



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 90 of 2008**  
**GEORGE GIKUBU MBUTHIA.....APPELLANT**  
**AND**  
**HOUSING FINANCE COMPANY LTD**  
**THE HON. ATTORNEY GENERAL**  
**MUHAMUD SHEIKH HUSSEIN.....RESPONDENTS**

**(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Lady Justice Rawal)  
dated 11<sup>th</sup> April, 2008**

**in**

**H.C.C.C. NO. 1203 OF 2006)**

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**JUDGMENT THE COURT**

This is an appeal from the ruling and order of the superior court (Rawal J) dated 11<sup>th</sup> April, 2008 whereby the superior court dismissed the appellant's notice of motion dated 15<sup>th</sup> February, 2005 seeking discharge of earlier orders recorded on 22<sup>nd</sup> October, 2007 and 5<sup>th</sup> December, 2007.

It is necessary to set out a brief background to the appeal. Sometime in 1983 the appellant purchased L.R. 36/11/1 Eastleigh Section II Nairobi (suit property) for Shs.500,000, apparently with the assistance of a loan of Shs.413,440/= advanced by Housing Finance Company of Kenya (HFCK) which loan was secured by a mortgage on the suit property. Both the conveyance to the appellant and the mortgage in favour of HFCK were registered on 11<sup>th</sup> August, 1983. It seems that the appellant subsequently defaulted in the repayment of the instalments due under the mortgage. Thereafter sometime in August, 1990 HFCK filed suit *H.C.C.C. No. 414 of 1990* against the appellant seeking a decree of possession of the mortgaged property under *The Mortgages (Special Provisions) Act Cap. 304 Laws of Kenya*. However, the application for decree of possession was dismissed by the superior court on 16<sup>th</sup> May, 1991.

Sometime in 2006, HFCK sold the suit property in exercise of its statutory power of sale conferred by **Section 69 (1)** of the *Transfer of Property (Amendment) Act 1959* to **MUHAMUD SHEIKH HUSSEIN** (3<sup>rd</sup> respondent) for Shs.20,000,000/=. The conveyance to the 3<sup>rd</sup> respondent which is dated 24<sup>th</sup> April,

2006 was registered against the title on 28<sup>th</sup> April, 2006.

Apparently on learning of the sale of the suit property to the 3<sup>rd</sup> respondent, the appellant revived the moribund suit for decree of possession. The suit was transferred to Milimani Commercial Court and re-registered as *High Court Milimani Commercial Court Civil Suit No. 162 of 2006*. On 22<sup>nd</sup> June, 2006 the appellant filed an amended defence, without leave, in the revived suit joining the 3<sup>rd</sup> respondent as a second defendant. The appellant's application for leave to further amend the defence and counter-claim in order to join the 3<sup>rd</sup> respondent to the suit and challenge the sale of the mortgage property to him was dismissed by the superior court (Kasango J) on 10<sup>th</sup> July, 2006. The Milimani suit was ultimately marked as settled by consent on 27<sup>th</sup> September, 2007.

Meanwhile on 15<sup>th</sup> November, 2006, the appellant filed *H.C.C.C. No. 1203 of 2006* against HFCK, Attorney General and the 3<sup>rd</sup> respondent. In the suit the appellant averred, among other things, that HFCK and 3<sup>rd</sup> respondent have trespassed on the suit property, determined lease of 88 tenants and demolished the building and started the construction of a shopping mall. The reliefs sought in the plaint are: a declaration that HFCK and 3<sup>rd</sup> respondent are trespassers; a mandatory order directing the Registrar of Titles to cancel the registration of conveyance to 3<sup>rd</sup> respondent dated 28<sup>th</sup> April, 2006 and damages.

It seems that the appellant subsequently filed an amended plaint dated 1<sup>st</sup> December, 2006 and re-amended plaint dated 22<sup>nd</sup> December, 2006. It is also apparent that the 3<sup>rd</sup> respondent, on his part, filed a statement of defence dated 27<sup>th</sup> November, 2006; Amended Statement of Defence dated 29<sup>th</sup> November, 2006 and Re-Amended Statement of Defence dated 4<sup>th</sup> December, 2006.

On 18<sup>th</sup> June, 2007, the appellant filed a “*withdrawal notice*” dated 15<sup>th</sup> June, 2007 in the suit whose format and contents are as hereunder:

**“WITHDRAWAL NOTICE**

**(Under Order XXIV rule 1 of Civil procedure Rules)**

**I wish to withdraw the amended plaint dated 1<sup>st</sup> December, 2006; re-amended plaint dated 22<sup>nd</sup> December, 2006 and re-amended plaint dated 9<sup>th</sup> March, 2006.**

**Signed.**

**GEORGE GIKUBU MBUTHIA”.**

The notice was copied to respective advocates for the parties.

The appellant contemporaneously with the filing of the “*withdrawal notice*”, filed an Amended plaint amending the original plaint dated and filed on 15<sup>th</sup> November, 2006.

The advocates for the 3<sup>rd</sup> respondent upon service of the withdrawal notice on them, wrote to the Deputy Registrar of the High Court on 18<sup>th</sup> June, 2007, thus:

**“We have been served with a withdrawal (sic) dated 15<sup>th</sup> June, 2007 in which the plaintiff has withdrawn the suit. Kindly mark on the court file that the same is withdrawn with costs in order to enable the 3<sup>rd</sup> Defendant to tax his bill of costs”.**

It is common ground that the Deputy Registrar made an order on 26<sup>th</sup> June, 2007 that the suit had been withdrawn with costs.

On 2<sup>nd</sup> July, 2007, the appellant filed an application dated 29<sup>th</sup> June, 2007 in the superior court seeking an order that the 3<sup>rd</sup> respondent's statement of defence, the amended statement of defence and the Re-Amended statement of defence be struck out on the main ground that those pleadings were not served on the appellant. The advocates for the 3<sup>rd</sup> respondent raised a preliminary objection to the application – that the court had no jurisdiction to entertain the application as there was no suit in existence, the appellant having withdrawn the suit. By a ruling dated 22<sup>nd</sup> October, 2007, the superior court (Rawal J) upheld the preliminary objection holding that the suit was not in existence as the substratum of the suit was not on record.

By an application dated 9<sup>th</sup> November, 2007 and filed on 14<sup>th</sup> November, 2007 and made under **Order LXIV Rule 1 (1) Civil Procedure Rules**, (CP Rules) the appellant asked the superior court to review its ruling of 22<sup>nd</sup> October, 2007 on various grounds. However, the application for review was dismissed by the superior court (Rawal J) on 5<sup>th</sup> December, 2007. Undaunted, the appellant made a third application dated 15<sup>th</sup> February, 2008 for setting aside and discharge of orders (ruling) made on 22<sup>nd</sup> October, 2007 and 5<sup>th</sup> December, 2007. That application was similarly dismissed by the superior court (Rawal J) on 11<sup>th</sup> April, 2008 holding, among other things, that the court was *functus officio*.

This appeal is against the ruling dated 11<sup>th</sup> April, 2008. The object of the appeal is to have *H.C.C.C. No. 1203 of 2006* reinstated for hearing.

There are twenty grounds of appeal raising various matters of law and fact. The appellant complains, *inter alia*, that the superior court did not have jurisdiction to entertain the preliminary objection; that the appellant was deprived of an opportunity to present his objection to courts jurisdiction; and that the order of 22<sup>nd</sup> October, 2007 was null and void.

Both Mr. Gicharu Kimani and Mr. Sagana, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents respectively contended at the hearing of the appeal that the grounds of appeal have no bearing to the order appealed from. Mr. Sagana, in particular, submitted that the grounds of appeal do not relate to the order of 11<sup>th</sup> April, 2008 but rather to previous orders which are not the subject of the appeal and that the appellant has gone way beyond the dispute.

The submissions of the respective counsel are with respect correct. The application which gave rise to the present appeal is dated 15<sup>th</sup> February, 2008. By the application, the appellant sought an order:

**“to set aside, discharge and vacate *ex debito justitiae* its orders recorded on 22<sup>nd</sup> October, 2007 and 5<sup>th</sup> December, 2007 .....**”.

The application does not show the rule under which it is brought. However, the applications shows that it is brought:

**“Under inherent powers of the Court and all other enabling provisions of law”.**

Upon hearing the application, the superior court ruled:

**“Mr. Nassir only relied upon his grounds of objection dated 21<sup>st</sup> February, 2008 stating that this Court is *functus officio* having delivered a ruling and refused to review. The application is stressed to be an abuse of court process.**

**I do agree with those grounds as they are consistent with law and principles that the litigation must come to an end”.**

The superior court concluded:

**“the upshot of the above is that this court is *functus officio* and cannot entertain the application as it is brought forth”.**

By **Rule 84 (1)** of the Court of Appeal Rules, the memorandum of appeal should, *inter alia*, set forth the grounds of objection to the decision appealed against and specifying the points which are alleged to have been wrongly decided.

The superior court in effect ruled that the court was *functus officio* and that the application dated 15<sup>th</sup> February, 2008 was an abuse of the process of the court. The grounds of appeal do not relate to the decision of the superior court. Rather the grounds of appeal are wide ranging and encompass the entire dispute relating to the suit property including the dismissal of the application for decree of possession; the caveats lodged against the title; the previous litigation including *H.C.C.C. No. 4140 of 1990*, the impugned conveyance of suit property to the 3<sup>rd</sup> respondent, the state of pleadings and other processes in *H.C.C.C. No. 1203 of 2006* and the previous rulings of the superior court dated 22<sup>nd</sup> October, 2007 and 5<sup>th</sup> December, 2007 respectively. The appellant did not appeal against the latter two rulings.

Upon our consideration of the appeal, we find that the grounds of appeal are extraneous to the decision of the superior court appealed from and that the appeal is for that reason incompetent.

Lastly, it is right to say that even if the appeal was competent, we would not have interfered with the finding of the superior court.

On 22<sup>nd</sup> October, 2007, the superior court upheld the preliminary objection and ruled that *H.C.C.C. No. 1203 of 2006* was not in existence having been effectively withdrawn by the appellant under **Order XXIV Rule 1** CP Rules. The superior court made a further finding that after the appellant filed a notice to withdraw, the Deputy Registrar of the superior court made an order on 26<sup>th</sup> June, 2007 that the suit has been withdrawn with costs. The appellant did not appeal against the order of 22<sup>nd</sup> October, 2007. He instead applied for review of the order under **Order XLIV Rule 1 (1)** CP Rules. The application for review was dismissed by the superior court on 5<sup>th</sup> December, 2007 holding that the court had no jurisdiction to review its determination on a point of law.

The order dismissing the review application was appealable as of right under **Order XLII** CP Rules but the appellant did not lodge an appeal against it. The CP Rules do not provide for filing of a second review application and when the superior court dismissed the review application, its jurisdiction was exhausted and the court thus, became *functus officio*.

The application dated 15<sup>th</sup> February, 2008 for setting aside the orders of 22<sup>nd</sup> October, 2007 and 5<sup>th</sup> December, 2007 which invoked the inherent jurisdiction of the superior court was for all intents and purposes, either a second review application or an appeal. By **Order XLIV Rule 7** CP Rules a second review application cannot be entertained and needless to say, a court cannot sit on appeal against its own decision. Thus, the application dated 15<sup>th</sup> February, 2008 was not maintainable in law. It was a gross abuse of the process of the court. The decision of the superior court was undoubtedly correct.

For those reasons, the appeal is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of March, 2009.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR