



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 120 of 2008

LUIS WAHOME JOHNPLAINTIFF

VERSUS

1. HOUSING FINANCE COMPANY OF KENYA (H.F.C.K.) LTD

2. CHRISTINE WAIRIMU MAINADEFENDANT

R U L I N G

Luis Wahome John, the plaintiff/Applicant herein, took out the notice of motion dated 29th September 2008 pursuant to the provisions of Order L rules 1 and 2, Order XLI rules 3 and 4 of the Civil Procedure rules and under sections 3A, 63(e) and 90 of the Civil Procedure Act. In the aforesaid motion, the applicant's main prayer is for an order of stay of execution delivered on 28th August 2008 pending the hearing and determination of the intended appeal. The motion sets out the grounds it is based. It is supported by the affidavit sworn by the applicant. When served with the motion, the defendants filed grounds of opposition to resist the same.

The facts leading to the filing of the motion appear to be short and straight forward. By a plaint dated 15th May 2008, Luis Wahome John, sued Housing Finance Company of Kenya (H.F.C.K.) Ltd and Christine Wairimu Maina, the defendants herein in which he sought for the following orders:-

- a) *A declaration that the charge dated 31st October 1994 and the 1st Defendant's exercise of Statutory Power of Sale in favour of the 2nd Defendant is premature, invalid, illegal, irregular and null and void.*
- b) *A declaration that the transfer of the suit property to the 2nd Defendant by the 1st Defendant in exercise of the Statutory Power of Sale is invalid, premature, illegal and null and void.*
- c) *A declaration that the 2nd Defendant's threat to the plaintiff to render vacant possession of the suit property is invalid, irregular illegal and null and void.*
- d) *A mandatory injunction directed against the 1st and 2nd defendants ordering the transfer of Plot No. 2041 Section I.M.N. in favour of the 1st Defendant be ordered at its own cost to retransfer the property to the plaintiff.*
- e) *An Injunction to restrain the Defendants jointly and severally from evicting the plaintiff from*

the suit premises pending the hearing and final determination of this suit.

f) *Any other relief that this honourable court shall deem fit and expedient to grant.*

g) *Costs of this suit and interest hereon at court fees.*

The applicant also filed a summons of the same date in which he sought for interalia:

Temporary orders of injunction to restrain the defendants from evicting the plaintiff from Plot No. 204, Section I M.N.

When the aforesaid summons came up for interpartes hearing, the defendants raised preliminary points of law in a notice dated 27th May 2008. In that notice they sought for the summons and the entire suit to be struck out. The preliminary objection was argued and upheld. The entire suit and the application were ordered struck out on 28.08.08 with costs to the defendants. Being dissatisfied with the aforesaid decision, the plaintiff filed a notice of appeal to express his intention to challenge the same in the court of Appeal. The Notice of Appeal is dated 10th September 2008. Pending the hearing of the intended appeal, the plaintiff has now come to this court seeking to be granted the order of stay.

It is the submission of Mr. Kadima, learned Counsel for the plaintiff, that the applicant is likely to suffer substantial loss unless the order for stay is granted. It is said that the defendants have through their advocates, Musinga Muniyithya & Co. Advocates threatened to evict and forcefully enter the suit premises. He avers that he will suffer embarrassment and disrepute if the defendants' execute the threat.

Mr. Muniyithya, Learned advocate for the defendants, opposed this ground. He was of the view that the decision of this court cannot be stayed because the same is not capable of execution because there is nothing to execute. Mr. Muniyithya also pointed out that there is no averment that the plaintiff is in occupation of the suit premises; hence he has not shown the substantial loss he would suffer. The defendants urged this court of to find that since the applicant has not sought for leave to appeal, then there is no competent appeal.

I have perused the motion and the supporting affidavit plus the grounds of opposition. I have also taken into account the submissions made by learned counsels on both sides. I have already stated that the plaintiff is before this court seeking for an order of stay pending appeal. The power of this court to grant or refuse such an order is spelt out under Order XLI rule 4 of the Civil Procedure Rules. The court of Appeal restated the applicable principles in Mukuma =vs= Abuoga [1988] K.L.R. at page 646 as follows:

:The granting of a stay of Execution in the High Court is governed by Order XLI rule 4(2), the questions to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security."

Let me now apply the above principles to this matter. The applicant has said that he is likely to suffer substantial loss. The defendants are saying that the applicant has nothing to lose because he does not occupy the suit premises. On the face of the motion the applicant states that he would suffer embarrassment and substantial loss unless the order of stay is given. The affidavit is silent on what kind of loss the applicant is likely to suffer. The law is quite categorical that the kind of loss must be substantial. It was incumbent upon the applicant to prove substantial loss. The loss envisaged must be huge as opposed to any loss. The plaintiff does not state that he resides on the suit land. I am persuaded by the submissions of Mr. Muniyithya that the applicant has failed to prove the substantial loss he would suffer if the order is not given. It was incumbent upon him and his legal advisers to discharge that burden.

The defendants are of the view that the order striking out the entire suit and the application is incapable of execution hence there is nothing to stay. Mr. Kadima did not address me over this submission. I have considered that submission and I am convinced that the order striking out the

application and the suit is not an executory order. There is no order to execute. The order cannot be used to evict the applicant. What the order has done is to strike out the suit and no more. In such cases, the appropriate remedy could be for one to apply for an injunction pending appeal. Even if the order of stay was granted, still the applicant is not safe because there is no order barring the defendants from evicting the plaintiff from the suit premises.

The other principle which must be considered is whether the application was timeously filed. The answer to that can be obtained by perusing the proceedings. It is clear that the order in contention was made on 28th August 2008. The applicant filed a notice of Appeal on 10th September 2008. The notice of motion dated 29th September 2008, the subject matter of this ruling was filed on 29th September 2008. I am convinced that the motion was timeously filed.

The third principle is that the applicant must provide security. I am of the view that this principle can only be considered if the applicant establishes the substantial loss he would suffer if the order is denied.

The defendants have argued that the notice of appeal was filed without seeking for prior leave to appeal. In other words the defendants' contention is that the intended appeal has no chances of success because no leave was sought to lodge the same. I will not venture to consider the same because it would appear that is one of the conditions the court of Appeal would have to consider under rule 5(2) (b) of the Court of Appeal rules. It suffices to state that it was necessary for the applicant to seek prior leave to appeal under section 75 of the Civil Procedure Act and under Order XLII of the Civil Procedure rules in view of the fact that the order was made on the basis of a Preliminary Objection.

In the end I am convinced the motion has no merit. The same is dismissed with costs to the defendants.

Dated and delivered at Mombasa this 31st day of October 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Munyithya for Respondent and

N/A for Kadima.