



IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civil Appli 223 of 2007 (UR 138/2007)

BERNARD CHEPKWONY MUTAI
APPLICANT

AND

HOUSING FINANCE COMPANY OF KENYA LTD.

PROF. PAUL K. RONO

RUTH CHEPKOECH RONO
RESPONDENTS

(Application for stay of execution in an intended appeal from the ruling and order of the High Court of Kenya at Nakuru (Lady Justice Koome) dated 8th June, 2007

in

H.C.C.C. NO. 20 OF 2007)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Rules of this Court for an order that pending the filing, hearing and determination of the intended appeal against the order of the High Court of Kenya at Kericho dated and delivered on 8th June, 2007 an injunction be granted restraining the respondents jointly and severally from evicting the applicant, or interfering with, taking possession of, disposing, or in any other way dealing with the property L.R. No. 8938/88, Bomet Municipality (the suit premises).

It is not in dispute that the applicant executed a charge over the suit premises on 23rd July, 1998 to secure a loan of Shs.6,000,000/=. Subsequently, there was default leading to the first respondent exercising its statutory power of sale by way of private treaty. The suit premises have since been transferred to the 2nd and 3rd respondents and are now the registered proprietors thereof.

The suit before the superior court has not been tried but Kimaru, J. on 8th June, 2007 dismissed the applicant's application for an injunction and hence this application.

The suit premises were transferred to the 2nd and 3rd respondents on 10th January, 2006. The applicant's main complaint is that the respondents colluded and purportedly sold the suit premises without any bids for the same being invited and that he was not given any opportunity to redeem the suit premises.

The counsel for the applicant, Mr. Munyao, concedes that no cent has been repaid since the borrowing. This ineffect leads to the conclusion that the applicant is in no position to repay the loan. The learned Judge of the superior court was satisfied that the applicant had not advanced any prima facie case before him and that is why he declined to grant the injunction sought. We think, he was right in the exercise of his discretion.

The 1st respondent's power of sale had arisen and it was in exercise of that power that the suit premises were sold. In our view, the applicant's application is without merit for any loss he may suffer is only in damages. Thus, we would think, the intended appeal is not arguable.

Further, it has not been demonstrated to us that the success of the intended appeal may be rendered nugatory in any event if we do not grant the injunction sought as damages which the first respondent can pay will suffice.

For these reasons, we dismiss this application with costs to the respondents.

Dated and delivered at Nakuru this 6th day of March, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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