



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appli 89 of 2006

JOSEPH KINOTI MARETE ..... APPLICANT

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION ..... 1<sup>ST</sup>  
RESPONDENT

ROSE GAKII MUTUMA..... 2<sup>ND</sup> RESPONDENT

SAMUEL MUGENDI T/A CLEAR REAL TRADERS ..... 3<sup>RD</sup>  
RESPONDENT

*(Application for injunction pending hearing and determination of the an intended appeal from a ruling and order of the High Court of Kenya at Meru (Justice Lenaola) dated 27<sup>th</sup> March, 2006*

in

H.C.C.C. NO. 79 OF 2004

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RULING OF THE COURT

By this application expressed to be brought under *rule 5(2)(b)* of the Rules of this Court, the applicant *JOSEPH KINOTI MARETE* prays for an order of injunction to be issued against the respondents, their agents, representatives or anybody claiming through them restraining them from evicting, alienating or whatsoever interfering with the applicant's occupation, possession or utilization of the property known as *Nkuene/Taita/512* until the intended appeal is heard and determined.

In or about *October, 1996*, the applicant borrowed *Shs.1,500,000.00* from the 1<sup>st</sup> respondent ICDC and charged his property *land parcel No. Nkuene/Taita/512* as security. It is not in dispute and is admitted by the applicant that soon thereafter he was unable to service the loan and fell into grave arrears. The 1<sup>st</sup> respondent in exercise of its Statutory Powers of Sale instructed the 3<sup>rd</sup> respondent Samuel Mugendi t/a Clear Real Traders to sell the property by public auction.

It is apparent that the sale did take place and the 2<sup>nd</sup> respondent Rose Mutuma was declared the

purchaser and subsequently registered as the proprietor thereof.

It has been canvassed before us that the applicant will contend in the intended appeal that the sale by public auction was fraudulent and actuated by malice on the part of the respondents; that there was no public auction; and that the property was sold at a value way below the market rate.

It is worthy of note that the applicant sought in the suit before the superior court the nullification of the title now registered in the name of the 2<sup>nd</sup> respondent. The suit is yet to be heard. The applicant's application for injunction was rejected by the superior court and hence this application.

Before us, the applicant admitted that he did receive the Statutory Notice of Sale. He also admitted that he was in default before the issuance of the Notice and that the loan still remained unpaid. He emphasized that he was only complaining against the manner in which the sale was conducted.

The respondents on the other hand aver that the sale was properly conducted after the applicant had failed to honour his undertakings and only upon issuance of the requisite notices. This was in exercise of the 1<sup>st</sup> respondents power of sale and that the property had been valued at an open market value. The property was bought by the 2<sup>nd</sup> respondent as the highest bidder at the time of the auction.

For this application to succeed the applicant must show that he has an arguable appeal, and not a frivolous one; and secondly, that if the intended appeal is successful, should not be rendered nugatory. On the material placed before us has the applicant satisfied these conditions?

It would appear to us that whatever transgressions the respondent is alleged to have committed in the sale and transfer of the property in question, the applicant's only remedy, if any, lies in damages. In this regard, we draw support in the clear provisions of *Section 77 (3)* of the Registered Land Act and on the fact that the applicant challenges only the manner in which the public auction was exercised. In the circumstances, we do not think that the applicant has satisfied the first test of the conditions required for the grant of the equitable relief under *rule 5 (2) (b)* of the Rules.

As the remedy of the applicant, as we have opined lies in damages, it cannot and it must follow that there is no way the intended appeal if successful would be rendered nugatory.

In the result, this application is ordered dismissed with costs.

*Dated and delivered at Nyeri this 12<sup>th</sup> day of May, 2006.*

P. K. TUNOI

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*JUDGE OF APPEAL*

*S. E. O. BOSIRE*

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*JUDGE OF APPEAL*

*P. N. WAKI*

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*JUDGE OF APPEAL*

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

DEPUTY REGISTRAR