



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

Civil Case 28 of 2006

HOUSING FINANCE COMPANY OF KENYA LTD.....APPLICANT

VERSUS

PRUDENTIAL DRY CLEANERS LTD..... RESPONDENT

RULING

This is an application by Housing Finance Company of Kenya Limited the plaintiff for 3 substantive Orders: that judgment be entered for it against the defendant as prayed in the plaint; that the defendant do deliver vacant possession of L.R. No.Nakuru Municipality/Block 5/42 hereinafter called the suit property and that in default of giving vacant possession, the defendant and all the tenants on the suit property be evicted therefrom.

The reasons for the application are that the defendant is the registered proprietor of the suit property; that it charged the property to the applicant to secure KShs.7,500,000/- and as the defendant was in breach of its covenants under the charge the applicant served a Statutory Notice of Sale but the defendant is still in occupation of the suit property or has unapproved tenants on the said premises. The application is supported by an affidavit sworn by one Joseph Kania the Manager Legal Services of the defendant. To that affidavit are annexed 4 exhibits including a copy of the charge to secure the said Shs.7,500,000/-, copies of the defendants Statement of Accounts with the plaintiff, a copy of the Statutory Notice of Sale and a copy of the affidavit of service of the plaint and summons.

The application is not opposed.

When the application came up before me for hearing on 28/6/06, Issa, Learned counsel urged me to allow the application as prayed. Reliance was placed upon the Mortgages (Special Provisions) Act Chapter 304 of the Laws of Kenya and the case of **Nyaga Kabute –vs- Housing Finance Company of Kenya Civil Appeal No.158 of 1996 (UR)**.

This application has been brought under Section 5(1) of the Mortgages (Special Provisions) Act. The Section reads:-

“5(1) At any time after the expiration of twenty-one days after the summons has been served on the defendant, the company may apply to the court for: a decree for possession of the mortgaged property, and on such application the court shall read the affidavits filed and shall pass a decree for possession accordingly, unless it is satisfied on such reading that the specified conditions do not exist, or that there is reasonable doubt, whether they exist, in which case the court shall grant leave to defend, either unconditionally or on such terms as to giving security or time of trial or otherwise

as the court may think fit.”

Under this section, the applicant is obligated to show that summons to Enter Appearance was effected upon the defendant at least 21 days prior to the application for judgment . The applicant’s annexure “**JK 4**” is a copy of the affidavit of service of the summons to enter appearance. The process server deponed in the said affidavit of service that he effected service upon the defendant on 13.2.2006. It is clear therefore that by the time this application was filed on 13.4.2006, the 21 day’s prescribed in the above section had expired.

The applicant has also exhibited a copy of the charge over the suit property as “**JK 1**”. The charge reveals that the suit property was charged to the plaintiff to secure the sum of KShs.7,500,000/-. It is obvious therefore that the suit property was mortgaged property in terms of the above section.

A copy of the Statutory Notice of Sale is exhibited to the supporting affidavit as “**JK3**.” It shows that the defendant as at 31.5.2002, was indebted to the plaintiff in the sum of KShs.29,437,503.85 and annexure “**JK2**” is a copy of the Mortgage Statement for the period between 1.1.2005 and 31.12.2005 showing that as on the latter date the defendant owed the plaintiff KShs.53,259,8831.55. That statement clearly reveals that the defendant was in default of payment of its mortgage debt.

The entire evidence contained in the above documents was not controverted by the defendant in a replying affidavit or orally at the hearing of this application. In the premises I am satisfied that the conditions for the grant of an order for possession set out in Section 3(1) of the Mortgages (Special Provisions) Act have been met.

In the result, I allow the plaintiff’s application dated 13.4.2006 as prayed.

DATED and DELIVERED at NAIROBI this 18th day of July, 2006.

F. AZANGALALA

JUDGE

18.7.2006

Read in presence of:-