



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Case 31 of 2001**

**AUGUSTINE MPAKA MUGWIKA ..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE LTD ..... DEFENDANT**

**RULING**

On 13<sup>th</sup> February, 2001 the applicant herein brought this suit simultaneously with an application in which the main relief sought was a temporary injunction against the respondent restraining it from advertising, selling and/or disposing of the applicant's property L.R. No.Meru/Municipality/Block 11/265 (the suit property) until the finalization of the suit herein.

Temporary orders were issued in terms of the application. However the application was not heard *interpartes* until 29<sup>th</sup> September, 2005, when, at the instance of the court (Sitati, J), it was agreed that the hearing of all the pending applications, including that filed on 23<sup>rd</sup> February, 2001 be dispensed with and the main suit set down for hearing. The court further ordered that;

*“Status quo to be maintained until the suit is heard and determined”*

Subsequently on 14<sup>th</sup> December, 2005, by consent, it was agreed that the application dated 12<sup>th</sup> February, 2001 (which was filed on 13<sup>th</sup> February, 2001) be withdrawn and the suit fixed for hearing on 17<sup>th</sup> May, 2006.

No hearing has taken place since although there have been two attempts by the respondent to have the case heard before the present application was brought on 20<sup>th</sup> March, 2007. It seeks similar orders as those sought in the withdrawn application.

The application is premised on the grounds that the applicants charged the suit property to the respondent to secure a loan facility of Kshs.180,000/ on 18<sup>th</sup> August, 1998. That the applicants have been servicing the loan and have repaid it fully. They have also stated that despite this fact, the respondent, in 2000 purported to exercise its statutory power of sale but was restrained by an order of injunction issued on 13<sup>th</sup> February, 2001. That subsequently the court ordered that *status quo* be maintained yet the respondent has, once again, issued a statutory notice dated 14<sup>th</sup> December, 2006 threatening to sell the suit property.

The applicants are also relying on the further affidavit dated 7<sup>th</sup> June, 2007 in which they have attempted to show the payments so far made to settle the loan.

In replying affidavit sworn by the General Manager – Legal Services of the respondent, it is argued that the applicants have not been servicing the loan with the result that the account is in arrears of Khs.3, 220,727.70. That the order of maintenance of *status quo* lapsed with the withdrawal of the application of 13<sup>th</sup> February, 2001. The respondent further states that the applicants have not been serious in prosecuting the suit while enjoying interim orders to the respondent's detriment.

That the arrears continue to accrue without any attempts on the part of the applicants to reduce the same. They are therefore, in the respondent's view, not deserving of the equitable remedy being sought in this application.

These are the main grounds in the application and the replying affidavits which formed the the basis of the arguments by counsel for both sides during the hearing.

From the onset it must be noted that the order of maintenance of *status quo* was issued by a court of concurrent jurisdiction. That order was to remain in force until the hearing and determination of the suit. It was not, as argued by counsel for the respondent, subject to the application which was subsequently withdrawn. What is the effect of that order? *Status quo* is a latin phrase which literally means the present, current existing state of affairs. To maintain *status quo* is therefore to keep the things the way they presently are.

The *status quo* as at 29<sup>th</sup> September, 2005 was that the suit property was in the hands of the applicants while the respondent retained the right of sale under Section 74 of the Registered Land Act, which right could only be exercised, if at all, after the hearing and determination of the suit, in accordance with the terms of the order of *status quo*. If the respondent was aggrieved by that order, it ought to have sought its review or setting aside and not issue a notice of sale. Having said that, I still find the need to consider the present application.

Being an application for injunction the usual strictures in the celebrated case of Giella V Cassman Brown & Co.Ltd (1973) EA 358, must apply. Where it was held in that case that for a temporary injunction to issue the applicant must demonstrate the existence of a *prima facie* case with a probability of success at the hearing. It was further held that an injunction will normally not issue where an award of damages is adequate to compensate the applicant. Finally if the court is in doubt the matter will be decided on a balance of convenience.

In considering the first requirement, the court is precluded from making any definite findings either of fact or law, as doing so would amount to deciding the suit with finality at an interlocutory stage. What the court concerns itself with at this stage is *prima facie* case as defined in the case of Mrao Ltd V First American Bank of Kenya

2003) KLR 125.

Without going into the merit of each party's case, the respondent maintains that the applicants are in arrears while on their part the applicants argue that they have settled the loan.

I have looked at the annextures filed by both sides and find them inadequate and lacking in material detail. They are not capable of guiding me one way or the other in deciding whether the applicants are in arrears or not.

For instance the respondent has annexed a statement for only three months, January to March, 2007 yet they ought to have brought out the entire picture of the account from 18<sup>th</sup> August, 1988, when the loan was advanced – particularly bearing in mind that the applicant's position is that they made the final payment on 16<sup>th</sup> August 2002.

The applicant's position as regards payments have not been challenged, but again I am not able to say, from their annextures, that indeed they are not in arrears.

In other words I am in doubt and must decide the case on a balance of convenience. That balance will be struck by the maintenance of *status quo* already in place pending the hearing and determination of this suit.

In view of the period this matter has taken it is directed that parties do take dates at the registry for the hearing of the suit during the new term on a priority basis.

The costs of this application to the applicants.

Those will be my orders.

DATED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF JULY, 2007

W. OUKO

JUDGE

26.7.2007

*Coram:*

W. Ouko, J

Mr. Lompo

Mr. Swaka Absent

C/clerk Marangu

Ruling delivered.