**(Emphasis supplied)**

15. It is therefore noted that section 69 deals with a situation where the owner of the property mortgage sells to a third party irregularly sub rule 3 deals with “any person, ..... by an authorized or improper or irregular exercise of the power of sale.”

16. I would take this to apply to the plaintiff/applicant who complains of an improper sale. His remedy lies in the aspect of damages against the defendant.

17. Consequently I dismiss this application for an injunction on grounds that the issue of damages requires to be perused.

18. Under Section 6 Civil Procure Act I stay the Hccc110/08 pending the finalization of this Hccc108/08 already pending before court.

19. I award costs to the defendant No.1. No costs to defendant No.2 who is absent.

DATED THIS 8<sup>TH</sup> DAY OF APRIL 2008 AT NAIROBI.

M.A. ANGA’WA

JUDGE

F.N. Wamalwa for F.N. Wamalwa & Co. Advocates for the plaintiff/applicant-present

N.M. Mungai for N.M. Mungai & Co. Advocates for the 1<sup>st</sup> defendant/respondent – present

No appearance of 2<sup>nd</sup> defendant/respondent