

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL APPEAL 91 OF 2006

ERASTUS KIAMA GICHUKI APPELLANT

VERSUS

CO-OPERATIVE BANK OF KENYA..... 1ST APPELLANT

JOSEPH GIKONYO T/A GARAM INVESTMENT.....2ND RESPONDENTS

R U L I N G

By a Chamber Summons brought under Order XXXIX rules 1, 2 & 9 of the Civil Procedure Rules Erastus Kiama Gichuki who is the appellant in High Court Civil Appeal No. 91 of 2006 seeks to have the Respondents their agents or servants restrained by way of an injunction from selling, alienating and, or disposing Mweiga/Block 2 (Ikumari) 434 pending the hearing of his appeal.

In the grounds stated on the body of the application the applicant contends that his property Mweiga Block 2 (Ikumari) 434 (hereinafter referred to as suit property) is exposed to sale by the Respondent, and that the applicant has filed an appeal against the Ruling delivered in Nyeri Chief Magistrate's Court Civil Case No. 335 of 2006 rejecting his application for an injunction. The applicant believes that his appeal has overwhelming chances of success and that if the interim injunction is not granted he will suffer irreparable loss and damage.

The application is also supported by an affidavit sworn by the applicant's advocate Muhoho Gichimu the gist of which is that the applicants appeal has overwhelming chances of success and that the appeal will be rendered nugatory unless the orders sought are granted.

The 1st Respondent has strenuously opposed the application. Stephen N. Gakuya the 1st Respondent's Branch Manager has sworn a replying affidavit in which he depones that the application before the court is defective, and that the applicant's appeal has no chances of success as the applicant charged the suit land to the 1st Respondent and has admitted that he still owes the 1st Respondent and therefore the 1st Respondent cannot be stopped from exercising its powers of sale. A number of annexures have been exhibited to confirm the Respondent's contention.

It was further maintained that the applicant was not coming to Equity with clean hands as he has not paid or deposited into court the amount he was disputing as due to the Respondent and that the applicant had failed to honour a promise he had made to pay Kshs.100,000/= in order to have the auction scheduled for 19th May 2006 put off but had instead filed Nyeri Chief Magistrate's Court Civil Case No. 335 of 2006 for interim orders without disclosing the promise he had made. It was therefore contended that the application for injunction was rightly dismissed as no prima facie case had been made out.

I have carefully considered the application the affidavit in support and in reply and the annexures thereto. In the first place the application ought to have been brought under Order XLI rule 4(6) of the Civil Procedure Rules which gives an appellate court powers to grant an order of interlocutory injunction.

Secondly the applicant only relies on an affidavit sworn by its advocate whose main contention is that the applicant's appeal has overwhelming chances of success. The Respondent has however filed a detailed replying affidavit deponing to matters which in its opinion makes the applicant appeal unlikely to succeed. There was no affidavit sworn by the applicant in response to this replying affidavit. Nor was there any affidavit sworn by the applicant to show that he has a prima facie case. In effect therefore the facts before this court are as put by the 1st Respondent. Without going into great details. The facts show that the applicant is seeking an equitable relief but has not come to this court with clean hands.

I find therefore that the applicant has not satisfied this court that he is worthy of this court's discretion. Accordingly I do reject his application for an order of interlocutory injunction pending the hearing of his appeal.

Dated signed and delivered this 15th day of February 2007.

H. M. OKWENGU

JUDGE