

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

Civil Case 1007 of 1996

DANIEL KANYI MWARANO.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

The applicant in the Chamber Summons dated 13th February 2006 prays, inter alia, for leave to amend his plaint filed herein on 24th April 1996 following the sale by public auction of the suit premises on 7th February 2006. He seeks to challenge the sale within the suit by amending both the body of the Plaint and the prayers with a view to having the sale declared unlawful and to have the same “**set aside**”.

The application is brought under Order VIA Rules 3(1), 5(1) and 8. Both Rules provides that leave to amend may be granted on such terms as to costs or otherwise as may be just. Rule 3(1) provides that an amendment may be allowed at any stage of the proceedings.

The Respondents have objected to the application on the grounds that the Applicant is guilty of delay in bringing the application and that if the application is allowed then the ends of justice would be defeated in that the same would have the effect of defeating the Respondents’ statutory power of sale under which the suit premises was sold to recover a debt secured by a charge over the same.

The charge herein is not disputed. Neither is the Respondent’s contention that since the Applicant’s application for an injunction to stop the realization of security was dismissed on 17th March 1998 the Defendant did not take any further steps to prosecute his suit, leading to the Respondent issuing statutory notices and exercising its power of sale through a public auction at which the Applicant attended. The applicant does not say why he has taken 10 years to have his suit heard or why he failed to stop the auction of 7th February, 2006 by an order of injunction.

He was aware, as is evidenced from the proposed amended plaint of the intended auction yet did not do anything to pre-empt the same. It is clear in the circumstances that this application is an afterthought. The course sought by applicant is not available as a relief since the property has changed hands. Under Section 77 of the Registered Land Act (Cap 300) once the power of sale has been exercised, the only remedy available to a party is a claim for damages from the person exercising that power, and only if the power is shown to have been exercised irregularly. I see no reasonable grounds to allow this application in circumstances which will no doubt occasion prejudice not only to the Respondent but also to the new owner of the suit premises. I agree with the counsel for the Respondent that the applicant has slept on his rights, if any, and can only blame himself for the consequences.

I refuse to allow the application for the reasons given and do hereby dismiss the same. I grant the Respondent costs of the application.

Dated at Nairobi this 7th day of June 2006

M.G. Mugo

JUDGE

Delivered in the presence of

No appearance for Applicant

Kucho for Respondent