



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 288 of 2007

CYRUS NYAGA KABUTE APPLICANT

AND

HOUSING FINANCE CO. OF KENYA LTD

SAMUEL P. GACHOKA RESPONDENTS

(An application for injunction pending the hearing and determination of an intended civil appeal as per the notice of appeal (Azangalala, J) dated 26th October, 2007

in

H.C.C.C. No. 159 of 2000)

RULING OF THE COURT

The applicant *Mr Cyrus Nyaga Kabute* has filed an application dated 21st November, 2007, expressed to be grounded on rule 40(a) and (b) of this Court's rules. The applicant is in person.

The application has sought orders as follows:-

1.) That this Honourable Court be pleased to grant a temporary injunction restraining the respondent by themselves, servants or agents from selling, disposing, alienating transferring or in any manner interfering with the applicant's property known as *Parcel No. GICHUGU/SETTLEMENT/SCHEME/232* situated in *Kirinyaga* pending the hearing and determination of an intended appeal as per the Notice of Appeal dated 26th October, 2007 or further orders of this Honourable Court.

2.) That costs of this application be provided for.

The applicant has in the body of the application given six grounds in support of the application, but for reasons set out hereinbelow, we shall focus on grounds (a) and (e) only.

Ground (a) states;

“That the sale notice has been given by M/s VIEWLINE AUCTIONEERS an agent for the respondent/defendant the creditor/chargee dated 26th September, 2007 where the said notice stipulates that the date of sale by public auction will be held on 30th November, 2007.”

Ground (e) states:-

“Unless an order of injunction is issued restraining sale or disposal of the said property the intended civil appeal as per the Notice of Appeal which is dated 26th October 2007 will be rendered nugatory.”

It is common ground that the applicant who is unrepresented had charged the property described in prayer (1) above, to the 1st respondent. At the hearing on 11th May 2007, the learned Counsel for the 2nd respondent **Mr Z. Kimani** informed the Court that the property in question was sold on 30th November, 2008 by public auction pursuant to chargee’s statutory power of sale conferred on the 1st respondent by a charge registered under the Registered Land Act (Cap 300), a fact that was admitted by the applicant. The applicant further admitted that after the said sale, he filed a suit in the High Court in Embu in which he sought an order to have the sale set aside and the said suit is still pending in the said superior court.

Ordinarily, in an application of this nature which should have been brought under Rule 5(b)(2) of this Court’s rules, (but was brought by the applicant who acts in person under rule 40), this Court considers two principles, namely, whether there is any arguable appeal, or that it is not frivolous and whether the intended appeal if successful, would be rendered nugatory if the order sought is refused. However in the special circumstances of this case, as both parties to the application have disclosed to the Court, that a public auction which was intended to be stopped by an order of injunction has already taken place, the Court is of the view that the application has been overtaken by events, and the Court cannot restrain a sale that has already taken place. In addition, it is a fundamental principle of law that a court of law never acts in vain. We decline to grant the orders sought.

It is clear to the Court that the applicant’s remedy, if any, concerning the sale, lies in the suit filed in the superior court in Embu.

In the result, and for the foregoing reasons, the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of May 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR