



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 162 OF 2006

HOUSING FINANCE COMPANY OF KENYA LIMITED.....PLAINTIFF

VERSUS

GEORGE GIKUBU MBUTHIA.....DEFENDANT

RULING

INTRODUCTION

1. The Application before the Court is the Defendant's Notice of Motion dated **6th February 2014** and filed on **12th February 2014**. It is expressed to be brought under the provisions of **Section 99** of the **Civil Procedure Act**.
2. It sought for one main order, to wit, that the error arising from the decree given by the Honourable Court on **16th May 1991** in HCCC No. 4140 of 1990 be corrected.

THE DEFENDANT'S CASE

3. The application is premised on among other grounds that errors arising from judgments, decrees or orders may be corrected by the court at any time either of its own motion or on the application of any of the parties. The application is supported by the affidavit of the Defendant sworn on **6th February 2014** as well as his Further affidavit sworn on **30th April 2015**. He filed his written submissions dated **22nd April 2015** on **23rd April 2015**. He also filed various lists of authorities in support of his application.
4. The Defendant's case is that prayer no. 1 in the Plaintiff's Notice of Motion dated **23rd November 1990** and the Plaint dated **3rd August 1990** misdirected the Court and wrongly sought an order for possession of LR 36/11/1 Eastleigh, Nairobi from him instead of a decree of possession. He referred the Court to Section 5 (1) of the Mortgages (Special Provisions) Act cap. 304 in asserting that the provisions therein were mandatory and that the Plaintiff's application therefore ought to have been for a decree for possession of the mortgaged property.
5. It was further his case that on **16th May 1991** this Court was intentionally misdirected and it therefore made an error which ought to be corrected both in the Plaint and in the Notice of Motion by substituting the word 'order' and replacing it with 'decree'. It is his contention that the changes to be brought by the correction are bound to have widespread social and economic ramifications which would have been avoided if the Plaintiff drafted the Plaint and the application strictly as

required by section 5 (1) of the Mortgages (Special Provisions) Act.

6. It was his assertion that the decree awarded to him on 16th May 1991 was a form of incorporeal property and there was no warrant in the Constitution for arbitrarily depriving him of the suit property when the right of the same properly vested in him.

THE PLAINTIFF'S CASE

7. On 6th March 2014, the Plaintiff filed the Grounds of Opposition dated 5th March 2014 in opposition to the said application. The Plaintiff opposed the application on the following grounds:
 1. **The Defendant/Applicant is guilty of laches.**
 2. **The grounds in support of the order sought are mischievous.**
 3. **The Application in its entirety is mischievous, ill-advised and brought in bad faith.**
 4. **The Application is frivolous, vexatious and bad in law.**
8. The Plaintiff filed its written submissions dated 7th May 2015 on 8th May 2015. It also filed a list of authorities dated 26th March 2014 on even date.

ANALYSIS

9. Section 99 of the Civil Procedure Act, 2010 under which the Defendant brought the current application provides as follows:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties..”

10. The Defendant's application seeks for orders that this Court be pleased to correct the error in the decree given by this Court on 16th May 1991 in HCCC No. 4140 of 1990 by substituting the word “order” with the “Decree”. The Defendant relies on section 5 (1) of the Mortgages (Special Provisions) Act, cap. 304.
11. On the other hand, it is the Plaintiff's submission that the Defendant seeks to amend a Decree while there is none on record. This Court will not belabor much on this submission as it is clear which Order the Defendant referred to for correction. He attached to his application the said Order dated 16th May 1991 and issued by the Court on 23rd October 1991.
12. Now turning to the substance of the matter which is whether the Order given by this Court on 16th May 1991 had an error to be corrected. The Defendant relied on section 5 (1) of the Mortgages (Special Provisions) Act in submitting that the term “order” was to be substituted by the term “decree” in the Order of the Court dated 16th May 1991. The said section provides as follows:-

“5(1) At any time after the expiration of twenty-one days after the summons has been served on the Defendant, the company may apply to the Court for a decree for possession of the mortgaged property, and on such application the court shall read the affidavits filed and shall pass a decree for possession accordingly, unless it is satisfied on such reading that the specified conditions do not exist, or that there is reasonable doubt whether they exist, in which case the court shall grant leave to defend either unconditionally or on such terms as to giving security or time of trial or otherwise as the court may think fit.”

In view of the above provisions, it was the Defendant's contention that the Plaintiff misdirected the Court by seeking for an order for possession instead of a decree for possession.

13. It is plain from the Plaintiff's Plaint dated 3rd August 1990 and its application dated 23rd November 1990 that they sought for an order for possession of the suit property. This Court has also read and understood the above provisions of section 5 (1) of the Mortgages (Special Provisions) Act which provide that a company is at liberty to apply for a decree for possession

- after the expiration of twenty-one days after the service of summons upon the Defendant. Upon such application, the Court will either grant the same or grant leave to defend. The Plaintiff's application dated 23rd November 1990 was taken out under section 5 (1) of the Mortgages (Special Provisions) Act and therein the Plaintiff sought for an order for possession as prayed in the Plaintiff and also sought to execute the decree which was to emanate from the said order.
14. In the circumstances foregoing, this Court cannot see how the Plaintiff misdirected the Court. The fact that the said section 5(1) provides that a company will apply for a decree for possession does not mean that an application to that effect has to be worded in the said terms, that is, by using the term decree. The orders prayed for by the Plaintiff in the said application dated 23rd November 1990 if granted would obviously lead to a decree for possession as intended under section 5 (1) of the Mortgages (Special Provisions) Act. In any case the Plaintiff had also sought in its prayers the execution of a decree, in the event that there was any. However, the Court did not grant the said orders and therefore there was no decree.
15. The definition of the terms decree and order are to be found in section 2, the interpretation section of the Civil Procedure Act. They are defined as follows:-

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91...”

“order” means the formal expression of any decision of a court which is not a decree, and includes a rule nisi;

From the above definitions it is obvious that what the Court rendered on 16th May 1991 was an Order as the same did not conclusively determine the rights of the parties with regards to the matters in the suit.

16. As earlier stated and as provided for under section 5(1) of the Mortgages (Special Provisions) Act, in the event that the Court does not allow an application for a decree for possession it shall grant leave to defend. To that end, the Defendant's submission that the real intention of the Court in the Orders of 16th May 1991 was to award him with a decree once the Plaintiff's application failed is misguided and cannot stand.
17. Accordingly, having carefully considered the pleadings herein and the written submissions by the Parties the court finds that there was no error arising from any accidental slip or omission in the Court Order of 16th May 1991 as envisaged under Section 99 of the Civil Procedure Act.

DISPOSITION

18. The upshot of the foregoing is that the Defendant's Notice of Motion application dated 6th February 2014 and filed on 12th February 2014 is hereby dismissed with no orders as to costs.
19. Lastly, and in order to put the record straight, this court observes, and wonders why this application was filed in the current suit, yet it was submitted that the said suit being HCCC No. 4140 of 1990 is still ongoing. If that is so, this application for rectification ought to have been filed in that matter.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF JULY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mbutia for the Defendant

M/s Weru for for the Plaintiff

Teresa – Court Clerk