



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 414 OF 2004

FRANCIS J. K. ICHATHA.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF (K) LTD.....1ST DEFENDANT

BAKER'S CORNER COMPANY LIMITED.....2ND DEFENDANT

RULING

This Ruling is delivered in the Plaintiff's Chamber Summons dated 30th June 2010, by which, he seeks leave to amend his Plaint filed on 23rd July 2004, under which he claims from the HOUSING FINANCE COMPANY OF KENYA LTD (hereinafter referred to as the Defendant) the following reliefs;-

- (a) A permanent injunction restraining the defendant, its agents and/or servants from exercising its powers of sale over the suit premises herein namely L.R. No. 13689 Langata Nairobi.**
- (b) A declaration that the defendant is not entitled to charge the plaintiff any penalties whether described as 'penalty interest' 'interest on arrears', 'default charges' or by whatever name called and that such penalties, variously described herein as 'penalty interest', 'interest on arrears', 'default charges' together with the cumulative interest thereon that the defendant has charged the plaintiffs in the past is in breach of contract herein is unconscionable, illegal, null and void and that the same constitutes a fetter or clog on the plaintiff's equity of redemption.**

(c) A declaration that the defendant has acted in contravention of The Banking Act (Cap 488, Laws of Kenya) and that it (the defendant) has applied interest rates on the plaintiff's facility in breach of the specific terms of the contractual documents governing the facility herein.

(d) In view of the mathematical nature and foundation of the dispute herein accounts be taken of the loan amount herein due by the Department of Mathematics of the University of Nairobi in accordance with the banking facility contracts between the parties and that the plaintiffs indebtedness, if any, be adjusted in accordance with the findings of the Department of Mathematics of the University of Nairobi.

(e) Costs of this suit be provided for.

(f) Any other or further relief that this Honourable Court may deem fit to grant.

The proposed amendments, as contained in the draft annexed to the Chamber Summons are intended for the purposes, mainly, of enjoining Bakers Growers Company Limited (hereinafter referred to as the proposed 2nd Defendant) proposed 2nd Defendant in the suit, and to further challenge the sale of the suit premises by the Defendant to the proposed 2nd Defendant, by introducing facts, which according to the plaintiff would lead this court to find that he is entitled to a **“retransfer”** or **“reconveyance”** of the suit property from the proposed 2nd Defendant. In this regard, the Plaintiff avers, in the proposed paragraph 27A to 27D of the draft amended Plaint as follows;-

“27A. Sometime between June and July, 2005 the 1st Defendant, acting under the pretext of exercising its accrued right of sale on account, sold the suit premises to the 2nd Defendant.

27B. The Plaintiff states that the said sale was malicious, capricious, reckless, irregular and unlawful, was without any factual and/or lawful justification.

PARTICULARS;-

(a) The particulars contained in paragraph 17 infra repeated and reiterated.

(b) The sale was conducted by way of private treaty in breach of the material covenants and contrary to law in the premises;

(c) There was no proper notification of the sale in the circumstance as known in law;

(d) Denying the Plaintiff the contractual right to make alternative arrangements to re-finance in the circumstances;

(e) Failing to render a proper account of the proceeds of sale.

(f) Failing to refund the excess amount vis-a-vis the same proceeds.

(g) Selling the suit property in light of, and despite gross under –valuation of the suit premises.

27C. As a consequences the Plaintiff has suffered loss.

PARTICULARS OF LOSS

(a) Loss of the suit premises;

(b) Loss of user of the suit premises;

(c) In the alternative, loss of difference in monetary terms of the refund due together with overcharged sum.

27D. The 2nd Defendant is thus sued in its capacity as the purchaser of the suit premises and the Plaintiff seeks from it, inter alia, a retransfer and repossession thereof to him”

Consequently, the Plaintiff seeks to amend prayer (d) of the Plaint and to include additional prayers as follows;-

“(d1) Refund of amount due to the Plaintiff consequent upon such accounts being taken.

As against the Defendants jointly and severally, and in the alternative to prayer (d1) above;-

(d2) A rescission of sale, reconveyance, retransfer and vacant possession of the suit premises in favour of the Plaintiff.

(d3) In the alternative to (d 2) above, the Deputy Registrar of this Court to execute the necessary reconveyance and transfer instruments in respect if the suit premises in favour of the Plaintiff.

(d4) A declaration that the purported sale by private treaty to the 2nd Defendant is in breach of contract, cavalier, fraudulent, irregular and unlawful and that the 1st Defendant was not entitled to sell the suit premises”.

The Chamber Summons is opposed on the grounds of opposition filed by the Defendant on 22nd September, 2010 and the Notice of Preliminary Objection filed by the proposed 2nd Defendant on 21st July, 2010.

Both contender argue that the application is devoid of merit, is bad in law, misconceived and frivolous. They hold the common view that no useful purpose will be achieved by allowing the amendments sought since, according to them, the matters raised in the amendments are res judicata and

that the applicant's equitable right of redemption has since been extinguished by the operation of the law and that the application is merely intended to cause delay. According to the Defendant, the Applicant, having breached the contract on which he basis his claim, cannot, by reason of such breach, expect any redress from the court. On his part, the proposed 2nd Defendant claims to be a bona fide purchaser of the suit property for value, without notice of any defect in the title thereof and is thus protected by Section 77 (1) of the Registered Land Act, since he holds an absolute and indefeasible title as provided for under Section 23 of the Registration of Titles Act.

Submitting in support of his application, the Plaintiff told the court that the reason for his wanting to join the proposed 2nd Defendant is with a view to having him enlighten the court as to how much he paid for the subject matter and also because there appears to have been a conspiracy between him and the Defendant calculated at disentitling the Plaintiff of the property. He believes that the acts of the Defendant, when dealing with the proposed 2nd Defendant had an element of fraud which would render the transfer of the property to the latter null and void, thus entitling the Plaintiff to a re-transfer of the property, upon the issuance of the declarations sought under Prayers (b), (c) and (d 4), as well as the orders sought under Prayers (d 2) and (d 3) of the amended plaint. The applicant, although admitting that he defaulted in his repayment of the loan owed to the Defendant, contends that he would not have found himself in that predicament had the Defendant not proceeded in a manner that made the instalments payable go outside the applicant's financial capacity by altering the rate of interest without giving him four months notice of its intention to do as was provided in Clause 5 of the charge in its favour, dated 7th August, 1991. I consider this to be an interesting argument which ought to be given consideration in these modern times of developing jurisprudence as it touches on the freedom to contract. The applicant bases his argument on the contractual document itself which, under the said Clause 5 provided, *inter alia*, that

“ (1) Until the service of such notice as is hereinafter referred to interest shall be at the rate of 18% per centum per annum”

My above observation notwithstanding, I am of the view that the said argument can only be validly raised in a claim for damages for breach of contract and/or contractual duty, if any, as would be brought by the Plaintiff/Applicant against the Defendant. The plaint and the draft amended plaint do not specifically provide for such a claim, although the applicant does state that he suffered loss in the form of

(a) Loss of the suit premises,

(b) Loss of user of the suit premises

(c) In the alternative, loss of difference in monetary terms of the refund due together with the overcharged sum.”

In this regard, he prays for a refund of the sums stated in (c) above from the Defendant (H.F.C.K.). Unless it is assumed that the applicant would expect the court to award damages as part of “other or further relief that this honourable court may deem fit to grant, uponmaking of the declaration sought under the additional Prayer (d 4), damages for breach of contract or the alleged wrongful exercise of the statutory power of sale have not been specifically prayed for.

This court has previously held that the applicant has not established a prima facie case with a likelihood of success against the Defendant when a temporary injunction to stop the sale of the suit property was refused under a Ruling delivered by the Honourable Justice Emukule on 3rd March, 2005. That finding notwithstanding the applicant still believes that he can still prove his case, on the balance of probabilities,

through the calling of evidence. He believes that the proposed amendments would assist him in that regard.

The law as regards the power of the court to amend pleadings is not in dispute. It is derived firstly from **Section 100** of the **Civil Procedure Act** which provides, *inter alia*, that

“...all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

and **Order 8 Rule 5** of the **Civil Procedure Rules 2010** (formerly **Order VIA Rule 5** of the **Civil Procedure Rules, 2009** Revised Edition). The said rule provides as follows:

“5 (1) For the purposes of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, the court may, either on its own motion or on the application of any party order any document to be amended in such manner as it directs or on such terms as to costs or otherwise as are just.”

The applicant has invoked the above rule in addition to **Rule 3** of the same order which provides for leave to amend pleadings at any stage of the proceedings subject to **Order 1 Rule 9 and 10, Order 24 Rules 3, 4, 5 and 6** (parties to suits; misjoinder, non-joinder and substitution thereof).

The legal relationship between the parties hereto is fundamental to the application before court as the real question in controversy between them is dependent on that relationship. The relationship between the Applicant and the Defendant (H.F.C.K.) is one of chargor and chargee. The question arising from the applicant's suit is whether the Defendant exercised its statutory power of sale (resulting in the sale of the suit property to the proposed 2nd Defendant) in accordance with the law and/or whether the same was tainted by fraud in a manner that would render transfer of the same null and void. The Applicant also raises the issue that his equity of redemption was lost to him by virtue of the Defendant's misfeasance, bringing about the question whether, in that case, the Applicant is entitled to the reliefs sought under the amended Plaintiff.

The Applicant claims that the sale having been under private treaty and not by way of an auction, his equity of redemption could not have been lawfully extinguished. This argument cannot stand since that equity is lost upon registration of a bona fide purchaser as the new owner. In their submissions, the advocates for the Respondents did not come out clearly as to how the matter is res judicata as stated in their respective objections. If I am to assume that the reference in that regard is as concerns the finding that the Applicant did not, at the interlocutory stage, demonstrate that he has a prima facie case against the Defendant, my view is that the Ruling of the Honourable Justice Emukule, even if upheld by the Court of Appeal did not determine this suit conclusively. The Applicant is still entitled to call any evidence he believes would assist him in proving his case on a balance of probabilities. Being so determined to argue his case to the end, despite the previous findings of the court, one can only conclude that the Applicant is prepared to meet whatever costs the court may impose upon him in the event that he loses in the end.

It is clear from the pleadings as they stand, including the draft amended plaintiff, that the Defendant, having exercised its rights under the charge document and realized its security stands to suffer no prejudice if the amendments to the Plaintiff are allowed, save only for the inconvenience of being kept a little while longer in these proceedings, and perhaps the cost of amending its defence. These are hardships which can be compensated by way of costs. Going by the enthusiasm the applicant has displayed in prosecuting the application and the suit, notwithstanding previous orders issued by the court over the same subject matter, it can only be presumed that he is quite prepared to pay such costs. Therefore, in view of the questions in controversy between the Plaintiff and the Defendant I am inclined to allow the amendments in no far as they relate to the Defendant.

Turning to the joinder of the purchaser, I am not persuaded that the amendments have any basis. Both the Respondents are in agreement on this and the numerous authorities cited to support their objections are quite clear on the fact that the Applicant has no right of claim against the proposed 2nd Defendant. The bulk of these authorities are in line with the holdings of the Court of Appeal in the cases of **DOWNHILL LTD –VS- HARITH ALI EL BUSAIDY & CITY FINANCE LIMITED CIVIL APPEAL NO. 254 OF 1999**, and **JAMES OMBERE OCKOTCH –VS- EAST AFRICAN BUILDING SOCIETY & 2 OTHERS CIVIL APPEAL NO. 202 OF 1996**, cited herein by the Respondents.

Both these decisions were arrived at upon due consideration of the provisions of the **Indian Transfer of Property Act** as regards the exercise of the statutory power of sale under **Section 69** of the **Act**. There is no dispute whatsoever that the said provisions apply to the charge executed by the Applicant in favour of the Defendant. Indeed, clause 8(ii) of the charge, specifically entitles the Defendant to exercise **“all statutory powers conferred on chargee (sic) by the Indian Transfer of Property Act 1982 or any Act amending the same”**, in the event that the Applicant defaulted in the payment of any monthly instalment or other payment covenanted to be paid under the charge or in the observance or performance of any of the covenants or obligations thereby expressed or implied. Furthermore, the said clause provided that the exercise of such statutory powers could be exercised without any previous notice or concurrence on the part of the Applicant.

As regards the chargor’s power of sale, Section 69 provides as follows;-

“69 (1) A mortgagee or any person acting on his behalf where the mortgage is an English Mortgage to which this section applies, shall, by virtue of this Act and without the intervention of the court have the power when the mortgage money has become due, subject to the provisions of this section to sell or to concur with any other person in selling the mortgaged property or any part thereof, either subject to prior encumbrances or not and either together or in lots, by public auction or by private contract subject to such conditions respecting title, or evidence of title or other matter, as the mortgagee thinks fit with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale and to resell without being answerable for any loss occasioned thereby; the power of sale aforesaid in this Act referred to us the mortgagee’s statutory power of sale and for the purposes of this Act the mortgage money shall be deemed to become due whenever either the day fixed for repayment thereof or part thereof, by the mortgage instrument has passed or some event has occurred, which according to the terms of the mortgage instrument renders the mortgage-money or part thereof immediately due and payable”.

As regards the consequences of the statutory power of sale being exercised pursuant to **Section 69(1)** it is provided under **Section 69 B(2)** that

“Where a transfer is made in exercise of the mortgagee’s power of sale the title of the purchaser shall not be impeachable on the ground –

(a) That no case has arisen to authorize the sale

(b) That due Notice was not given

(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 had arisen to authorize the sale or due notice had been given, or the power is otherwise or improperly 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”.

Section 69(1) is quite clear that the above situation maintains whether the sale in exercise of the statutory power of sale is by public auction or by private contract. This being the case, the amendment of the Plaint to enjoin the proposed 2nd Defendant in the suit will serve no useful purpose. Consequently I allow the application only in so far as it relates to the Defendant, Housing Finance Company of Kenya Limited. Leave to amend the Plaint to enjoin the proposed 2nd Defendant is declined. In the circumstances the Amended Plaint as filed cannot be deemed to be properly filed. An appropriately Amended Plaint shall be drawn and served upon the Defendant within the next 14 days failing which the leave granted herein shall automatically lapse. Once served, the Defendant shall file its amended defence within 14 days of serve.

The Applicant shall bear the costs of this application which is allowed as against the Defendant and refused as against the proposed 2nd Defendant.

Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 17TH day of FEBRUARY, 2011

M. G. MUGO

JUDGE

In the presence of:

Francis J. K. Ichatha

Plaintiff in Person

Mr. Kabaka

For 2nd defendant

Mr. Kabaka holding brief for Mr. Muganda

For 1st Defendant