

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 133 of 2006

JOHN MUTHINI KAMIAPLAINTIFF

VERSUS

GIRO COMMERCIAL BANK.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO t/a GARAM UNVESTMENTS2ND DEFENDANT

R U L I N G

In a summons dated 19th June, 2006, John Muthini Kamia, the Plaintiff/Applicant herein, prayed for an order of temporary injunction to restrain the 1st and 2nd defendants, namely Giro Commercial Bank Ltd. and Joseph Mungai Gikonyo t/a Garam Investments from selling by public auction or by private treaty or otherwise disposing of in any way plot No. Kwale/Ukunda/3137 pending the hearing and determination of this suit. The summons is expressed to be filed under Order XXXIX rules 1(a), (b), 2, 2A(1), 3 and 9 of the Civil Procedure Rules. The summons is supported by the affidavit of John Muthini Kamia sworn on 19th June 2006.

When served, the defendants filed the replying affidavit of Anurag Svivastava sworn on the 7th day of July 2006. Grounds of opposition of the same date were also filed to resist the plaintiff's application.

The background of this dispute can easily be deduced from the facts deponed on affidavits and pleadings filed before this court. The plaintiff/applicant pledged his title No. Kwale/Ukunda/3137 as security to secure financial facilities from Giro Commercial Bank Ltd. -sometimes in the year 1999. There is evidence that he managed to borrow an overdraft to the tune of Kshs.1,000,000/- and a term loan of Kshs.300,000/-. It would appear the plaintiff continued to pay the agreed monthly instalments up to some stage when he fell into arrears. When the plaintiff fell into arrears, Giro Commercial Bank Ltd. (1st defendant) instructed Joseph Mungai Gikonyo t/a Garam Investments (2nd Defendant) to advertise for sale the aforesaid landed property in an attempt to realize its securities. This action prompted the plaintiff to file this action.

In the summons dated 19th June 2006, the plaintiff has accused the 1st defendant of seeking to realize its securities without issuing the necessary statutory notice under the provisions of section 74 of the Registered Land Act. This assertion is denied by the defendants who in turn claimed that the plaintiff's application is res judicata hence incompetent in view of the fact that a similar application had been filed, argued and later dismissed by the Chief Magistrate's court in Mombasa C.M.C.C.C No.3073 of 2002. when this submission was brought to the attention of this court it became obvious that the same should be disposed of first as a preliminary point. It is not in dispute that the plaintiff had instituted a civil suit against Giro Commercial Bank and Marchet Auctioneers (K) Ltd. vide Mombasa C.M.C.C.C. No. 3073 of 2002 to forestall by an order of injunction the bank from exercising its statutory power of sale. In it a summons dated 30.8.2002 was filed to secure temporary orders of injunction pending the hearing of the aforesaid suit. The summons was dismissed on 23rd October 2002. It is evident that the plaintiff filed an application dated 29.10.2002 seeking for interalia orders to reinstate the dismissed summons dated 30.8.2002 and for further orders of injunction. This application was also dismissed by the Chief Magistrate's Court. Being dissatisfied with the aforesaid decision, the plaintiff filed an appeal vide Mombasa H.C.C.A. No. 203 of 2002. It is admitted that the appeal is still pending for hearing before this

court.

I have intentionally gone into the details of this matter to bring out the real issues on bode. What is clear in my mind is that the plaintiff is not guilty of material non-disclosure. I have been urged to find that the application now before court is res judicata. I do not think that principle is applicable in this matter because the issue is still pending for hearing before this court on appeal. I am however convinced that the principle of res subjudice is applicable in this matter. This court had an occasion to deal with a similar issue in the case of **Abdul Kassim Hassanali Gulamhussein Khaki =vs= Southern Credit Banking Corporation Ltd** (unreported) in which I stayed the suit on the basis that the application was res subjudice. The court of Appeal confirmed the position in the subsequent application **vide Civil Application No. NAI 153 of 2006** between **Abdul Kassim Hassanali Gulamhussein Khaki =vs= Southern Credit Banking Corporation Ltd.**

For the foregoing reasons I am of the considered view that there is no need to go into the merits of the summons. A fair order which I hereby issue is to have the hearing of the application dated 19th June 2006 stayed pursuant to the provisions of section 6 of the Civil Procedure Act pending the hearing and determination of Mombasa H.C.C.A No. 203 of 2002. the interim orders of injunction which were issued exparte are hereby discharged. Costs of the application is awarded to the defendants.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Kipsang for the plaintiff/Respondent

H/b Munyithia for Mrs. Makone for defendant.

Court

Certified copies of the proceedings should be granted on payment of the requisite fees.

Sergon, J