



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

AT NAIROBI

CIVIL CASE 61 OF 2006

RACHAEL MUMBI KIGUNDA.....PLAINTIFF

VERSUS.

HOUSING FINANCE COMPANY LTD.....1ST DEFENDANT

CRYSTAL VILLA LIMITED.....2ND DEFENDANT

R U L I N G

The 1st Respondent HOUSING FINANCE COMPANY OF KENYA

by a chamber summons dated 6th December, 2006 brought under Order VI, rule 13(1) (b) and (d) of the Civil Procedure Rules sought the striking out of the Plaintiff's plaint with costs of the application and of the suit. The grounds for the application are cited on the face of the application as follows:-

1. That the Plaintiff herein has no *locus standi* to bring this suit.
2. That the Plaintiff's suit filed herein is barred by the plea of *res judicata*.
3. That the Plaintiff's suit filed herein is scandalous, frivolous and ipso facto vexatious.
4. That the instant suit is an abuse of the court process.
5. That the Plaintiff has no registered interest in the land and neither in do the purported donors of the Power of Attorney.

The application is also supported by an affidavit sworn by JANET MWALUMA the Manager in charge of Legal Services in the Applicant's company together with annexures therein.

Mr. Ochie'ng for the Applicant in support of the ground that the Plaintiff lacks *locus standi* to bring this suit submitted that the suit was filed on 22nd February, 2006 and that the Plaintiff relied on a Power of Attorney from the owners of the suit property LR 1870/111/70 to bring the suit. Counsel submitted that as of the time of filing suit, the property was registered in the name of Crystal Villa Ltd, the 2nd Defendant in the suit. Annexure JMI is a transfer of charge and JM1(b) a title to the suit property. The transfer is by the chargee Housing Finance Company Ltd to Crystal Villas Ltd. It is dated 25th April, 2005. The title to the suit property was transferred to Crystal Villa Ltd by a grant registered on 30th

January, 2006. Mr. Ochie'ng has urged this court to find that the two documents were enough to prove that indeed the Plaintiff herein did not have Power of Attorney from the registered owner of the property.

The documents mentioned are a clear indication that by the date the Plaintiff filed the instant suit, the suit property was registered in the name of the 2nd Defendant. The plaint is dated 21st February, 2006 and was filed simultaneously with an application for an injunction under certificate of urgency on 22nd February, 2006. That was 3 weeks after the suit property had been transferred by the chargee, Housing Finance Company of Kenya Ltd to the 2nd Defendant Crystal Villas Ltd.

I agree with the Applicant's Advocate that the first paragraph of the plaint in which the Plaintiff averred that she had a lawful Power of Attorney from the registered owners of the suit property LR 1870/111/70 as of 22nd February, 2006 was incorrect.

On that ground alone the suit can stand struck out for lack of *locus standi*, on Plaintiff's part to bring this suit.

In support of the ground that the matter in issue in the suit was *res judicata*. Mr. Ochie'ng relied on a replying affidavit sworn by one Joseph Kania Manager, Legal Services of the 1st Defendant, annexed to JANET MWALUMA affidavit as JM 2. The annexed affidavit was sworn by Joseph Kania in reply to the application for injunction filed simultaneously with the suit. At paragraph 6 of the said affidavit it is deponed that the issues raised in this suit were previously litigated between the 1st Defendant on the one part and Salim Githiomi and Elizabeth Githiomi on the other part; the latter two are the ones that the Plaintiff averred at paragraph 1 of the plaint gave her Power of Attorney to file the instant suit on their behalf. At paragraph 8 it is further deponed that the 1st Defendant/Respondent filed a suit by way of Originating Summons, Civil Suit No. 272 of 2005, against the said Salim and Elizabeth Githiomi. At paragraphs 14, 15 and 16 it is deponed that the said suit No. 272/05 was concluded when a consent letter was filed in court on 19th January, 2006 effectively facilitating the 1st Defendant to exercise its statutory power of sale over the suit property herein.

The facts deponed to in the said affidavit were indeed considered by my brother Azangalala, J. in his ruling in the instant suit, annexed in MWALUMA'S affidavit as 'JM4'. My learned brother's ruling is dated 11th July, 2006. Indeed he came to the conclusion that as a result of the consent entered by the parties in HCCC No. 272 of 2005 the 1st Defendant registered, *inter alia*, a transfer by chargee in favour of the 2nd Defendant in the instant suit. The learned Judge also found that the Plaintiff herein had nothing to protect and that her basis for seeking relief was fallacious.

In Joseph Kania's affidavit it is deponed that the said Salim Githiomi and Elizabeth Githiomi had previously filed suits in respect of same matter being Nairobi Milimani HCCC Nos 569/98, 2738/98, 1884/99 and 1468/00. He further deponed that all the said suits were dismissed for want of prosecution. That further, in all four suits, the two parties were seeking to restrain the 1st Defendant from exercising its statutory power of sale over the suit property herein.

As stated earlier the application was unopposed and the various averments in the affidavit of MWALUMA and KANIA remain uncontroverted. It is therefore undisputed that Salim Githiomi and Elizabeth Githiomi who donated power to Plaintiff to file this suit have instituted several suits in the past. Even though these suits were dismissed for lack of prosecution, the consent entered in HCCC 272/05 disposed off the issue of the 1st Defendant's/Applicant right to exercise its Statutory Power of Sale. There is no challenge that the consent order was fraudulently obtained.

In the instant suit, the Plaintiff seeks two prayers in the plaint:-

(a) A permanent injunction restraining the 1st Defendant whether by itself, agents or workmen from transferring or putting the 2nd Defendant into possession of the suit property LR. No. 1870/111/70 and;

(b) Costs of the suit.

The prayer sought cannot succeed as not only has the 1st Defendant transferred the suit property into the 2nd Defendants name in exercise of the statutory power of sale; the 1st Defendant exercised that power after the donors of Power of Attorney to the Plaintiff filed a consent in HCCC No. 272/05 allowing it to exercise said power. Having come to this conclusion I make the following findings and orders:-

- 1) The Plaintiff lacked *locus* to bring the suit, as the parties who donated the Power of Attorney to her are not the registered owners of the suit property and therefore have no registered interest.
- 2) The Plaintiff's suit is scandalous, frivolous and *ipso facto* vexatious.
- 3) The Plaintiff's suit is barred by the plea of *res judicata*.
- 4) The plaint filed herein is struck out with costs to the Applicants for both the suit and of the application.

Dated at Nairobi this 8th day of June, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of :-

Mr. Ochie'ng for Applicant.

N/A for Respondent.

LESIIT, J.

JUDGE