



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO 194 OF 2007**

**JOSEPH MWANGI WAHOME.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**CYPRIAN MUTABARI M'EKANDI..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Prior to his death Joseph Mwangi Wahome (the Deceased) was a customer of Housing Finance Company of Kenya (HFCK or the 1<sup>st</sup> Defendant). The deceased who died in the course of these proceedings brought this action in respect to land reference No. 9509/36 (the Suit Property). Upon his death, Charles Maina Mwangi, his personal representative, substituted him as the Plaintiff.

2. The suit property was charged (P. Exhibit Page 6-15) in favour of HFCK to secure a borrowing of Kshs.963,000.00 made to the Deceased on 15<sup>th</sup> August 1991. It is the case of Plaintiff that, although HFCK took a security for Kshs.963,000.00, it made an advance of Kshs.788,550.00 and in breach of the loan agreement withheld Kshs.174,440.00 or thereabouts.

3. The Plaintiff impugns the charge as not being executed in accordance with sections 59 and 69 of the Indian Transfer of Property Act of 1882. He elaborates that the chargor's signature was allegedly witnessed by one instead of two people.

4. It is common ground that the suit property is currently in the name of Cyprian Mutabari M'Ekandi (the 2<sup>nd</sup> Defendant) having been sold to him by HFCK in purported exercise of its statutory power of sale (P. Exhibit). The Plaintiff challenges the sale as fraudulent, illegal, oppressive, coercive and discriminatory on the following grounds:-

- a) The 2<sup>nd</sup> Defendant did not pay the 1<sup>st</sup> Defendant the said purchase price of Kshs.6,000,000/=.
- b) The 1<sup>st</sup> Defendant charged the suit premises to secure a sum of Kshs.4,800,000/= purportedly lent and advanced to the 2<sup>nd</sup> Defendant.
- c) The 1<sup>st</sup> Defendant sold the suit premises to the 2<sup>nd</sup> Defendant fraudulently as the actual payment made by the 2<sup>nd</sup> Defendant was Kshs.1,200,000/=. The balance of the purchase price Kshs.4,800,000/= having been lent by the 1<sup>st</sup> Defendant on the security of the suit premises.
- d) The suit premises has a value of not less than Kshs.8,000,000/= and selling the same to the 2<sup>nd</sup> Defendant as aforesaid without giving notice to the Plaintiff was fraudulent.
- e) The 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant fraudulently executed an Agreement for Sale on 22<sup>nd</sup> July 2005 with the objective of defrauding the Plaintiff.
- f) The Defendants with the deliberate intention of defrauding and oppressing the Plaintiff to submit his property failed to comply with the terms of the alleged Agreement of sale by:-
  - i. Failing to pay the purchase price of Kshs.6,000,000.00

ii. Failing to deposit the 10% of the purchase price being Kshs.600,000.00

iii. Misrepresented that the property was sold in vacant possession.

g) The 1<sup>st</sup> Defendant in cahoots with the 2<sup>nd</sup> Defendant made illegal and fraudulent entries by crediting the Plaintiff's account as follows:-

i. On or about 14<sup>th</sup> December 2005 Kshs.4,800,000.00 disbursement MC 600-0005733 being a mortgage to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant.

ii. On or about 16<sup>th</sup> December 2005 Kshs.607,369.10 from Junior Account No. 200-0048 in the name of Anthony Mbugua son of Mr. John Mbugua with the 1<sup>st</sup> Defendants Nakuru Branch.

iii. On or about 28<sup>th</sup> December 2005 Kshs.514,000.00 being the Account of one George Gitau with the 1<sup>st</sup> Defendant's Nakuru Branch.

h) Fraudulently applying punitive and oppressive interest rates contrary to Section 44 of the Banking Act Laws of Kenya by the 1<sup>st</sup> Defendant.

i) With intent to defraud, oppress and apply a discriminatory and or punitive interest the 1<sup>st</sup> Defendant deliberately contravened the provisions of Section 39 of the Central Bank of Kenya Act Cap 491 of the Laws of Kenya.

5. In the Amended Plaint dated 9<sup>th</sup> October 2009, the Plaintiff prays for judgment against the Defendants jointly and severally for:-

a) A declaration that the purported sale of the piece or parcel of land known as L.R No. 9509/36 situate at Ruaraka in Nairobi be declared null and void.

b) That the name of the 2<sup>nd</sup> Defendant as the registered owner of the suit premises be cancelled from the register of land.

c) That the name of the Plaintiff be restored to the register of land as the owner of L.R. No. 9509/36 situate at Ruaraka in Nairobi.

d) An order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants or agents from disposing, transferring or dealing with the land known as L.R No. 9509/36 situate at Ruaraka in Nairobi in any manner whatsoever.

e) An order of injunction restraining the 2<sup>nd</sup> Defendant his servants or agents from entering or remaining on the suit premises or interfering in any manner whatsoever with the peace occupation of the said premises by the Plaintiff.

f) Costs of the suit.

g) Interest.

6. HFCK denies any wrongdoing. Pleads validity of the charge. Alleges default on the part of the Deceased and asserts service of a statutory notice. HFCK states that the sale extinguished the Chargor's equity of redemption and he would have no locus to complain about the property.

7. As for the 2<sup>nd</sup> Defendant, he pleads that he purchased the suit premises for consideration when HFCK sold it pursuant to its statutory powers. As the Plaintiff, perhaps now his estate, is still in occupation of the suit property, the 2<sup>nd</sup> Defendant Counterclaims for vacant possession. In addition he prays for mesne profits at the rate of Kshs.35,000.00 per month from January 2006 until when the Plaintiff delivers vacant possession.

8. Joseph Mwangi Wahome, Charles Maina Mwangi, Wilfred Abincha Onono and Moses Mureithi Njuguna gave evidence in support of the claim. Alice Weru testified on behalf of HFCK while no evidence was called for the 2<sup>nd</sup> Defendant.

9. As Joseph Mwangi Wahome passed on before he was cross-examined, this Court, upon invitation of the parties, ruled on 12<sup>th</sup> March 2019 on how his evidence will be treated. This is what the Court Concluded:-

[8] While the evidence of the Deceased should not be expunged, the weight to be attached to his evidence and any documents he may have produced will be the weight that is attached to untested evidence. The trial Court will consider whether, having regard to all evidence adduced, any probative value should be given to that evidence. The trial Court will consider the relevant factors which may include those explicitly set out in Section 36 of The Evidence Act. In doing so, the court will be keenly aware that the evidence is unchallenged and will be cautious that it does not cause undue prejudice to the opposing side.

[9] The Court declines to expunge the testimony of the Deceased that is already on record. The application for expungement is disallowed.

10. As regards the rest of the evidence, this Court proposes to give highlights of the evidence as is useful in resolving the issues that present themselves for determination. Issues which, although there was no joint agreement, are:-

1. Whether the charge document was valid?
2. Whether the Plaintiffs account was illegally, irregularly or oppressively operated by HFCK?
3. Whether the Deceased was in default?
4. Whether HFCK served a statutory notice on the Deceased?
5. Whether the sale of the property to the 2<sup>nd</sup> Defendant was tainted with fraud?
6. Whether the Court can grant the prayers sought in the Plaint?
7. Whether the 2<sup>nd</sup> Defendant has proved his Counterclaim?

Of the validity of the charge.

11. At all material times, the suit property was registered under the now repealed Registration of Titles Act (See P. Exhibit Page 5). This is hardly in dispute. Also agreed is that the charge document of 15<sup>th</sup> August 1991 which is the subject of this suit was executed by the Deceased in the presence of Advocate Rosselyn Olivia Adero Atieno who not only attested the signature of the Deceased but also made a certificate as required by Section 69(1) of the Indian Transfer of Property Act 1882.

12. As I understand it the complaint by the Plaintiff is that the charge, being to secure more than 100 Rupees then the Chargor's signature needed to be attested by at least two witnesses. This Court is told that the sole signature of Advocate Atieno fails the requirements of section 59 of the Indian Transfer of property Act which reads:-

[59] Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon.

13. This argument is not novel and has been answered as follows in the case of Kamdsar Investment Company Ltd Plaintiff –vs- Savings & Loan Kenya Ltd [2009] eKLR;

“This is further elaborated in the case of SOPHIA HOUSE LIMTIED –VS- BARCLAYS BANK OF KENYA LTD HC.CC.NO.435 OF 2004 wherein it was held as hereunder;

“ In the case of Coast Brick and Tiles Works –vs- Premchand Raichand & another (1964) EA 187, it was held that Section 57 of the Titles Ordinance, now Registration of titles Act provides a code in relation to attestation of instruments required to be registered under the Act, Section 1(2) and Section 58 of the that Act must supersede in relation to and under that Act, the requirement of section 59 of the Transfer of property Act 1882 that a mortgage be signed by the mortgagor and attested by at least two witnesses. This view was upheld when the matter went on appeal to the Privy Council who held that S.58 of the Registration of Titles Act, taken with S. 1(2), overrides the provisions of S.59 of the Transfer of property Act 1882 with the consequence that execution of the charge in accordance with S.58 of the Registration of Titles Act suffices, and the charge is not invalidated by want of compliance with S.59 of the Act of 1882.”

This then settles the issue of the validity of the charge. The argument that the charge herein is invalid must fall by the wayside. Section 59 of the ITPA is irrelevant here. The RTA only borrows from the ITPA in cases of realization of the charged security as the former Act lacks provisions for realization. I find and hold that the charge herein is valid on attestation.

14. See also the decision of Ochieng J. in James Mutua Maingi & Another –vs- Housing Finance Company of Kenya ltd [2006] eKLR in which he held:-

“As regards the validity of the charge instrument, the starting point must be the acknowledgement that the suit property is registered under the Registration of Titles Act (Cap 281). That being the case, it is important to bear in mind the following words, as set out in Section 1 (2) of that statute:

“*Except so far as is expressly enacted to the contrary, no Act in so far as it is inconsistent with this Act shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Act.*”

Therefore, the provisions of statute which govern the suit property herein would be those of the Registration of Titles Act. Any other statutory provisions which were inconsistent with that statute would not apply to the suit property.

As regards the execution of charge instruments, Section 46 (1) of the Registration of Titles Act stipulates that the charge shall be executed by the proprietor of the lease, in form J1 or J2 in the First Schedule. Neither the statute nor the forms provided, make provision for execution by the chargee.

And as regards the attestation of the charge instruments, Section 58 (1) of the Registration of Titles Act provides as follows:

*“Every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar shall be attested by one of the following persons – “*

To the extent that the provisions of Section 59 of the Transfer of Property Act are inconsistent with those of the Registration of Titles Act, the said provision shall not be applicable to the suit property herein. Therefore, as Section 59 of the Transfer of Property Act requires that the mortgagor’s signature to a mortgage be attested by two witnesses it is inapplicable to the suit property because by virtue of Section 58 (1) of the Registration of Titles Act, the signature of the chargor needed to be attested by any one of the specified persons cited.

15. That does it for the first issue. The Plaintiff’s argument is without merit.

Of illegality and irregularity in the accounts of HFCK and whether the Deceased was in default?

16. On this I proceed on the assumption that the evidence of Mr. Abincha given on behalf of the Plaintiff is accepted by Court. He is the managing consultant of Interest Rates Advisory Centre (IRAC) which prepared a recalculation report (P. Exhibit pages 75-92) of the Deceased mortgage report for the period 31<sup>st</sup> October 1991 to 31<sup>st</sup> December 2005. He concluded as follows:-

*“Housing Finance’s outstanding balance on 31<sup>st</sup> December 2005 is a debit of Kshs.2,289,990.90. The recalculated outstanding balance is a credit of Kshs.2,203,994.35 . This means that the recalculated difference is Kshs.4,493,985.25 in favour of the mortgagor”.*

17. But his oral evidence was telling on an important aspect of the case;

*“Even after recalculation the borrower owed HFCK some money. As at November 2005 Kshs.3,675,088.85”.*

18. What however would be of great interest is whether or not the Deceased was in default as at 24<sup>th</sup> January 2003 when HFCK is said to have issued a statutory notice. The tabulation of HFCK shows that even after discounting “unlawful” interest charges, the Deceased owed HFCK Kshs.2,229,329.80 as at 31<sup>st</sup> December 2002 and Kshs.2,266,233.81 as at 31<sup>st</sup> January 2003. Clearly the Deceased was in default as at 24<sup>th</sup> January 2003 and the Bank was within its rights in issuing a statutory Notice.

Of the statutory Notice and its validity or otherwise

19. The Defence of HFCK is that it served the Deceased with a statutory Notice dated 24<sup>th</sup> January 2003 (P. Exhibit Page 45). Where the deceased testified before Muga Apondi J, he stated:-

*“Page 45 of our bundle shows I received the statutory Notice. In response I wrote a letter dated 11<sup>th</sup> July 2003 shown on page 47 of our bundle”.*

20. Receipt of the statutory Notice is expressly acknowledged by the chargor.

21. The argument now made on behalf of the Plaintiff is that HFCK ought to have served another statutory Notice because of discussions and negotiations that ensued between the two between 2004 and 2005. This however is not in within the case pleaded by the Plaintiff which was that he had not been served with any statutory Notice at all.

22. Again whether another Notice ought to have been issued is an old argument that has previously been rejected.

23. Perhaps such an argument may have been more helpful if the Plaintiff had proved that in holding the discussions after the statutory Notice, HFCK waived its right press on with the Notice. Quite to the contrary, the statutory Notice makes this disclaimer:-

*“Take note that any proposal made if acceptable and any payments made by you subsequent to the date of this Notice shall be accepted without prejudice to our rights”.*

24. As to the issue that the Notice may have been a demand for more than what was actually due, this Court is unable to fault the validity of the Notice because it was not demonstrated that the debtor paid to HFCK whatever small sum it admitted to be due and owing.

Was sale of 2<sup>nd</sup> Defendant tainted by fraud?

25. The sale of the charged property to the 2<sup>nd</sup> Defendant was by way of private treaty. Section 60 of the repealed ITPA permits the sale of a mortgaged property by way of private contract. This is what it provides:-

[S. 60]. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court and is exercised before the mortgagee has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

26. Was the property sold at an under value? The evidence is that the property was sold to the 2<sup>nd</sup> Defendant for Kshs.6,000,000.00 (D. Exhibit 1 Pages 80-86). The Bank did not produce any valuation to back the price it fixed yet still the onus was on the Plaintiff who had asserted sale at an under value to be prove it. In this regard the valuation of Zenith values dated 13<sup>th</sup> January 2006 was produced (P. Exhibit Pages 68-74). In it the Valuer returned a market value of Kshs.8,000,000.00 as at 13<sup>th</sup> January 2005 (2006?). This report however falls short of proving that the sale to the 2<sup>nd</sup> Defendant was at an under value for two reasons. First, it does not advise on a forced sale value which would be more relevant as the Bank was making a forced sale. Secondly, it does not advise on the value as at July 2005 when the sale happened.

27. Fraud is alleged against the two Defendants in regard to the price on which the property was sold. Fraud must be proved by evidence that is higher than a balance of probability although not as high as beyond reasonable doubt. The evidence of the value falls short of this mark.

28. The evidence available showed that Kshs.4,800,000.00 was credited to the Plaintiff's account on 14<sup>th</sup> December 2005 (D. Exhibit Page 127). This Court was not able to trace the payment of the balance being Kshs.1,200,000.00.

29. Yet even if the Court was to find HFCK liable for failing to timeously credit the Plaintiff's account with the sale price so soon after the sale to the 2<sup>nd</sup> Defendant, it cannot grant any order to Plaintiff's because of the prayers sought. So as to make the point, the Court again reproduces them:-

a) A declaration that the purported sale of the piece or parcel of land known as L.R No. 9509/36 situate at Ruaraka in Nairobi be declared null and void.

b) That the name of the 2<sup>nd</sup> Defendant as the registered owner of the suit premises be cancelled from the register of land.

c) That the name of the Plaintiff be restored to the register of land as the owner of L.R. No. 9509/36 situate at Ruaraka in Nairobi.

d) An order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants or agents from disposing, transferring or dealing with the land known as L.R No. 9509/36 situate at Ruaraka in Nairobi in any manner whatsoever.

e) An order of injunction restraining the 2<sup>nd</sup> Defendant his servants or agents from entering or remaining on the suit premises or interfering in any manner whatsoever with the peace occupation of the said premises by the Plaintiff.

f) Costs of the suit.

g) Interest.

30. Upon the entry of the contract of sale the 2<sup>nd</sup> Defendant, the Deceased's equity of redemption was extinguished. The only remedy that would be available to the Plaintiff was an award of damages. As this was not sought, then it cannot be granted. A reversal of ownership of the suit property is not viable as the equity of redemption was long extinguished.

31. As to the 2<sup>nd</sup> Defendant Counterclaim, the sale of the property to him has not been successfully impeached by the Plaintiff. For that, reason I find that he is entitled not just to the title of the property but to all rights associated with such ownership. Occupation and user being at the very core.

32. On the second limb of the Counterclaim, the 2<sup>nd</sup> Defendant did not tender any evidence to prove mesne profits and I do not make any award in that respect.

33. The Upshot the Plaintiff's case is dismissed with costs to both Defendants. The Counterclaim of the 2<sup>nd</sup> Defendant succeeds for an order that the Plaintiff's estate, servants or agents grant vacant possession of LR No. 9509/36 to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant shall also have costs of the Counterclaim. Vacant possession to be given within 60(Sixty) days of this Judgment.

**Dated, Signed and Delivered in Court at Nairobi this 21<sup>st</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Munyingi (Miss) for Mbisi for Plaintiff

Otieno for Wilson for 1<sup>st</sup> Defendant

Masinde for Mungai for 2<sup>nd</sup> Defendant

Court Assistant: Nixon