



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

**Civil Appli 288 of 2008 (UR 190/2008)**

**MICHAEL MUNGAI ..... APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER AVISA ..... 2<sup>ND</sup> RESPONDENT**

**HOUSING FINANCE CO. (K) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KENYA BUILDING SOCIETY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**MR. MUNG'LA ..... 5<sup>TH</sup> RESPONDENT**

*(Application for injunction pending filing, hearing and determination of appeal from a judgment of the High Court of Kenya at Nairobi (Okwengu, J.) dated 16<sup>th</sup> October, 2008*

*in*

**H.C.C.C. NO. 335 OF 1997)**

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**RULING OF THE COURT**

The applicant, **MICHAEL MUNGAI**, who is unrepresented, filed this application expressed as having been filed “**under section 3 (rules 1,2 & 3)** and part 1 (**rules 1 and 2**) of the **Court of Appeal Rules Cap 9.**” The application was brought by way of notice of motion and the reliefs sought therein were:-

- “1. This application be certified urgent due to the nature of the matter.**
- 2. That service of this application be dispensed with and the application be dealt with instantly due to its nature and urgency.**
- 3. That the Honourable Court of Appeal order the respondents and their lawyers to stop disposing off any of their assets or shares pending the hearing of the appeal.**
- 4. That the respondents be ordered to pay the undisputed costs and charges for these applications.**

**5. That the Hon. Court of Appeal grant any other orders it deems fit to unblock the intrusion and compel the execution of the lawful orders issued by the High Court in HCCA 335 of 1997.**

**And for an order that the costs of and incidental to this application be paid by the respondents and their lawyers.”**

The said application was brought on the following grounds:-

**“(a) The petitioner had used unauthorized forged/fake documents and accounts given by the respondents to evict the appellant/applicant (decree holder) from his home.**

**(b) The appellant/applicant (decree holder) successfully appealed against this eviction, documents, accounts and other actions.**

**(c) He got orders for the reinstatement and maintenance of the status quo and to be paid costs.**

**(d) The 5 respondents and their lawyers were summoned to the High Court to facilitate the clearing of the intrusion and payment of the extra bills (which they have caused). They ignored the summons and no action was taken on them.**

**(e) The 5 respondents and their agents/lawyers have blocked execution of these orders deliberately to cause huge bills and inconveniences to the Court, appellant/applicant (decree holder) and his family.**

**(f) It is only fair, just and equitable that they be punished/penalized as provided in law for this misconduct.”**

The application came up for hearing before us on 7<sup>th</sup> July 2009 when the applicant appeared in person, while Mr. C.O. Odongo, appeared for the 1<sup>st</sup> respondent (**Kenya Commercial Bank Ltd**), and Mr. Mugambi Laichena, appeared for the 3<sup>rd</sup> respondent (**Housing Finance Company of Kenya**). There was no appearance for the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

Being unrepresented the applicant was given wide latitude to address the Court. He took advantage of that leeway and proceeded to make long submissions.

All the applicant was seeking was the reliefs set out in the application. He surprised us when he stated that he had no intention of filing an appeal in this Court!

Mr. Odongo, on his part submitted that as there was no service of the notice of motion he was unable to file a reply but he urged us to dismiss the application.

Mr. Laichena was of the view that this application was misconceived in that the applicant failed to cite the section or the rule under which the application was brought.

In reply, the applicant clarified that he intended to appeal against only some sections of the ruling of *Okwengu, J.*

The genesis of this application is a dispute between the applicant and his wife in the subordinate court which dispute reached the High Court by way of an appeal in which the applicant was successful. The applicant (*as a successful appellant*) had his bill of costs taxed and was awarded **Shs.311,290/=**. That being so, one would have expected the applicant to be contented with that success in the dispute with his wife. But that was not to be so. The applicant instead of being contented with that outcome of his appeal, decided to go back to the High Court and filed a notice of motion expressed as being brought “**under order XXI, order XXXIX and section 3A** of the Civil Procedure Act and **section 5** of the Judicature Act” seeking inter alia:-

- “1. Orders to stop Nancy Wanjeri (petitioner), Kenya Commercial Bank (1<sup>st</sup> Respondent), Christopher Avisa (2<sup>nd</sup> respondent), Housing Finance Co (K) Ltd. (3<sup>rd</sup> Respondent), Kenya Building Society Ltd. (4<sup>th</sup> respondent) and Mr. Mung’la (5<sup>th</sup> respondent), from malicious repeating (sic) in words and deed, false and malicious allegation that the appellant borrowed money from housing finance Company Ltd.**
- 2. That the 5 respondent’s and their agents be ordered to vacate the appellant’s property on LR. Nairobi Block 111/530. In default they be removed from the property by the OCPD/OCS Kayole Police Station.**
- 3. that the five respondents be ordered to pay the applicant the extra bills for the losses, charges and costs caused by the publishing in words and deeds false and malicious allegations.**
- 4. That warrants of attachment do issue against the respondent for the undisputed bills of Kshs.846,556,520/=.**
- 5. That the court should cite and penalize the five respondents by ordering their arrest and committal to civil jail for contempt of court.**
- 6. That the court do impose a fine of Kshs.100,000/= as punitive damages against the respondents.”**

That is the application that was placed before Okwengu J. for consideration. The learned Judge considered all that was urged before her and in a ruling delivered on 16<sup>th</sup> October 2008 the learned Judge said:-

**“I have carefully considered the application before me. The applicant has raised substantive complaints. First, he appears to be complaining about being defamed by the respondents. Secondly, he appears to be complaining about substantial loss and damage arising from his alleged unlawful eviction from the suit property by the respondents. And thirdly, the alleged contempt of court orders by the respondents. I have also considered the court record with regard to this appeal. I note that the appeal was against orders made on 11<sup>th</sup> December, 1997 in a Divorce Cause No. 122 of 1996 in the SRM’s Court, Nairobi, where-in it was ordered inter alia that the applicant (who was the respondent in the divorce cause) vacates the suit premises i.e. Komarock Sector 3A House No. 283 by 13<sup>th</sup> December, 1997; that in default he be evicted; and that the couple be no longer bound to cohabit with each other.**

**This appeal was heard and the judgment delivered in favour of the appellant on 13<sup>th</sup> July, 1998. Subsequently, the appellant’s bill of costs was taxed and he was awarded a sum of Kshs.311,290/=. In my considered opinion, the proceedings relating to this appeal have been finalized and there is no room for the applicant to canvass the substantive issues which he is now raising. Moreover, the respondents were not parties to this appeal and cannot be brought in at this stage. Further, the issue relating to defamation and damages, forms a substantive cause of action which can only be canvassed in a separate suit. Finally, the applicant cannot purport to enforce orders made in a different suit i.e. HCCC No. 17 of 2001 “OS” in this particular appeal. For these reasons, I find that the application before me is misconceived and the same is accordingly dismissed.”**

Presumably, that is the order the applicant intends to appeal against or, at least, sections of the said order as he told us in his submissions. But what does the applicant seek from this Court in this application before us?

The prayers for the application to be certified urgent and that service be dispensed with are now spent since the application has now reached this Court. The third prayer is that this Court do order the respondents and their lawyers to stop disposing of any of their assets or shares pending the hearing of the appeal. There is no way we can grant that relief since it would be based on no cited legal provision. The fourth prayer is that the respondent be ordered to pay the undisputed assets and charges for these applications. We have only one application before us and if there are other applications, we do not

know. In any case there is no basis for such a prayer. The fifth and last prayer relates to the orders of the High Court and costs of this application. It is upon the High Court to execute its orders. As for costs of this application, we shall decide that in a short while.

We have carefully considered the background to this matter and what the applicant has stated in his oral and written submissions but we have come to a firm conclusion that while the applicant has the constitutional right to ventilate his lamentations in our courts the application before us is clearly misconceived. We are unable to grant what the applicant is seeking in this application.

For the foregoing reasons, we order that the application dated 29<sup>th</sup> October 2008 be and is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of July 2009.***

***R.S.C. OMOLO***

.....

***JUDGE OF APPEAL***

***E.O. O'KUBASU***

.....

***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**