



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

**Civil Case 682 of 2006**

**EDDIE MWENDWA MUTUA AND**

**BEATRICE WANZA JOSEPH (Suing as the Administrator of the late**

**LUCY SYOMBUA MUTUA).....  
PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CORPORATION OF  
KENYA.....DEFENDANT**

**JUDGEMENT**

The plaintiffs describe themselves as the administrators of the Estate of the late LUCY SYOMBUA MUTUA. They have sued the defendant a financial institution and seek against it a permanent injunction restraining the defendant from selling, alienating, disposing and/or transferring Land Parcel No. Nairobi Block 93/23 situated at Golden Gate Estate Nairobi (hereinafter “the suit property”). It is pleaded that sometime on or about 15.5.2005 the defendant through their agents Garam Investments advertised the suit property for sale which property belonged to the late Lucy Syombua Mutua. It is further pleaded that the late Lucy Syombua Mutua had taken a loan facility from the defendant which at the time of her death was off-set by proceeds from an Insurance policy taken over the suit property. It is also pleaded that at the time of her death, she had not been served with a Statutory Notice of Sale and neither were the administrators thus necessitating the filing of this suit by way of a plaint dated 13.12.2006.

Simultaneously with the filing of the plaint, the plaintiffs lodged a Chamber Summons seeking one primary prayer that, pending the hearing of the suit, a temporary injunction be issued restraining the defendant from selling, alienating, disposing, and/or transferring the suit property. The application was then served and on 19.12.2006, the application was placed before Waweru J, who granted an interim injunction pending the hearing of the application. The injunction was granted in the interests of justice as the defendant had threatened to sell the suit property on 23.1.2007.

In the end, that Chamber Summons was by a consent order recorded before me on 18.5.2007 withdrawn. I will revert to the other terms of the consent shortly.

On 24.7.2007, the defendant delivered its defence. It is averred in paragraph 3 that the suit property was advertised for sale in the exercise of the defendant’s statutory power of sale which had legally arisen. It is further pleaded in paragraph 4 of the defence that the suit property had been offered as security to secure a loan to the said Lucy Syombua Mutua (deceased) who fell in arrears of the repayment schedule,

was duly served with a Statutory Notice but failed to comply therewith, causing the defendant to advertise the property for sale by public auction. It is then averred in paragraph 5 that although the mortgage account was insured, the proceeds from the insurance were not enough to clear the loan balance of the account on the death of Lucy Syombua Mutua as the loan account was in arrears and the mortgage insurance covered only the net amount owing to the creditor had the said Lucy Syombua Mutua been making regular payments to the defendant.

It is noteworthy that the said defence was filed after the consent of 18.5.2007 was recorded which consent set down two issues for determination by the court. The other terms of the consent related to those two issues. The issues were framed as follows:-

**“2) The Court to determine the suit on the following issues –**

**(a) Whether the plaintiffs who are the administrators of the deceased’s estate are liable to settle the outstanding loan arrears of the deceased.**

**(b) If the answer to (a) is in the affirmative the court to determine the amount of the loan arrears outstanding in accordance with the agreed list of documents to be filed and submissions of the parties.**

**3) Which party should bear the costs of the suit?”**

As noted above no defence had been filed at the time the consent was recorded. To remedy the position, the advocates for the parties on 13.7.2007 appeared before Lesiit J and the Learned Judge recorded that

**“by consent the defendant is granted leave to file its defence by 23.7.2007.”**

In the event, the defence was filed on 24.7.2007 as already stated. On 21.9.2007, the advocates for the parties appeared before me and took a judgment date and agreed to file written submissions in the interim. The defendant's advocate had filed his written submissions on 20.9.2007 and the plaintiff's advocate filed his on 16.10.2007.

I have considered the pleadings, the documents filed and the written submissions made by counsel for the parties. From the material before the court there is no dispute that the plaintiffs are administrators of the estate of the late Lucy Syombua Mutua who died on 1.10.2004. A Limited Grant of Letters of Administration Ad Litem was issued to the plaintiffs on 16.5.2006. Indeed the 1<sup>st</sup> issue framed by the parties for determination by the court is whether the plaintiffs, **who are the administrators, of the deceased’s estate** are liable to settle the outstanding loan arrears of the deceased. It is plain that in framing that issue the parties acknowledged that the plaintiffs are the administrators of the deceased’s estate.

The deceased secured financial facilities from the defendant using the suit property. In that regard, a charge dated 13.2.1997 was executed between the deceased and the defendant. In the recital of the said charge the Late Lucy Syombua Mutua is described as **“the chargor which expression shall where the context so admits include her personal representatives and assigns.”** Having agreed that the plaintiffs are the administrators of the deceased’s estate, I have no hesitation in finding that they are liable to settle the outstanding loan arrears of the deceased if any. Having answered the 1<sup>st</sup> issue in the affirmative, I can now consider the second issue which is the amount of the Loan arrears outstanding in accordance with the documents filed.

The charge indicates that the sum advanced to the deceased by the defendant was KShs.2,500,000.00 upon which interest accrued at the initial rate of 26% p.a.. The defendant’s Memo dated 7.3.2006 from its Recoveries Officer to its Manager Recoveries and Realization, discloses that the deceased herself before her demise paid to the defendant a total of KShs.4,458,899.00. The Memo further shows that an insurance claim realized KShs.2,281,970.00 on 1.2.2005. The total sum paid towards the deceased’s

liability as on the 1.2.2005 was therefore KShs.7,008,899.00. The same Memo indicated the shortfall to have been KShs.567,612.00 at that time.

It is clear to me that the said shortfall comprised what the documents describe as interest on advance, monthly interest, interest on capital, interest on arrears, default charge, ledger fees, Insurance for fire and life, valuation fees, Auctioneer's fees, Administrative charges and other charges.

Besides those debits, there are other sums debited against the deceased's loan account which have not been satisfactorily explained by the defendant. The first significant debits were effected on the same date the advance of KShs.2,500,000.00 was made on 26.2.1997. The debits were for KShs.5,342.45, KShs.50,000.00 and KShs.106.85 described as interest on advance and single advance. The total debits of that date excluding the sum of KShs.2,500,000.00 amounted to KShs.55,449.30. The sum of KShs.50,000.00 may have been an additional sum advanced by the defendant to the deceased but the sum advanced under the charge was only KShs.2,500,000.00. If KShs.50,000.00 was indeed advanced the same was unsecured. The other sums of KShs.5,342.45 and KShs.106.85 described as interest on advance cannot be correct, as the defendant could not charge any interest before the advance. In my view the total sum of KShs.55,449.30 was unlawfully and or wrongfully charged against the deceased's account. It is note worthy that that sum attracted interest at the rate of KShs.26% p.a. for the entire period of the advance which interest itself attracted interest for the same period. After 6 years the Total sum wrongfully debited against the deceased's account could have been more than KShs.200,000.00.

The statement of account availed by the defendant further reveals that KShs.2,267.10 was debited against the same account for 8 months between 1.4.1999 and 1.12.1999. For another 25 months between 29.2.2000 and 30.6.2002 the defendant debited KShs.1,889.25. Between 31.7.2002 and 30.4.2003 a period of 11 months, similar debits of KShs.1,784.92 were made against the same account and for another 6 months between 31.7.2003 and 31.12.2003 the defendant effected debits of KShs.1,732.73 against the same account. Those debits total to about KShs.95,400.00. The debits are described as "other charges and at the foot notes of the statements the same comprise Life Protection Insurance Premium, Fire Insurance Premium, Ledger fees, Legal fees, Eviction charges, Auctioneers Fees etc. The defendant did not identify the specific payments for which the debits were made. In my view for those payments to be legitimate, the defendant had to indicate in respect of what specific expense the same had been made. The term "**other charges**" left room for making debits that were not contractual. Indeed the defendant seems to have realized the anomaly and after December 2003 identified each debit in the statement of account.

For my part, I hold that unspecified "**other charges**" were not provided for under the charge and the debits given above were wrongfully made against the deceased's account. The sums attracted interest of 26% p.a. which interest further attracted interest for the period of the account. In my view by the time the Insurance payment was made to the defendant on 11.2.2005, the total sum wrongfully debited against the deceased's account as "**other charges**" together with interest could have been more than KShs.250,000.00.

The same statement of account further shows that at various times the defendant debited the same with sums described as default charges and administrative charges. The latter was at 1% and according to the defendant was necessitated by the fact that a lot of management time and other resources were being spent on accounts in arrears. It was not possible to ascertain the sum debited against the deceased's account on that score. The levy was however not provided for in the charge instrument. As the levy was not contractual, the defendant in my view was not entitled to debit the deceased's account with the same.

In view of my above findings, I hold that the sum of KShs.2,281,970.00 paid to the defendant under the Insurance policy on the life of the deceased on 1.2.2005 settled the deceased's entire indebtedness to the defendant as in reality as at that date there could not have been lawful shortfall of KShs.567,612.00. The answer to the second issue framed by the parties is therefore that, from my analysis of the documents availed by the parties, and the submissions made to me by counsel, no sums are outstanding and due to the defendant as loan arrears or any other sum.

Before penning off I am alive to the fact that Counsel made submissions on whether a Statutory

Notice had been served. Out of deference to counsel I will briefly make my observations thereon. The alleged Statutory Notice was dated 15.9.2005 and was addressed to “**The Estate of the late Lucy Syombua Mutua.**” The defendant had known that Lucy Syombua Mutua was deceased hence the manner the notice was addressed. As at 15.9.2005, the plaintiffs had not been appointed administrators of the Estate of the late Lucy Syombua Mutua. At page 1 of the charge instrument, “**the Chargor**” includes her personal representatives and assigns and at “**Clause 11 (i) the expression the Chargor**” includes the persons deriving title under and the personal representatives of the chargor.”

Under Clause 12, any notice to be served by the chargee on the chargor would be sufficiently served if sent by prepaid post to the chargor at the chargor’s last known postal address in Kenya or delivered to the place of business of the chargor or to the charged property and proof of posting would be proof of service.

So, did the defendant discharge its burden when it posted the said Statutory Notice to the Estate of the late Lucy Syombua Mutua when no personal representative had been appointed? A plain reading of the provisions of the charge reveals that, service was to be effected upon the chargor by prepaid post or delivered to the place of business of the chargor or to the charged property. The defendant does not allege that the notice was delivered to the charged property. It served by prepaid post not to the chargor or her personal representative but to the Estate of the late Mutua. No one at the time had been appointed to represent the Estate of the deceased. In my view therefore, no notice could be validly served upon the Estate of the deceased unless there existed a personal representative of the deceased or there was a person who validly derived title from the deceased or the notice was delivered to the charged property.

The upshot is that, even if I had found that some loan sums were due from the estate of the late Lucy Syombua Mutua to the defendant, the defendant’s statutory power of sale, even if it had arisen, was not exercisable as the requisite statutory notice had not been served.

Reverting to the issues framed by the parties and the answers I have given, I find and hold that the plaintiffs have established their case on a balance of probabilities. There will therefore be judgment for the plaintiff’s as prayed in the plaint.

The plaintiffs did not pray for costs in the plaint. No application was made to amend the same during the proceedings. I therefore make no order as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Delivered in the presence of:**

Gatere holding brief for Okoth for the plaintiff.

**F. AZANGALALA**

**JUDGE**