

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 511 OF 2003

JOSEPH KARITA MBURU..... PLAINTIFF

VERSUS

FAMILY FINANCE BUILDING SOCIETY:.....:DEFENDANT

HUMPHREY JOSEPH WAWERU.....PROPOSED 3RD PARTY

RULING

The Chamber Summons dated 4th June 2004 is brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of Civil Procedure Act. It is seeking mainly two orders which are that:-

2. Pending the inter partes hearing and determination of the Plaintiff's application dated 15 th August, 2003, and the main suit herein, this Honourable Court be pleased to restrain the Defendant/Respondent, its agents and/or servants from disposing of transferring executing the transfer seeking Land Control Board Consent and/or in any other manner dealing with the suit property known as Title No.Kambaa/Kanunga/T.50.

3. This order be served upon the Chairman of Kiambaa Land Control Board to restrain the Board from considering on the 8 th day of June 2004 or on any other subsequent date the pending application for consent to transfer the suit property i.e. Title No.Kiambaa/Kanunga/T.50 which application was submitted for the Boards consideration on 19 th April, 2004 by the Defendant and one Moses Ngugi Gatere.

The Grounds for the application are: (1) The Plaintiff's application dated 15 th August, 2003 and the main suit have been already fixed to be heard on 14th July 2004 and 15 th December, 2004 respectively and the outcome thereof shall be rendered nugatory should the Defendants be allowed to dispose of and/or transfer the suit property before the said hearing dates.

(2) There is a pending 3 rd Party application in this suit by one Humphrey Joseph Waweru challenging the purported sale of the suit land already fixed for hearing on 22 nd July 2004.

(3) The Court previously heard the Applicant/Plaintiff on 21.8.2003 and agreed that there existed good grounds for restraining the Defendant/Respondent from disposing of the suit property and granted orders to that effect on the said date and it is fair and just to reinstate and maintain such orders in place until the final determination of this suit.

The Respondent opposed the application and filed Grounds of Objection.

Mr. Nguta argued the application for the Plaintiff and Mr. Gachomba opposed the application for the Defendant. In his oral submissions in Court counsel for the Plaintiff argued that as there is another application scheduled for hearing on 14th July 2004 the orders sought in the present application should be granted on an interim basis until the earlier application is heard. He submitted that no Statutory Notice of Sale was served by the Defendant. Accordingly the Plaintiff had shown a prima facie case and the orders sought should be granted.

Mr. Gachomba for the Defendant in reply relied on the Grounds of Objection filed on 14th June

2004. Counsel took me through the record of this Court starting with the Plaintiff's 1st Application made on 7th May 2001 upto the present application. In his view the present application is an abuse of the process of the Court. The suit property was advertised for sell by public auction on 22nd January 2003 after the Plaintiff's several attempts to stop the sale failed. The auction attracted low bids as a result of which the sale was postponed. The Plaintiff did not challenge the advertisement to sell and the abortive auction. The Defendant subsequently sold the property on 8th August 2003. The application fixed for hearing on 14th July 2004 is to restrain a transfer after the said auction sale. The initial injunctive orders given pursuant to this application lapsed and the Defendant proceeded to complete the transfer in favour of the purchaser at the auction. When the Land Control Board's consent to transfer was sought, the Plaintiff came to court with the present application.

I have carefully considered this application. The main ground given for the application is that there exists another application fixed for hearing on 14th July, 2004 and therefore this application should be allowed. With respect this is strange reasoning. Indeed in my view it is the very existence of the earlier application that seals the fate of the present application. A party who obtains an interim injunction which lapses is not entitled to bring another application for injunction pending the hearing of the previous application. The Applicant should have applied to have his earlier application heard urgently or sought reinstatement of the orders that had lapsed. I find that the course he has taken of filing a fresh application for injunction was not available to him. The Application is misconceived, incompetent and an abuse of the process of the Court. The same is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5ND DAY OF JULY 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-