



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

Civil Case 336 of 2003

ISHMAEL KAGUNYI THANDE..... PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT

RULING

This matter has a chequered history. The plaintiff commenced his suit by way of a plaint filed on 6.6.2003. On 16.6.2005, he lodged an application for inter alia a temporary injunction to restrain the defendant from advertising for sale, disposing or selling L. R. No.DAGORETI/RIRUTA/S.437 Nairobi (hereinafter “*the suit property*”). That application was heard, and determined by Ochieng J on 30.3.2006. The Learned Judge dismissed the plaintiff’s application as he found no merit in the same and awarded costs to the defendant.

Being dissatisfied with that ruling, the plaintiff expressed his intention to appeal against the same and in that regard, lodged a Notice of Appeal dated 31.3.2006. In the interim he lodged an application by way of a Notice of Motion dated 7.4.2006 seeking primarily a temporary injunction to restrain the defendant from advertising for sale, disposing or selling the suit property; completing any transfer or conveyance of sale, leasing, letting or other interference with the suit property pending the hearing and determination of the intended appeal.

That application was again heard by Ochieng J. In a reserved ruling the Learned Judge on 5.7.2006 granted an interim injunction pending the hearing and determination of the appeal. The injunction was granted on condition that the plaintiff would pay to the defendant the sum of KShs.100,000.00 monthly. The payments were to commence on 31.7.2006 and were thereafter to be made on or before the last day of every month, until the appeal is heard and determined. The appeal has not been heard.

The plaintiff did not comply with the condition for the grant of the injunction pending appeal. It would appear that simultaneously with the application for injunction pending appeal, the plaintiff lodged an application in the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules seeking an order of injunction pending the filing hearing and determination of the then intended appeal. The plaintiff prayed that that application be certified as urgent. The Court of Appeal did not certify the application urgent.

Since the plaintiff did not comply with the conditions of injunction pending appeal the defendant on 15.9.2006 lodged an application by way of Notice of Motion seeking an order that the order of injunction granted on 5.7.2006 be discharged. That application was listed before Ochieng J.

However, when the application came up for directions on 29.11.2006, the defendants had advertised the suit property for sale. Ochieng J put off the sale and ordered that all the payments in arrears be made within 7 days of his order. In default, the defendant was given the green light to realize its security.

The plaintiff filed yet another application to stop a sale which had been scheduled for 29.11.2006. The application was placed before Ochieng J who recorded the following order:-

“The sale scheduled for 29.11.2006 is put off. If the plaintiff is in default of any payments upto this moment, he is to remedy the position forthwith by clearing all the outstanding arrears within the next 7 days.

.....

In default the defendant be at liberty to realize the security.”

On 31.1.2007 the plaintiff lodged another application for a temporary injunction. It was listed for hearing before the same Learned Judge on 1.2.2007 who listed it for mention on 19.2.2007. In the interim Counsel for the defendant on 2.2.2007 informed the Learned Judge that Waki J. A. had ordered cancellation of the sale intended for that day on certain conditions that the plaintiff failed to meet.

The defendants application to discharge the injunction granted on 5.7.2006 was in due course fixed for hearing on 5.6.2007. Come that date, counsel for the plaintiff raised no objection to the application and Warsame J who was seized of the matter allowed the application with no order as to costs. The injunction pending appeal was therefore discharged.

When the defendant again sought to realize its security after the discharge of the injunction, the plaintiff was back. This time with the present application seeking primarily that the suit be heard on priority; that the status quo be maintained and alternatively that a specific period injunction for 6 months be issued restraining the sale of the suit property pending the hearing and final determination of C. A. No.Nai. 157 of 2006 scheduled for 29.11.07 – before the Court of Appeal.

The main reasons for the application are that the Civil Application pending before the Court of Appeal will be rendered nugatory unless the **“specific period injunction”** is granted, and that the orders sought should be granted in the interest of justice as the plaintiff contends that he has fully repaid the defendant. There is a supporting affidavit sworn by the plaintiff in which averments that have been previously made are repeated. As expected, the application is opposed and there is a replying affidavit sworn by the defendant’s Manager, Legal Services. In the affidavit, the background to this application as adumbrated above is stated.

I have considered the application, the affidavits filed both for and in opposition to the application. I have also considered the submissions made to me by counsel and the authorities relied upon. Having done so, I take the following view of this matter. The applicant has not invoked Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules which gives the court the jurisdiction to grant temporary injunctions pending hearing of the suit or other proceedings. The plaintiff has instead invoked the inherent jurisdiction of the court. Yet the plaintiff primarily seeks what he calls a specific period injunction pending the hearing and determination of CA No. Nai. 157 of 2006. It does not matter by which name the plaintiff describes the relief he is seeking. In my view the plaintiff’s application is a simple application for a temporary injunction pending the hearing and determination of the civil application pending in the Court of Appeal. As detailed above, the plaintiff’s various applications seeking orders of injunction pending one thing or another have been exhaustively dealt with by my colleagues. Ochieng J dismissed the plaintiff’s first application for a temporary injunction. The plaintiff filed a Notice of Appeal and sought an interim injunction pending the intended appeal. The same Learned Judge granted the plaintiff’s application on terms. Those terms were not complied with by the plaintiff. At about the same time the plaintiff sought an interim injunction pending the filing and hearing of an intended appeal. Waki J.A. granted an interim injunction on terms. The plaintiff did not meet those terms and the interim orders granted by Waki J. A. lapsed. The defendant sought and obtained an order to discharge the temporary injunction which had been issued by Ochieng J. Indeed the plaintiff did not object to the injunction being discharged.

Whichever way I look at the plaintiff’s application, it is for dismissal. The plaintiff in the present

application admits that he has been unable to comply with the condition set by Ochieng J. The order of Ochieng J has not been varied or set aside. I cannot sit on appeal against that order. The plaintiff has in fact a pending application before the Court of Appeal. In my view he should seek orders of injunction in that Court. This court is *fancus officio*.

In the end the plaintiff's application dated 13.7.2007 has absolutely no merit. It is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Simiyu for the plaintiff and Ogonya holding brief for Janmohamed for the defendant.

F. AZANGALALA

JUDGE

21/11/07