



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

Civil Case 145 of 2003

HOUSING FINANCE CO. LTD. PLAINTIFF

VERSUS

JOSEPH MUGAI WANENE

COMMISSIONER OF LANDS

CHIEF LAND REGISTRARDEFENDANTS

REASONS FOR RULING

On 24/7/08 this court entered judgment as prayed against the 1st, 2nd and 3rd defendants. These defendants failed to appear at the hearing and were not represented by counsel.

The two defendants were employees of the Kenya Government as Commissioner of Lands and Chief Land Registrar.

Regarding the trial the evidence led was for formal proof against the first defendant interlocutory judgment having already been entered against him for 2nd and 3rd defendants it was for trial. On the hearing date the 2nd and 3rd defendants did not appear and although the record shows that they were represented by the Attorney General of the Republic of Kenya, he did not appear, though served. I entered judgment against the defendants on 24/7/08 and directed that reasons for the judgment shall be delivered later. The evidence led by the plaintiff shows that the plaintiff advanced a loan to the first defendant which was secured by a charge on Plot No.1294/16. The charge is exhibited as a plaintiff's exhibit No.1 which was registered on 18/8/1996. It was a term of the charge that the loan would be repaid by installments of Kshs.117,288/= every month. There was also a default clause which gave power to the plaintiff as chargee to exercise its chargee power of sale as provided by law.

The first defendant failed to pay any money to the plaintiff and by the date of trial the amount outstanding is Kshs.34,437,927/00, that is on 1/7/2008.

The plaintiff attempted to exercise its power of sale and in suit **No.692 of 1998** the defendant was

ordered to pay outstanding arrears and in default of payment the plaintiff (chargee) to be at liberty to exercise its statutory powers of sale under **Section 69 (1) of Transfer of Property Act**. There was failure to pay and plaintiff attempted to sell the security. However, the first defendant filed another suit **No.1260 of 1999**. In 2001 there was a suit filed **HCC No.321/2001** by first defendant which was dismissed. Later the plaintiff filed suit to recover possession. Orders were granted but were not executed because the file went missing and an application to reconstruct the file was made. The charge is still subsisting. At this stage the plaintiff found that the land had been sub-divided. Certificate approving sub-division was issued by the Town Clerk. The plaintiff as chargee did not approve or give consent to the sub-division. However the charge was not discharged and the loan was still outstanding.

Entry No.3 on title which is a copy records the surrender of title. The land was sub-divided into 4 portions. All sub-divisions were issued in the name of first defendant as proprietor. The plaintiff states that the said sub-division was fraudulent. Upon considering the evidence led by the plaintiff against the first defendant, it is my finding that the conduct and dealings of the first defendant in this dispute were fraudulent and with malice. I find the particulars of fraud as particularized under paragraph 13 of the plaint numbered as (a-j) both inclusive totally proved. Regarding the 2nd defendant. He was charged with the responsibility of keeping the records of Registered lands and ensuring that the dealings presented for registration were in accordance with the provisions of law relating to land registration. I find the particulars of fraud and malice particularized against him under paragraph 13 of the plaint and numbered (9) to (d) inclusive proved against him. Regarding the particulars of malice and fraud numbered under paragraph 13 (a) to (f) inclusive. I find the same proved. The 2nd and 3rd defendants acted fraudulently in performing their duties. They breached the trust placed on them by the Government and deserve to be condemned.

I therefore declare all entries and registration of the transactions noted against the original Certificate of Title and numbered from entry No.9 to be all null and void of no legal effect. The same shall be struck out and expunged from the register of Plot Nos. L.R.38628 and L.R. 12945/16. The court is aware that Certificate of Title purporting to record entries No.2 Certificate of sub-division by Town Clerk of Nairobi City Commission approving the sub-division and the entry No.3 purported surrender to the Government, area measuring 0.2340 HA – L.R.12945/16/1 and entry No.4 Certificate of Title L.R.90111 issued to first defendant.

Entry No.5 – L.R.90112 in the name of first defendant.

Entry No.6 – L.R.90113.

Entry No. L.R.90114 are all fraudulent and declared void, null and illegal and the same are hereby expunged from the Register of L.R.12945/16.

DATED and DELIVERED at Nairobi this 26th day of August 2008.

JOYCE N. KHAMINWA

JUDGE