



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

Civil Appli. Nai 11 of 2007 (UR. 9/2007)

SAMUEL NDIBA KIHARA

VIRGINIA NDUTA NDIBA APPLICANTS

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED

ROBERT NGUNYI NJURA

NANCY WANJIKU MBUGUA RESPONDENTS

(Application for interlocutory injunction pending an intended appeal from a ruling and order of the High Court of Kenya at Nairobi (Lady Justice Kasango) dated 21st December, 2006

in

H.C.C.C. NO. 638 OF 2006)

RULING OF THE COURT

The applicants seek an injunction under **Rule 5 (2) (b)** of the Court of Appeal Rules to restrain the respondents from taking vacant possession and occupation of land L.R. No. 76/202 situated in South East of Kiambu Municipality (suit land) pending the hearing and determination of the applicants' intended appeal against the order of the superior court (Kasango J) dated 21st December, 2006 dismissing the applicants' application for interlocutory injunction pending the hearing and determination of *H.C.C.C. No. 638 of 2006*.

By a charge dated 4th September, 1995 the applicants charged the suit land which was then registered in their joint names, to **Housing Finance Company of Kenya** (HFCK) (1st respondent) to secure a loan of Shs.1,500,000/=. The applicants obtained the loan from HFCK to finance the construction of a residential house on the suit premises. The loan was repayable in 15 years with interest at 22% p.a. by monthly instalments of Shs.27,885/=. In the course of time, the applicants experienced difficulties in servicing the loan and as a consequence HFCK issued a statutory notice under **section 69 (A) (1)** of the **Transfer of Property Act 1882**, (TPA), to the applicants dated 28th September, 1998 demanding the payment of the arrears of over Shs.7 million within three months. It appears that the applicants did not comply with the statutory notice and in the year 2000, the applicants filed *H.C.C.C. No. 1604 of 2000* at Milimani

Commercial Courts to challenge the advertised sale of the suit property. The plaint was accompanied by an interlocutory application for injunction to restrain HFCK from advertising and selling the suit land until the determination of the suit. The application was heard and allowed by Mwera J on 22nd November, 2001 on condition that the applicants do pay Shs.50,000/= per month with effect from December 2000 until further orders of the court. The order of injunction was however, discharged on 3rd June, 2002 after the applicants failed to comply with the terms imposed by Mwera J. The applicants ultimately withdrew that suit. In the year 2005, HFCK issued a second statutory notice dated 1st March, 2005 to the applicants notifying them of the outstanding arrears of Shs.7,300,927/05 and demanding payment of the whole balance of arrears and loan amounting to Shs.9,465,762/65 within 3 months. It is apparent that the applicants did not comply with the statutory notice and on 22nd May, 2006 HFCK in exercise of its statutory power of sale sold the suit property by private treaty to 2nd and 3rd respondents in this application for Shs.3,800,000/=.

The 2nd and 3rd respondents were subsequently registered as proprietors of the suit land on 7th July, 2006. This prompted the applicants to file a second suit being *H.C.C.C. No. 402 of 2006* against the three respondents herein. In that suit, the applicants sought an interlocutory injunction to restrain the respondent from seeking vacant possession of the suit property pending the determination of the suit. The superior court (Kasango J) however, dismissed the interlocutory application on 8th November, 2006 on the ground that the applicants had neither shown a prima facie case with probability of success nor that damages would not be adequate compensation. On 21st November, 2006 the applicant filed a notice of withdrawal of the second suit (*H.C.C.C. No. 402 of 2006*) under **Order XXIV** of *Civil Procedure Rules* and proceeded to file a third suit, *H.C.C.C. No. 638 of 2006*, for nullification of the transfer of the suit land, on or about 21st November, 2006. The plaint was accompanied by a chamber summons seeking an interlocutory injunction to restrain the respondents from taking possession or evicting the applicants from the suit land.

The respondents raised a preliminary objection to the chamber summons dated 21st November, 2006, mainly on the ground that the application was *res judicata* as the applicant had filed a similar application in *H.C.C.C. No. 402 of 2006* which was heard and dismissed on merits on 8th November, 2006. The superior court upheld the preliminary objection and dismissed the chamber summons on 21st December, 2006. The applicants have filed a notice of appeal expressing an intention to appeal against the ruling and order dismissing the chamber summons and now seek from this Court an order of injunction to restrain the respondents from taking vacant possession, evicting, or interfering with the applicants' quiet possession of the suit land pending appeal.

This Court can only grant an injunction pending appeal under **Rule 5 (2) (b)** of the Rules of this Court if the applicants satisfy us both that the intended appeal is arguable and further that unless the order of injunction in terms sought is granted the intended appeal would be rendered nugatory (see *Madhupaper International Limited vs. Kerr* [1985] KLR 840; *J. K. Industries vs. Kenya Commercial Bank Ltd & Another* [1987] KLR 506 and *Githunguri vs. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838).

The applicants have filed a draft memorandum of appeal containing 8 grounds of the intended appeal. Mr. Mwangi, learned counsel for the applicant contended that there are serious issues of fraud, estoppel and the manner the sale was conducted to be raised in the intended appeal.

Most of the grounds of the intended appeal contained in the draft memorandum of appeal and referred to by the applicants' counsel relate to the merits of the application which was dismissed by Kasango J on 21st December, 2006. Those grounds do not, with respect, arise from that decision as the learned Judge did not decide on the merits of the application. Rather, the superior court rejected the application mainly on the ground that it was *res judicata*. We can only consider the grounds which relate to the actual decision of the court in that application for interlocutory injunction; that is the grounds relating to issue of *res judicata*. Ground 4 is the only relevant one. It states:

“4. The learned Judge erred in law and fact in having factually and legally confirmed that there are

new issues regarding the land sale agreement, estoppel and fraud and should have proceeded to avoid application of the doctrine of res judicata in view of the provisions of section 60 of the Transfer of Property Act which envisages a limited multiplicity of suits without invocation of the doctrine of res judicata”.

On our part, we are unable to find any explicit or implicit provision in **section 60, 60A, 60B** of TPA which excludes the application of the general principle of *res judicata*. However, the superior court was referred to the decision of this Court in ***Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others***, Civil Appeal No. 36 of 1996 where this Court is quoted to have said:

“Whilst section 60 of Transfer of Property Act envisages a limited multiplicity of suits without the application of the doctrine of res judicata, it cannot be correct to say that in such a suit an infinite number of chamber applications seeking an injunction to stop the statutory sale can be filed”.

In view of that decision, we are satisfied that ground 4 of the intended grounds of appeal is not frivolous and that the appeal on that legal point is indeed arguable.

The only reason given in the application to show that the intended appeal would be rendered nugatory if an injunction is not granted is that the applicants stand to lose their matrimonial home where they and their children reside. The applicants’ counsel did not advance any other ground in his submissions in court.

The purpose of the application for injunction pending appeal is apparently for the maintenance of status quo in respect of the possession and occupation of the suit property. The applicants seek an injunction to protect their possession and occupation of the suit property until the determination of the intended appeal. On the other hand, the 2nd respondent deposes, among other things, that he and his wife (3rd respondent) purchased the suit property for purpose of utilizing it as their family home and that the continued occupation by the applicants is not only unfair but unjust.

It is clear from the affidavit of Joseph Kania, Manager, Legal Services of HFCK and the affidavit of the 2nd respondent that HFCK indeed sold and conveyed the suit property by private treaty to the 2nd and 3rd respondents for Shs.3,800,000/= between May, 2006 and July, 2006 and that the 2nd and 3rd respondents have been registered as joint proprietors. These facts are not disputed by the applicants. Indeed, the pending suit in the superior court seeks the nullification of the sale, conveyance and registration of the suit property. By virtue of **section 23** of the Registration of Titles Act, the 2nd and 3rd respondents are presently the absolute and indefeasible owners. Moreover **section 69B (2)** of TPA provides:

“60B. (2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground –

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power”.

This application for an equitable remedy should be considered in the light of the law for equity follows the law. We are satisfied in the circumstances of this case that it would be inequitable to deny the 2nd and 3rd respondents the possession and occupation of the suit property to which they are currently in law

entitled.

Furthermore, the applicants have not shown that unless injunction is granted, the intended appeal would be rendered nugatory. The direct effect of the success of the intended appeal would be to restore the dismissed application for interlocutory injunction for hearing by the superior court on the merits. In the event that the application, if restored, succeeds, the 2nd and 3rd respondents would be required to give vacant possession of the suit property to the applicants pending the determination of the suit in the superior court. Thus, the fact that the 2nd and 3rd respondents would be in possession of the suit premises pending the determination of the intended appeal would not, in our view, render the appeal, if successful, nugatory.

In the result, we dismiss the application. The costs of this application shall be costs in the intended appeal.

Dated and delivered at Nairobi this 9th day of November, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR