



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 360 of 2003

STEPHEN BORO GITIHA.....APPELLANT

VERSUS

FAMILY FINANCE BUILDING SOCIETY1ST RESPONDENT

GEORGE MWANGI HIUHU.....2ND RESPONDENT

MUIBAO AGENCIES3RD RESPONDENT

THE LAND REGISTRAR.....4TH RESPONDENT

RULING

The application before court is the Notice of Motion dated 22nd April, 2008. It is an application brought under Section 63(b) and (e) and Section 3A of the Civil Procedure Act. It seeks two substantive orders as follows:

- a) That this honourable court be pleased to order the respondent to deposit the rent proceeds from property L.R 218278 New Huruma Estate to this honourable court from the date of filing Notice of Appeal dated 22nd June, 2004 until full hearing and determination of Appeal No. 173 of 2004 in the Kenya Court of Appeal (Nairobi).
- b) That this honourable court be pleased to order the respondent deposit any other security pending the hearing and determination of the said Appeal

Part of the grounds cited as the basis of this application is fact the Applicant is the duly registered owner of the suit property L.R. No.218278 New Huruma Estate and that the Respondent had refused to give him vacant possession.

The application has been opposed. The Respondent, who is the Plaintiff in the suit, has filed a replying affidavit. Part of the averments in this affidavit include the Plaintiff's contention that the suit property is still registered in his name and as proof of same annexed rates demand note over the suit property sent to him by the City Council of Nairobi.

The Respondent also filed three grounds of opposition to the effect that the application is defective in nature and form, that order sought are not enforceable and that the application has been filed in the wrong file.

I have considered the submissions by Ms Chege for the Applicant and Mr. Kaai for the Respondent together with the application and the pleadings filed in the matter. Having considered the application I find as follows:

Section 63(b) & (e) of Civil Procedure Act applies to orders sought against a Defendant in a suit. The instant application is against the Plaintiff and therefore those provisions do not apply. The Applicant needed to prove ownership of the suit property in order to justify the request for an order for the deposit of rents from the suit property or deposit of security as applied for in the application. No proof of ownership or title to the suit property was annexed.

There is also clear evidence that the Plaintiff has appealed against this courts rulings and orders to the Court of Appeal. That appeal was filed in 2004. The Applicant has therefore not made this application timeously.

More importantly the Applicant has not disclosed whether a similar application was ever made by him to the Court of Appeal. Further there is no disclosure whether the Court of Appeal has made any orders regarding the suit property, which may affect or limit this courts jurisdiction.

Without disclosure concerning these matters and of the position of the appeal before the Appellate court, I find no basis upon which to grant the prayers sought herein.

The application herein is dismissed with costs to the Respondent.

Dated at Nairobi this 13th day of June, 2008.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of:

N/A Ms Chege for Applicant

Mr. Gacheru h/brief for Mr. Kaai for Respondent

LESIT, J.

JUDGE