



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**MILIMANI COMMERCIAL COURTS)**

**Civil Case 427 of 2006**

**JAMES MUTUA  
MAINGI.....  
.....  
.....1<sup>ST</sup> PLAINTIFF**

**CHARITY KANYECHE  
MAINGI.....  
.....  
.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE  
COMPANY OF KENYA  
LTD.....  
.....DEFENDANT**

**R U L I N G**

The Plaintiffs are a couple. They are husband and wife, and they reside on L.R. No. 209/3879/13, Kileleshwa, Nairobi. In effect, that property is their matrimonial home.

They both concede that they had offered the title to their said matrimonial home, as security for loans that had been advanced to them by the defendant. The said property will henceforth be cited as “**the suit property**”.

It is the plaintiffs’ case that the defendant had no legal right to sell off the suit property. The reasons advanced for that contention were that the charge instrument which purportedly created the security, did not comply with the provisions of Section 59 of the Transfer of Property Act.

The plaintiffs’ submitted that pursuant to the provisions of Section 59, the charge instruments should have been witnessed by at least two witnesses. Therefore as none of the said instruments had been witnessed by two witnesses, the plaintiffs contend that they could not give rise to a statutory power of sale.

Secondly, it was said that the charge instruments herein did not constitute English mortgages, within the meaning ascribed thereto by Section 69(1) of the Transfer of Property Act. The plaintiffs pointed out that in order to constitute an English Mortgage, there should have been a complete transfer of the suit

property to the defendant.

In the event that there was no complete transfer of the property, the plaintiffs submit that the provisions of Section 69 of the Transfer of Property Act were inapplicable. That is said to be the position in this case.

Another issue raised by the plaintiffs was that the defendant had not given them notice of their intention to realise the security. The plaintiffs allege that they only learnt of the impending sale through interested purchasers, who had visited the suit property, for purposes of verifying the particulars thereof.

Finally, the defendant is accused of having taken steps to sell off the property at a gross undervalue. It is the plaintiffs' case that the property is valued at KShs. 25 million. Therefore, when putting it up for sale at a price of KShs. 15,000,000/=, the defendant was selling it at a throw-away price.

In response to the application, the defendant first made available a copy of a statutory notice of sale which had been served on the plaintiffs. After giving consideration to the notice dated 17<sup>th</sup> August 2005 together with the certificate of posting attached thereto, I am satisfied that the defendant did discharge its obligation in relation to the service of a statutory notice. Therefore, the plaintiffs were not right to have alleged that the defendant had not issued the appropriate statutory notice.

As regards the allegation that the intended sale at a price of KShs. 15,000,000/= was at a gross undervalue, the defendant has pointed out that the suit property had been valued for KShs. 13,500,000/=. The said valuation was carried out by Tysons Limited, whom the defendant has described as a reputable valuer.

The plaintiffs did not seek to impugn the reputation of Tysons Limited, and I therefore accept the defendant's assessment of them, as being reputable valuers.

That being the case, it was incorrect for the plaintiffs to assert, as they did that the intended sale at a price of KShs. 15 million would be a sale at an undervalue.

More significantly, the plaintiffs had themselves also procured an interested buyer for the sum of KShs. 14 million. The plaintiffs had then written to the defendant on 20<sup>th</sup> March 2006, seeking authority to proceed with the sale, for that price.

In response to the plaintiffs' request, the defendant wrote back on 5<sup>th</sup> April 2006, notifying them that the defendant had accepted the sum of KShs. 14 million, as the purchase price. The only condition set by the defendant was that the offer would lapse by 4<sup>th</sup> July 2006. That condition was accepted by the plaintiffs, who signified acceptance by appending their respective signatures to the defendant's letter dated 5<sup>th</sup> April 2006.

Even though the plaintiffs now contend that they cannot be deemed to have accepted the purchase price of KShs. 14 million because it reflected the true market value of the suit property, I find myself unable to be persuaded by their argument. If, as the plaintiffs contend, their acceptance of the sum of KShs. 14 million was **“intended to liquidate the debt in the best manner possible, without prejudicing their interests,”**

that would further fortify my belief that the plaintiffs also acknowledged that the sum of KShs. 14 million was sufficient to safeguard their best interests. In other words, I hold the view that by their conduct, the plaintiffs must be deemed to have accepted the sum of KShs. 14 million as reflecting a true value of the suit property. If they had not been of that persuasion, the plaintiffs could not have said that a sale at that price would provide them with the best manner of liquidating the debt, without prejudicing their rights.

As regards the validity of the charge instrument, the starting point must be the acknowledgement that the suit property is registered under the Registration of Titles Act (Cap 281). That being the case, it is

important to bear in mind the following words, as set out in Section 1 (2) of that statute:

**“Except so far as is expressly enacted to the contrary, no Act in so far as it is inconsistent with this Act shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Act.”**

Therefore, the provisions of statute which govern the suit property herein would be those of the Registration of Titles Act. Any other statutory provisions which were inconsistent with that statute would not apply to the suit property.

As regards the execution of charge instruments, Section 46 (1) of the Registration of Titles Act stipulates that the charge shall be executed by the proprietor of the lease, in form J1 or J2 in the First Schedule. Neither the statute nor the forms provided, make provision for execution by the chargee.

And as regards the attestation of the charge instruments, Section 58 (1) of the Registration of Titles Act provides as follows:

**“Every signature to an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the registrar shall be attested by one of the following persons – “**

To the extent that the provisions of Section 59 of the Transfer of Property Act are inconsistent with those of the Registration of Titles Act, the said provision shall not be applicable to the suit property herein. Therefore, as Section 59 of the Transfer of Property Act requires that the mortgagor’s signature to a mortgage be attested by two witnesses it is inapplicable to the suit property because by virtue of Section 58 (1) of the Registration of Titles Act, the signature of the chargor needed to be attested by any one of the specified persons cited.

In **ECCON CONSTRUCTION & ENGINEERING LTD V GIRO COMMERCIAL BANK LTD & ANOTHER, MILIMANI HCCC No. 371 of 2003**, the HON NJAGI J. granted an injunction to restrain the defendants from selling off the suit property. He did so, inter alia, because the mortgage instrument was not witnessed by two persons, as required under Section 59. On that ground, the learned judge held that the power of sale under Section 69 (1) was not exercisable.

Provided that the property which was the subject matter of that suit was not registered under the Registration of Titles Act, the learned judge was very right.

However, as the suit property herein, is registered under the Registration of Titles Act, Section 59 of The Transfer of Property Act is inapplicable, to the extent that it is inconsistent with Section 58 (1) of the Registration of Titles Act.

On the issue as to the validity of the charge instrument, I hold that the plaintiffs have failed to demonstrate any prima facie case with a probability of success.

The plaintiffs did concede being indebted to the defendant. They then asked the defendant for authority to sell-off the suit property for KShs. 14 million, which the plaintiffs promised to remit to the defendant. The defendant accepted that offer, in full and final settlement. However, the plaintiffs failed to meet the conditions set by the defendant. It is then that the defendant set about selling-off the suit property.

Having given due consideration to all the circumstances prevailing in this case , I find no grounds to warrant the grant of an injunction. Accordingly, the application dated 1<sup>st</sup> August 2006 is hereby dismissed, with costs to the defendant.

Dated and Delivered at Nairobi this 31<sup>st</sup> day of October 2006.

**FRED A. OCHIENG**

**JUDGE**