



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL CASE 159 OF 2000

CYRUS NYGA KABUTE PLAINTIFF

VERSUS

HOUSING FINANCE CO. LTD. DEFENDANT

RULING

Before me is the Chamber Summons lodged on 5.11.2007 by the plaintiff in which he seeks one order apart from costs that the 1st defendant, its agents, servants and or employees whosoever be restrained from disposing, alienating, selling L.R. NO. GICHUGU/SETTLEMENT/SCHEME/232 until the hearing and final determination of an intended appeal to the Court of Appeal.

The application is premised upon 4 grounds expressed on the face of the application as follows:-

1. **That there is a sale scheduled for 30.11.2007.**
2. **That the charged land (hereinafter “the suit property”) comprises about 20 acres and is the only family land of the plaintiffs where he lives with his 13 member family.**
3. **That the said family might be left in destitute if the 1st defendant sells the suit and**
4. **That the total amount of Kshs.21,357,532.45 claimed by the 1st defendant is fictitious and is not due.**

The application is supported by the plaintiff’s affidavit in which it is

deponed *inter alia* that the plaintiff has already applied for proceedings and intends to appeal to the Court of Appeal to which end a Notice of Appeal has been lodged. It is also deponed that the intended appeal has high chances of success particularly in view of the fact that the sum claimed by the defendant is fictitious. Annexed to the affidavit are copies of an order of the Court of Appeal in Civil Appeal No.158 of 1996 between the plaintiff and the defendant; A letter from the plaintiff forwarding Kshs.116,670.30 to the court; a copy of a Notification of Sale; Redemption Notice and the said Notice of Appeal.

The application is opposed and there is a Replying Affidavit sworn by one Joseph Kania, the defendant’s Manager-Legal Services. To that affidavit is annexed one exhibit comprising numerous documents including various court decisions made between the plaintiff and the 1st defendant over a period of time relating to the plaintiff’s claim against the defendant.

The application was argued before on 13.11.2007 by the plaintiff in person and Ms. Chelagat, Learned Counsel for the defendant. The plaintiff's argument is that during the entire period when this dispute has been before the courts, everybody has been misled by the 1st defendant including the various courts. The genesis of that argument is the plaintiff's interpretation of the decision of the Court of Appeal in Nairobi Civil Appeal No.158 of 1996. According to the plaintiff the Court of Appeal allowed him to pay to the defendant what he calls "the actual balance of loan due to the defendant together with accrued interest." The plaintiff contends that actual balance of the loan was Kshs.120,000/= and interest was to be calculated on that figure. Armed with that interpretation the plaintiff unilaterally determined what was payable to the 1st defendant and deposited the same in court. The court issued him with a receipt dated 23.4.1998.

When the plaintiff made that deposit he could not understand why the defendant has frequently sought to sell his piece of land.

The record shows that the plaintiff filed **HCCC NOS. 2292 of 1995, 3010 of 1997 and 860 of 1998**. Those suits were consolidated and on 2.7.1999 were struck out by Mbaluto, J. as according to the Learned Judge the suits offended the provisions of Section 7 of the Civil Procedure Act in that they dealt with matters which were directly and substantially in issue in the Court of Appeal in Civil Appeal No. 158 of 1996 between the parties which said matters were heard and finally determined by the High Court and the Court of Appeal.

The Learned Judge observed before striking out the suits that the plaintiff had executed a charge over the suit property to secure a loan of Kshs.160,000/= from the 1st defendant but only Kshs.120,000/= had been disbursed because of a dispute which arose between the plaintiff and the 1st defendant. The plaintiff blamed the 1st defendant for the dispute and refused to repay the loan as previously agreed causing the 1st defendant to institute proceedings for possession of the suit property pursuant to the Mortgages (Special Provision) Act.

The Learned Judge further observed that the 1st defendant's suit was heard by Githinji, J. as he then was who granted the orders sought by the 1st defendant. The plaintiff who was the defendant appealed against the decision of Githinji, J. which appeal was dismissed. The Court of Appeal stated as follows:-

"That the applicant (respondent) had defaulted in the payment of installments under the charge: that the arrears of installments then stood at Kshs.33,770.00 and that due notice had been served upon the applicant (respondent) requiring him to pay the entire outstanding loan with accrued interest thereon within a given period but that he had failed to do so."

The plaintiff therefore lost the Appeal with the consequence that the decision of Githinji, J. was affirmed. Mbaluto, J. also observed that despite the Court of Appeal decision the plaintiff did not repay the loan and instead instituted the above suits. That was on 2.7.1999.

The plaintiff was undeterred. He instituted the present suit which was fully heard by Kasango, J. In her reserved Judgment the Learned Judge dismissed the plaintiff's claim. In her view the plaintiff's claim does not disclose a reasonable cause of action in view of the Court of Appeal decision referred to above and is in any event *res judicata*.

The plaintiff sought a review of the Judgment of Kasango, J. I heard the review application and dismissed the same as I found no reason to review Kasango J's Judgment.

In view of the background given above, I am not persuaded that the plaintiff should have the injunction orders sought. The plaintiff has been in court for now nearly 17 years. The argument he presents is that the sum claimed of Kshs.21,357,532.45 is fictitious and is not due under the charge which itself is also fictitious according to the plaintiff. That argument is made despite the decision of Githinji, J. as he then was, the Court of Appeal, Mbaluto, J. and Kasango, J. The plaintiff has not in the premises persuaded me that despite the previous decisions of the High Court and the Court of Appeal, I should grant the injunction sought. He has not in any event attempted to establish the settled conditions for the grant of an injunction. I do not blame him as I do not see how he could have done so. His application is without merit and is dismissed with costs.

DATED and DELIVERED at NAIROBI this 27th day of November 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- The plaintiff in person.

F. AZANGALALA

JUDGE

27/11/07