



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 610 of 2005**

**EDWARD KITHINJI RINJAUGU .....PLAINTIFF**

**VERSUS**

**ROSE WAKUTHI MWANGI NJUNU .....DEFENDANT**

**RULING**

The defendant has filed a notice of preliminary objection dated 26<sup>th</sup> April, 2007 in response to the application dated 19<sup>th</sup> February, 2007. The grounds set out in the preliminary objection are:

- (1) That there is a pending earlier filed suit HCCC No.504/2005 between the same parties and on the same subject matter.**
- (2) That there is also the defendant/respondent's Application to implead a 3<sup>rd</sup> party in this case which is also pending and is due for hearing on 18<sup>th</sup> June, 2007.**

**Mr. Mugo** Advocate for the defendant/respondent submitted that there is an application to join **Housing Finance Company of Kenya** which is a proper party to this proceedings. He also mentioned HCCC 504/2005 filed on 16<sup>th</sup> September, 2005 which is pending for hearing and determination. The plaintiff in that case is demanding refund of the monies he had paid plus interest. While in this case the plaintiff is asking for eviction or vacant possession of the suit property. And if the two cases are heard they may embarrass the court. **Mr. Mugo** Advocate contended that such a scenario offends Section 6 of the Civil Procedure Act, which provides that no court shall hear a newly filed suit when there is an old case involving the same parties and same subject matter, pending before the same court for determination.

**Mr. Sharma** Advocate in reply submitted that HCCC 504/2005 is completely different from the present matter. The plaintiffs in both suits are different and the subject matter is different. The earlier suit did not involve vacant possession, which the plaintiff is claiming in the present suit. According to Mr. Sharma, the defendant's preliminary objection is meant to mess up the case of the plaintiff. He asserted that the plaintiff became the owner of the suit property on 12<sup>th</sup> May, 2005 and the balance of the purchase price is held upon getting vacant possession.

Section 6 of the Civil Procedure Act states;

**“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.**

In HCCC 504/2005, the plaintiff is the present defendant in this matter, while the plaintiff in this matter is the 1<sup>st</sup> defendant in the earlier suit. That suit has not been determined fully as far as the issues in contest is concerned. The 1<sup>st</sup> defendant, **Mr. Edward Kithinji** who is asserting a proprietary interest filed a defence and a counterclaim against the present defendant in this matter. He seeks three prayers against the present defendant who is the plaintiff in HCCC No.504/2005. The prayers are:

- (1) A refund of the sum of Kshs 1.5 million paid to M/S Kamotho Maiyo & Mbatia Advocates with commercial interest rates with effect from 8<sup>th</sup> February, 2005 when the said payment was made until payment.**
- (2) The plaintiff (present defendant) should pay commercial interest rates on the sum of Kshs 10.5 million deposited with Mr. Sharma Advocate who was liable to release to H.F.C. K. on completion of the sale and getting vacant possession of the suit property, which never happened.**
- (3) The plaintiff (present defendant) should refund the sum of Kshs 483,270/= being the stamp duty paid on the discharge of charge and the transfer with interest at commercial rates from 17<sup>th</sup> April, 2005 until payment.**

It was also essential to note that the 1<sup>st</sup> defendant in his counterclaim sought a prayer against **Housing Finance Company of Kenya Ltd**, which is;

**“Housing finance Company of Kenya Ltd should refund the sum of Kshs 2 million with commercial interest rates with effect from 21<sup>st</sup> June, 2005 when the payment was made to them until payment.**

The above prayers in HCCC No.504/2005 is still pending for determination between the parties. The impression one gets, looking at the pleadings in HCCC 504/2005 is that the 1<sup>st</sup> defendant in his counterclaim is not interested in the ownership of the suit property. The position taken by the 1<sup>st</sup> defendant in HCCC No.504/2005 is radically and substantially different from the position in the present suit. In the present the plaintiff seeks;

- a) possession of the suit property**
- b) Judgement for Kshs 600,000/= be entered against the defendant for mesne profits from 21<sup>st</sup> June 2005 to 18<sup>th</sup> October 2005 at the rate of Kshs 5000/= per day together with interest thereon at court rates.**
- c) Mesne profits at Kshs 5,000/= per day from the date of filing the suit i.e. 19<sup>th</sup> October, 2005 until delivery of possession.**
- d) Interest on the Mesne profits from the date of filing suit until payment.**
- e) Costs of the suit.**

The most significant question to determine is what happens when a party has put forward two inconsistent causes of actions for determination. The contradiction and the departure of the plaintiff of his earlier pleadings is a grave issue. The question that arises in the circumstances is whether the plaintiff should be allowed to take two contradictory and inconsistent positions in respect of the same subject matter.

It is clear in my mind that in HCCC No.504/2005, the present plaintiff is not interested in vacant possession of the suit property. The intention of the defence and counterclaim in HCCC No.504/2005 shows that the purchaser is not interested in getting vacant possession but is solely concerned with the monies paid in consideration of the purchase/sale of the suit property. The purchaser's Advocate, **Mr. Sharma** has confirmed that he is holding a sum of Kshs 8,500,000/= being substantial part of the

purchase price, whilst the plaintiff seeks in HCCC No.504/2005 that the widow to pay commercial interest rates on the sum of Kshs 10.5 million deposited with **Mr. Sharma**.

In essence the purchaser wants to recover the purchase price plus interest together with the stamp duty through the counterclaim in HCCC No.504/2005, while he seeks vacant possession and eviction in the present suit. In the initial agreement which generated the present dispute the husband of the defendant was to receive a sum of Kshs 1.5 million in consideration of giving vacant possession. There is ample evidence to show that the late **Njunu** and his family did not receive the consideration sum for giving vacant possession. It is also clear that the balance of the purchase price which was supposed to be paid over to HFCK is still kept by the Advocate for the alleged purchaser. According to the sale agreement, the balance of the purchase price was supposed to be paid over to H.F.C.K. who had agreed to utilize the same to pay off such balances as may otherwise have been outstanding in the account of the late **Njunu**. That was not done despite the property being transferred to the purchaser.

It is not clear why H.F.C.K. was agreeing to share the proceeds from the charged property with the chargor, unless the purpose was to close the account of the charger. Unfortunately the chargor passed before the completion of the sale agreement and before he could derive some beneficial interest from the deal. There is no evidence to show that the loan account had been subsequently closed. There is even an allegation that H.F.C.K. received substantial sums of money from an Insurance Company concerning the subject in issue.

In refusing an application for vacant possession in this matter, **Justice Ochieng** had this to say;

**“Of course I appreciate the plaintiff’s contention that he has been always been ready and asking to remit payment of the said balance of the purchase price. The question that arises in the circumstances is whether the plaintiff should get vacant possession before he remits payments to H.F.C.K., would that be an act of compliance with the terms of the agreement for sale. Whilst it may not be the obligation of the defendant to ensure that H.F.C.K. was paid off, the agreement for sale which the plaintiff is seeking to have specifically performed stipulates that vacant possession would be handed over on the completion date upon payment of the full purchase price. That appears to suggest that the payment of the full purchase price was a pre-requisite to the handing over of suit property in vacant possession”.**

In my view the procedure employed by the plaintiff smacks of a process meant to embarrass the cause of justice. The plaintiff has not come to court with clean hands while he is accusing the defendant of impropriety. The plaintiff on one hand is asking for a refund of the monies paid in purchase of the suit property, while on the other hand he is seeking an eviction order against the defendant herein. More worse the plaintiff is keeping substantial part of the purchase price while he seeks to enforce proprietary rights under the title he has acquired. I think such double action is unacceptable and contrary to the principles of justice and fairness. I do not understand what gives the plaintiff herein a better title than the defendants when he has not fulfilled his part of the obligation. The plaintiff has refused to pay the balance of the purchase price despite several reminders from the Advocates then on record for H.F.C.K. I do not think a court of justice can allow the plaintiff to take some beneficial advantage from his own fault. I am not in any way saying the defendant is blameless but the parties must bring both the chicken and eggs home at the same time. The matter which can determine the blame worthiness of the parties is HCCC 504/2005 which was earlier filed and which contains the full and clear details of the rights and liabilities of the parties.

I appreciate that in HCCC No.504/2005, the defendant herein lost her application for injunction both in the High Court and in the Court of Appeal. But I do not think that determination confined the defendant to certain death and despair of her rights.

In conclusion, I do not sincerely think the plaintiff can be entitled to sustain the present suit when he has taken divergent and contradictory position in the earlier suit. In my view it is preposterous notion to say that since the property is registered in the names of the plaintiff herein, he is Ipso facto entitled to an eviction order against the defendant herein. That notion exists and has thrived because the legal regime in

this country is heavily tilted in favour of the banks and persons who purchase properties through a public auction or a private treaty due to the default of the borrowers. The attitude of the financial institutions towards borrowers has been irritatingly obnoxious and demeaning. This matter clearly shows how the bank has been oblivious to the interests and well being of the family of the late **Mr. Njunu**. That kind of oblivion on the part of financial institution may obliterate public confidence towards our financial institutions. In my view the banks have had a stimulating, infallible and insatiable appetite for the sale of the charged property the moment there is the slightest default.

In short the present suit seeking vacant possession of the suit property is contrary to the provisions of Section 6 of the Civil Procedure Act. I am in agreement with **Mr. Mugo** Advocate that if the two cases are allowed to continue, they may embarrass the court. Parties cannot be allowed to cause an embarrassment to the justice system. I have to emancipate the court from such eventual embarrassment to happen. The only way is to uphold the objection and dismiss the application for review dated 19<sup>th</sup> February, 2007.

**Orders: The objection is upheld and the application is dismissed with costs.**

Dated and delivered at Nairobi this 23<sup>rd</sup> of May, 2007.

**M. A. WARSAME**

**JUDGE**