



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 227 OF 2003**

**NATIONAL INDUSTRIAL CREDIT BANK LTD ..... PLAINTIFF**

**VERSUS**

**NDEMI LANE APARTMENTS LTD ..... DEFENDANT**

**RULING**

The Applicant by its Notice of Motion dated 5th December, 2002 and filed on the same date seeks 4 prayers as follows:-

- 1. That the Honourable court do issue an order compelling the Respondent herein to give its written consent to the conveyance between the applicant and WACHIRA NDERITU over Flat C 18 on 209/403/2 and to execute such other documents as may be necessary to effect and perfect the said conveyance***
- 2. That in the alternative this Honourable court do appoint the Deputy Registrar of this court to execute the necessary consent attached to the conveyance between the applicant and one Wachira Nderitu in place of the Respondent***
- 3. That in the alternative this Honourable court do dispense with the necessity of the Respondent's written consent to the conveyance.***
- 4. Cost.***

The application is expressed to be made under Section 3A and 98 of the Civil Procedure Act, Order L Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the Law.

The application is based on the grounds set out in the body of the Notice of Motion and is supported by an affidavit of one REUBEN NYANGAGA sworn on 5th December, 2002.

The Respondent filed a Replying affidavit of one KENNETH MWANGI sworn on 17th January, 2003.

Mr Maina argued the application for the applicant and Mr Njagi opposed the application for the Respondent. Mr Maina submitted that the Respondent is the registered proprietor of L R No flat No C 18 on 209/403/2. On 5th May, 1997 a lease was created between the registered proprietor (the Respondent) and SONAK AGENCIES LTD. After Sonak Agencies Limited acquired the lease they took a mortgage with AFRICAN MERCANTILE BANKING COMPANY worth Kshs.4,000,000/=. Subsequently African Mercantile Banking Company Limited (Ambank) was later taken over by the Applicant. After the take

over the said SONAK AGENCIES LTD defaulted in mortgage repayments. The applicant therefore issued a Statutory Notice of Sale in respect of the said property. Sonak Agencies Limited then filed NAIROBI HCCC No 71 of 2002 claiming orders of injunction against the sale. The application for injunction was heard and dismissed on 9th February, 2002. After the dismissal the applicant exercised the Statutory Power of Sale and sold the said property to WACHIRA NDERITU. The conveyance to the said Wachira Nderitu has not been concluded because the respondent has refused to grant consent to the same.

In Mr Maina's view the consent should not be withheld by the Respondent. The respondent, now refuses to consent because the Registrar of Titles has purported to cancel the registration of the re conveyance of the mortgage which cancellation the respondent believe is irregular. Mr Maina argues that if the respondent has a complaint against the Registrar of Titles he should sue him. The respondent further says that an appeal has been filed against the decision in NAIROBI HCCC No 71 of 2002. But the only document filed is a Notice of Appeal dated 25th February, 2000 and no appeal has been filed. In Mr Maina's view even if there is an appeal the parties in the proposed appeal are different from the parties in the present proceedings. Mr Maina submitted that the said WACHIRA NDERITU paid Kshs.2 million for the said property and therefore he should be registered as proprietor which cannot be done without the Respondent giving its consent.

Mr Njagi in reply, relied on the replying affidavit of the said KENNETH MWANGI. He emphasized that there are irregularities in respect of the registration of the re conveyance. In Mr Njagi's view the cancellation of the re conveyance should have been by another instrument and not by a mere indication by the Registrar of Titles. He submitted that the respondent has not unreasonably withheld its consent, it has withheld the consent because of irregularities on the title.

Mr Njagi further argued that the Notice of Motion is incurably defective and cannot stand. He argued that Sections 3A and 98 of the Civil Procedure Act and Order L Rules 1 and 2 of the Civil Procedure Rules are not relevant.

He relied on – **REWAL vs MOMBASA HARDWARE (1968) E A page 392** . In this case the Court of Appeal held that inherent jurisdiction of the court is excluded where there is a remedy provided by the Rules.

In Mr Njagi's view, there are no special circumstances in this case to invoke the inherent jurisdiction of the court under Section 3A of the Civil Procedure Act. He further argued that Section 98 of the same Act applies where a party has obtained a decree or order in a suit which has not been complied with.

Mr Njagi further submitted that the applicant has not filed a suit. A miscellaneous application is not appropriate in the absence of a suit. He argued that the Court has no jurisdiction to entertain the applicant's application. He relied on **MITYANA GINNERS LTD vs PUBLIC HEALTH OFFICER KAMPALA (1958) E A page 339** . In this case it was held that an appeal not commenced in any manner prescribed by the Rules to regulate the procedure of the courts was not a suit and the Magistrate's order appealed against was not a decree.

In reply Mr Maina also relied on the Rawal case (supra) at paragraph D on page 394 where Sir Charles Newbold P said:

***“It is I think important to consider carefully the obvious intention that nothing in the Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice.”***

Mr Maina therefore submitted that the respondent's objection is on technicalities and not substance and under Section 3 A the court has jurisdiction to grant the prayers sought in the applicant's application.

After the above rival submissions, I have to decide whether or not this court can entertain the applicant's application under Sections 3 A and 98 of the Civil Procedure Act and Order L Rules 1 and 2 of the Civil Procedure Rules or indeed under any other provision of law.

Section 98 of the Civil Procedure Act provides:

***“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument the court may, on such terms and conditions, if any as it may determine, order the conveyance contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”***

Section 98 of the Civil Procedure Act clearly applies where a person neglects or refuses to comply with a decree or order. There is no decree or order made in the present proceedings. Section 98 of the Civil Procedure Act therefore has no application in this case.

Order L Rule 1 provides:

***“All applications to the court save where otherwise expressly provided for under these Rules shall be by motion and shall be heard in open court.”***

Order L Rule 2 provides:

***“No motion shall be made without notice to the parties affected thereby.”***

Order L Rules 1 and 2 apply to proceedings under the Civil Procedure Rules. The applicant must have been misled by the words “all applications to the court...” and assumed that he could institute the present proceedings by a Notice of Motion.

Lastly Section 3 A of the Civil Procedure Act provides:

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

The Section merely restates what has always been the position i.e. the invoking of the inherent jurisdiction of the court to do justice and to prevent abuse of the process of the court.

Section 3 A of the Civil Procedure Act does not give a party the right to come to court in any manner he/she chooses. It definitely does not confer on the applicant the right to institute the present proceedings by way of Notice of Motion.

The applicant should have instituted this proceedings by way of a suit which is described under Section 2 of the Civil Procedure Act as “all civil proceedings, commenced in any manner prescribed.” Notice of Motion is not one of the prescribed manners of commencing proceedings.

Having found that the applicant should not have commenced these proceedings by way of Notice of Motion I need not express an opinion on the merits or demerits of the prayers sought. I now strike out the applicant’s notice of motion dated 5th December, 2002 with costs. It is so ordered.

Dated and delivered this 11th day of March, 2004.

**F. AZANGALALA**

**JUDGE**

**11.3.2004**