



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 187 of 2002**

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

**VERSUS**

**ANN NJOKI KURIA.....DEFENDANT**

**JUDGMENT**

The Plaintiff is a financial Institution which, on request by the Defendant ANN NJOKI KURIA, advanced Kshs.2,572,500/= against a charge on the Defendant's premises (herein after referred to as the suit premises) registered as L.R No.209/403/2 dated 25<sup>th</sup> September, 1996. The Plaintiff claims that the Defendant defaulted in repayment following which the Plaintiff, in exercise of its statutory power of sale under the charge, sold the suit premises in a public auction on 23<sup>rd</sup> November, 1999. The Plaintiff realized Kshs.2,950,000/= leaving a short fall of Kshs.2,639,617.42. The Plaintiff thereafter filed this suit against the defendant seeking to recover the said short fall of Kshs.2,639,617.42/= with interest thereon at 19.9% per annum from 24<sup>th</sup> November, 1999 until payment in full.

After the Defendant was served with the plaint and summons to enter appearance, she filed her defence in court on 18<sup>th</sup> March, 2002. The salient features of the defence are:

In paragraph 3 the Defendant denies that she owns the suit premises and avers that in the circumstances she could not have charged the suit premises in favour of the Plaintiff.

In paragraph 4 and 5 the Defendant contends that what was charged was a lease and that she is aware the Plaintiff sold it for Kshs.2,950,000/= but that no statements of accounts were supplied. In paragraph 6 the Defendant avers that the Plaintiff had a fiduciary duty to recover all the outstanding amount from the sale, the Plaintiff having valued the security, and having known that it was sufficient to cover the entire amount.

In paragraph 7 the Defendant avers that she never executed any personal guarantee against the mortgage amount. The Defendant denied paragraphs 5 and 6 of the plaint where the Plaintiff claim together with interest is made.

The Plaintiff filed a reply to defence on 4<sup>th</sup> April, 2002. In answer to paragraphs 3, 4 and 5 of the defence the Plaintiff reiterated the content of the plaint in paragraphs 3,4 and 5. In reply to paragraph 6, it reiterated its right to exercise its statutory power of sale, and to file the suit to recover the short fall of the amount owed. In reply to paragraph 7 the Plaintiff avers that the content of paragraph 7 was irrelevant.

The case was heard on 18<sup>th</sup> February 2008 in the absence of the Defendant or her Advocate. Despite

service, none of them appeared for the hearing of the case.

The Plaintiff called the Assistant Manager, Legal Department, Ms. Joyce June Njoroge who testified on it's behalf. The witness produced the Mortgage Application form Exhibit.P1 and a Valuation Report Exhibit.P2, showing that the value of the property offered for the mortgage was assessed at Kshs.3 million. The witness also produced Exhibit.P3 showing that the special conditions and offer made by the Plaintiff to the Defendant was accepted on 20<sup>th</sup> June, 1996. The witness also produced an Offer to Advance Kshs.2,572,500/= dated 18<sup>th</sup> June, 1996, Exhibit.P4, which the Defendant also accepted by signing. The witness also produced the Mortgage Agreement Exhibit.P5, duly signed by the Defendant on 25<sup>th</sup> September, 1996. Among other provisions, the Mortgage Agreement provided for interest to be charged at the Plaintiff's sole discretion, with an initial interest rate of 26% per annum.

The witness produced various correspondences exchanged between the Plaintiff and the Defendant over the Defendant's default in making payments and the various requests made to the Plaintiff by the Defendant to extend the repayment period. These were exhibits 6 to 11 and exhibits 14 to 18.

Finally, the Plaintiff opted to send a Statutory Notice to the Defendant through it's Advocates, on 19<sup>th</sup> September, 1997. The Statutory Notice is Exhibit.P12. The Defendant acknowledged receiving the notice by a letter Exhibit.P13.

The Plaintiff has produced a bundle of Exhibits marked 19(a) to (k), showing notices sent to the Defendant to pay the debt and redeem the property. They also show the date the property was sold by public auction, the sum realized of Kshs.2,950,000/= and the outstanding balance in the sum of Kshs.2,639,617.42, which is sum claimed by the Plaintiff in this suit. In this suit with interest. The statement of the Defendant's Mortgage Account is Exhibit.19(1) and it confirms the same.

The Advocate for the Plaintiff, Mr. Sagana, gave his submissions orally and in writing. I have carefully considered the same, together with the cases relied upon. Having considered the pleadings of the parties, the evidence adduced by the Plaintiff and the documents relied upon by the Plaintiff, and the Statement of Agreed Issues dated 24<sup>th</sup> November, 2003 and submissions by Counsel for the Plaintiff, the issues in this case appear to me to be:

- a) Is a leasehold interest capable of being charged to secure a mortgage debt.
- b) Did the Agreement between the parties provide for interest and at what rate.
- c)
  - i) Did the Defendant execute any personal guarantee against the Mortgage debt and
  - ii) Can the Plaintiff recover the alleged balance due to it from the Defendant?

In regard to the first issue whether the suit property was capable of being charged being a leasehold. Surprisingly, Mr. Sagana for the Plaintiff did not deal with the issue in his submissions, written or oral. It is an issue raised in the Defendant's defence and acknowledged by the Plaintiff in their filed Statement of Agreed Issues dated 24<sup>th</sup> November, 2003.

The suit property was leasehold whose Head lessor was Ndemi Lane Apartments Limited, as per the mortgage document. The Head lessor signed the Mortgage documents and sealed it with the Common Seal of the Company, as proof of its consent to the Defendant to charge the suit property to the Plaintiff. The consent was framed in the following terms:

***"We NDEMI LANE APARTMENTS LIMITED, being the lessor in the Lease dated 25<sup>th</sup> day of September 1996 in respect of Flat No. C15 hereby consent to the within written mortgage without prejudice to our rights and privileges and the lessees covenants and obligations' under the said lease."***

The issue of consent by the Head Lessor does not therefore arise. The suit property was registered under

the Registration of Titles Act. The substantive law applicable to the Mortgage is the Transfer of Property Act, Group 8 (hereinafter referred to as the TPA). Under the Mortgage, Sub-sections 61, 65A and 65B and 67A of the TPA have been excluded from application.

In regard to the powers of sale of the suit premises, the Mortgage Agreement under clause 9(b), expressly provides that subsection 69 to 69G of the Transfer of Property Act apply under Section 58(a) of the Transfer of Property Act, a mortgage is defined in the following terms:

***“58(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*”**

Under that section, the Defendant entered into a valid Mortgage contract with the Plaintiff which had the effect of transferring the mortgaged property to the mortgage leaving only an equity of redemption to the Mortgagor. The Mortgagor cannot be heard to say that the Mortgage was illegal for being a leasehold. A leasehold is an immovable property capable of being charged to secure a debt and the Head lessor of the property consented to the said charge. The Defendant’s argument is therefore untenable.

Under Section 58(b) of Transfer of Property Act, a simple Mortgage is defined as follows:

***“58(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.”***

Section 58(b) of the Act is clear that by entering into the Mortgage Agreement, the Defendant bound herself personally to pay the Mortgage debt. The same section further provides that a Mortgagee can sell mortgaged property, where parties to a mortgage contract that a Mortgagee shall have the right to sell the mortgaged property to recover the secured debt, and where the Mortgagor binds himself personally to pay the mortgage debt. Under the Mortgage Agreement, very clear provisions were made invoking Section 69(1) of the TPA. More particularly the Defendant and the Advocate who witnessed her signature, Mbage N. Nganga, both signed a certificate at page 22 and 23 of the Mortgage Agreement, confirming that Section 69(1) of the TPA was read over and explained to the Defendant and it’s effect explained to her. The loss of the suit property by sale was clearly contemplated by the parties under the contract between the parties. In the case of **MAITHYA VS HOUSING FINANCE COMPANY OF KENYA [2003]IEA 133** Nyamu, J observed:

*“Charged properties are intended to acquire or are supposed to have a commercial value otherwise tenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending many renders, banks and mortgages houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities. The lending in most cases given on the basis of the commercial value of the securities or as a percentage of that value. These are commercial values which are established by valuers on the instructions of borrowers or the banks. Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”*

The entire section is set out at page 23 of the contract against which the Defendant signed confirming that the section was read to her and that she understood it.

The section 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 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 an contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as 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."*

I do find and hold that the leasehold property was capable of being mortgaged and that once the Defendant entered into the Mortgage Agreement the mortgage debt was secured and further that the Defendant bound herself personally to pay the said debt. I find and hold that the mortgage agreement was valid and that the Mortgage had the power to sell the suit property to recover the debt owed.

In regard to the second issue of whether the agreement between the parties provided for the charge of interest. The defendant at paragraph 4 of the statement of defence pleaded as follows:

4. The defendant avers that she made several payments to the plaintiff despite the fact that the plaintiff deviated from the contents of the charge and started charging sporadic and inconsistent interests on the account to a point when the account without prejudice was difficult to service.

In reply, to the defence the Plaintiff reiterated the contents of

paragraphs 3, 4 and 5 of the plaint. In paragraph 3 of the

plaint the Plaintiff averred as follows:

3. THAT by a Charge dated 25.9.1996 (hereinafter referred to as "the said charge") made by and between the parties hereto, the defendant charged her premises known as Land Reference No.209/403/2 to the Plaintiff being security for repayment of the principal mortgage debt of Kshs.2,572,500/= lent and advanced to the defendant with interest thereon at such rate(s) as the Plaintiff in its sole discretion determine. At the hearing the hereof, the plaintiff shall crave for Court's leave to refer to the said Charge for its full, effect, tenor and meaning.

The agreement between the parties is contained in the

Mortgage document which is Exhibit.P5. In clause 3 of the

Mortgage the two parties covenanted as follows:

"3. The Mortgagor shall pay interest on the amount secured (as well after as before any judgment) at such rate or rates per annum as the mortgagee shall in the sole discretion of the Mortgagee from time to time decide with full power of the Mortgagee to charge different rates for different account and such interest shall be calculated on daily balances and debited monthly by way of compound interest PROVIDED THAT:-

(a) The Mortgagee shall not be required to advice the Mortgagor prior to any change in the rate of interest so payable nor shall any failure by the Mortgagee to advise the Mortgagor as aforesaid prejudice in any way howsoever the recovery by the Mortgagee of interest charged subsequent to any such change."

Mr. Sagana submitted that the clause clearly provided the Plaintiff with the right to charge interest on the Mortgage debt at the rates determined by the Plaintiff in it's sole discretion. Learned Counsel also referred the Court to Clause 1 of the agreement in which the Defendant covenanted to pay all monies under the Mortgage account. Counsel relied on the case of ORION EAST AFRICA LIMITED VS

*“I do agree that these clauses are not the best and may work injustice to the chargor but I am not here to rewrite contracts for parties. The Applicant readily accepted the same conditions and he cannot seek any changes midstream. The agreement is clear that interest rates could be changed any time by the Respondent and even without informing the Applicant.”*

The terms of clause 3 of the Mortgage as to interest are very clear indeed. The Mortgagee had power under the Mortgage to charge interest at such rate as in its sole discretion will decide and to vary such interest rate without prior notice to the Mortgagor.

Mr. Sagana commented that the provision on interest may not be the best. Counsel urged the Court to agree with Otieno J's (as he then was) observation in Orion's case, supra. I agree that the Plaintiff had power under the Mortgage, to charge interest and to vary the interest charged from time to time without prior notice to the Defendant/Mortgagor. I also agree that however sympathetic the Court may be, it cannot re-write for the parties contracts entered voluntarily by the parties. I do find that the Defendant was not justified at this stage to question the contract terms on interest. The issue has no merit and is accordingly dismissed.

The remaining issue has two limbs to it. Whether the Defendant signed any personal guarantee against the Mortgage account and whether the Plaintiff is entitled to recover the alleged shortfall balance on the Mortgage loan from the Defendant.

The Defendant in her statement of defence averred that the Plaintiff was obliged to recover the entire loan due to it from the Plaintiff in the forced sale.

The Defendant averred further that she had not signed any personal guarantee to cover the Mortgage loan and that therefore the Plaintiff cannot recover from her. I have already dealt with this issue and found that indeed the Defendant, by entering into the Mortgage Agreement was personally binding herself to pay the Mortgage debt.

Mr. Sagana for the Plaintiff has submitted that the Defendant covenanted to pay all the monies due under the Mortgage loan to the Plaintiff. Indeed clause 1 of the Mortgage stipulates as follows:

*“1. The Mortgagor hereby covenants with the Lender on the 31<sup>st</sup> day of December next (herein after called the “Legal Date of redemption”) to pay to the Lender together with all interest costs charges and expenses hereby intended to be secured AND at any time after the Legal Date of redemption on demand in writing to pay and discharge all moneys and liabilities including all costs charges and expenses which may from time to time be due and owing by the Mortgagor to the Mortgagee as herein provided (hereinafter referred to as “Amount Secured”) together with interest thereon calculated at the rate and in the manner hereinafter specified in the Second Schedule AND this Mortgage shall be a continuing security notwithstanding any settlement of account or other matter whatsoever for the payment and discharge of the Amount Secured together with interest as aforesaid.”*

The Defendant appended her signature to the Mortgage Agreement in the presence of Counsel. As provided under the Mortgage, the Defendant covenanted “to pay to the Lender... and discharge all moneys and liabilities....due and owing to the Mortgagee.” It is as clear as day that the Defendant's liability to the Plaintiff was not capable of being discharged after the sale of Mortgaged (suit) property in exercise of the Mortgagee's Statutory Power of Sale. The Defendant's argument, that she had not entered into a “personal guarantee” over the Mortgage loan, and that the Plaintiff should have recovered all the debt due from the sale proceeds, was foreign to their clearly worded contract. There is no merit in the issue raised and the same is dismissed. I do find that the Plaintiff was entitled to recover the entire Mortgage debt together with all charges, interests, costs and incidentals arising there from, from the Defendant. The Plaintiff has proved it's case that after the Defendant defaulted in repayments and after due notices were served, it exercised it's Statutory Power of Sale under Section 69(1) of TPA. The

Plaintiff has also proved that the proceeds realized from the sale were insufficient to cover the debt owed. The Plaintiff has also proved that it was entitled to recover the short fall of the debt from the Defendant. The Plaintiff has therefore proved its case against the Defendant on a balance of probabilities.

Having considered this case in its entirety I find and hold as follows:

- 1) That the leasehold suit property was capable of being mortgaged to secure the Mortgage debt within the meaning of Section 58(a) of the Transfer of Property Act.
- 2) That the Defendant, the Mortgagee in this case mortgaged the suit property on 25<sup>th</sup> September, 1996 in favour of the Plaintiff, to secure the Mortgage debt and that the Mortgage Agreement is valid.
- 3) That the Mortgagee Agreement gave power to the Mortgagee to charge interest and to vary the interest charged without prior notice to the Mortgagor.
- 4) That the Mortgage Agreement gave power to the Plaintiff Mortgagee to sell the suit property to recover the Mortgage debt within the meaning of Section 58(b) of the Transfer of Property Act; and further, the Mortgage Agreement invoked Section 69(1) of the Transfer of Property Act giving the Mortgagee the power to exercise Statutory Power of Sale over the suit property.
- 5) That the Mortgagee exercised its Statutory Power of Sale over the suit property on the 23<sup>rd</sup> November, 1999.
- 6) That the Defendant Mortgagor covenanted under the Mortgage Agreement to pay all to the Mortgagee all the Mortgage debt including all the liabilities interest, costs and charges.
- 7) That the Mortgage debt was not fully recovered from the proceeds of the suit property.
- 8) That the Plaintiff was entitled to recover the short fall of the debt from the Defendant and it was therefore the Plaintiff's right to sue the Defendant to recover the debt.
- 9) That the Plaintiff has proved its case on a balance of probabilities and is therefore entitled to judgment in its favour.

In the result the Plaintiff succeeds in its case and I consequently enter judgment for it against the Defendant as prayed for in the plaint in terms of prayers (a) and (b).

Dated at Nairobi this 11<sup>th</sup> day of April, 2008.

JUDGE

LESIT, J

Read, signed and delivered in the presence of:

N/A

LESIT, J

JUDGE