**Aberdare Investments Ltd v Housing Finance Co of Kenya Ltd and another**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of ruling:** 26 March 1999

**Case Number:** 227/98

**Before:** Omolo, Shah and Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Civil procedure – Application for temporary injunctions – Whether application for temporary injunction can be founded on a claim for a declaration – Order XXXIX, rules 1, 2, 3 and 9 of the Civil*

*Procedure Rules.*

*[2] Mortgage – Mortgagee’s statutory power of sale – Whether mortgagee under obligation to exhaust other remedies to recover money first before exercising power of sale.*

**Editor’s Summary**

The appellant charged its property to the first respondent to secure a loan. The appellant at some point fell in arrears and the first respondent, upon giving statutory notice, appointed the second respondent to sell the property to recover the arrears.

The appellant filed suit seeking first, a declaration that the first respondent was not entitled to exercise its power of sale without exhausting other remedies and secondly, a permanent injunction to restrain the first and second respondent from selling the property.

Simultaneously with the suit, the appellant filed an application under Order XXXIX, rules 1, 2, 3, and 9 of the Civil Procedure Rules seeking a temporary injunction to restrain the respondents from selling the property. The High Court dismissed the application on the ground that it appeared to him the appellant was seeking an “interim declaration” under the guise of seeking an interim injunction. He also ruled that an interim injunction could not be founded on a declaration.

The appellant appealed to the Court of Appeal.

**Held** – The choice of a remedy for recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor: *Lavuna and others v Civil Servants Housing Co Ltd and another* [1995] LLR 3021 (CAK) followed. An offer of redemption based upon probable or possible future sales of other properties is no redemption offer. The appellant did not have a *prima facie* case with a probability of success.

Appeal was dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Lavuna and others v Civil Servants Housing Co Ltd and another* [1995] LLR 3021 (CAK) – **F**

***United Kingdom***

*International General Electric Co of New York Ltd and another v Commissioner of Customs and Excise*