



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 157 of 2006

ISHMAEL KAGUNYI THANDE APPLICANT

AND

HOUSING FINANCE OF KENYA LIMITEDRESPONDENT

(An application for injunction pending the filing, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi – Milimani (Ochieng, J.) dated 30th March, 2006

in

H.C.C.C. NO. 336 OF 2003)

RULING

This matter first came before me as the duty Judge on 13th June, 2006 for certification of urgency of the notice of motion dated 7th June, 2006. The motion sought to restrain the respondent from auctioning the applicant's property as scheduled on 14th June, 2006. The property had been advertised for auction after the applicant failed to comply with terms given to him by the superior court for stay pending appeal. I was not satisfied that the application was urgent and I stated so in my certificate which I issued on the same day.

I did not hear about the matter again for the next seven months until 1st February, 2007 when the file was placed before me purportedly for the *inter parte* hearing on the certificate of urgency under **rule 47 (5)** of the rules of this Court. As would be explained by Mr. Kingara, learned counsel who appeared for the applicant, the intended auction for 14th June, 2006 did not take place because an order was obtained from the superior court to stop it. The applicant was however unable to comply with the terms of the order after sometime and therefore the respondent re-advertised the property for sale in November, 2006. That sale was again stopped by the superior court on condition that the applicant paid the arrears due on the earlier order. He was unable to comply and therefore returned to this Court when the property was re-advertised for sale on 2nd February, 2007. That is how the parties landed before me one day before the auction.

As there were heavily contested matters of fact raised on both sides before I could meaningfully consider the application for urgency, the applicant sought, and I granted, leave to both parties to file affidavits within a limited period. The consequence of that order was that the auction intended for the

following day would be cancelled and so it was on strict terms, the consequence of non-compliance of which was, *inter alia*, that the applicant would not be heard on the application for urgency.

Some affidavits were then filed on both sides and the matter was re-listed before me on 15th March, 2007. On that day, Ms. Jan Mohamed, learned counsel for the respondent complained that there was no compliance with the earlier order and therefore the applicant should not have audience of the court. Mr. Kingara on the other hand strongly asserted that there was full compliance with the order. As there was no agreement on the facts which both counsel appeared to state from the bar, I made an order that affidavits be filed to verify the position and, once again I set deadlines for so doing.

When the matter came up again on 6th June, 2007, both parties had filed their further affidavits but it was again contended that the applicant had not complied with the deadline for filing and serving their further affidavit. Mr. Kingara did not appear before me this time round. Nor did the applicant who in all previous occasions had accompanied Mr. Kingara. Mr. Simiyu appeared instead and, to his credit as an advocate of the High Court, conceded in a forthright manner, that there was no compliance with my order made on 1st February, 2007. He went further and apologized for the misleading information given to the court earlier by Mr. Kingara about such compliance. Mr. Simiyu then attempted to explain the delay in complying with the order and sought the exercise of my discretion to hear the applicant on the certificate of urgency, the failure to comply notwithstanding. Ms. Jan Mohamed on the other hand felt vindicated on her earlier assertions of non-compliance which her further affidavit had clarified and stated that the applicant had still not complied fully with the order on 1st February, 2007. To compound matters, she pointed out, the applicant had not also complied with the subsequent order of 15th March, 2007 and had even served the wrong affidavit on her. In the circumstances, she submitted, the applicant was not deserving of any favourable consideration by the court.

I have considered the matter fully and I think it is regrettable that the progress in the hearing and determination of this matter has been delayed by what are clearly dilatory manouvres on the part the applicant and his advocates. A party who seeks discretionary favours from the court must endear itself to the court by coming before it with clean hands. The very concession that an attempt was made to mislead the court on whether or not there was compliance with a court order is by itself grave enough to deny the applicant of favourable treatment. My order made on 1st February, 2007 was clear and mandatory. There was no compliance by the applicant and therefore the default consequences must take effect.

In the result, there is no material placed before me to warrant the reconsideration of my certificate on urgency which was issued on 13th June, 2006. The matter is not certified urgent and will take its place in the normal scheduling of court business. The applicant shall bear the costs of the *inter parte* hearing which has now been determined. Those are my orders.

Dated and delivered at Nairobi this 8th day of June, 2007.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR