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

MISC. APP. NO.660 OF 1997

HOUSING FINANCE COMPANY OF KENYA LTD…….PLAINTIFF

-V E R S U S

CAPTAIN JAMES NYONGESA WAFUBWA……...DEFENDANT

R U L I N G

The application before the court is dated 3rd December, 2003 and is brought by way of a Notice of Motion under O.XLIV Rule 1 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act. It seeks orders that this court do review the judgment dated 23rd September, 2003 and grant further orders that the certificate for L.R.209/10385/85 be kept by the plaintiff and that the costs of this application be in the cause.

The grounds upon which the application is premised are-

(a) That upon judgment given (sic), and the defendant opting not to appeal, the plaintiff requires the physical possession of the certificate for lawful completion of the transaction.

(b) That the chargee has no legal basis for keeping the said certificate of title in the transaction

(c) That the review of the judgment is necessary as new evidence arose when the Honourable Court declared that the sale in a public auction is complete upon the fall of the hammer.

(d) That the plaintiff requires the certificate for making a supplementary agreement with the purchaser/transferee for completing the transactions.

The application is also supported by the annexed affidavit of Captain J.N. Wafubwa, the applicant himself.

On 15th December, 2003, the defendant's advocates filed their grounds of opposition dated 11th December, 2003. These are that-

(1) The plaintiff's application contravenes the provisions of Order XLIV of the Civil Procedure Rules and is therefore bad in law and defective.

(2) The orders sought by the plaintiff in his application are untenable in law

(3) The plaintiff's prayers in his application have no legal or factual basis

(4) The equity of redemption over the suit property has already been extinguished and the title documents cannot be retuned to him as prayed or at all.

(5) The plaintiff's application is frivolous and vexatious and ought to be dismissed.

At the hearing of the application, Captain Wafubwa appeared in person while Mrs. Mbanya represented the respondent. Captain Wafubwa, as a layman in law and unrepresented, made a gallant effort at canvassing his application. He argued that some new matters arose out of the judgment dated 23rd September, 2003, which matters could not have been argued. He further argued that the charge dated 16th October, 1989 appeared to be tainted with fraud and misapplication of the law which makes an appeal impossible because this court should look at it before the Court of Appeal can intervene in the matter. He also contended that the charge hereinabove referred to incorporated the provisions of the Transfer of Property Act under which a mortgagee has absolute power to sell and transfer the mortgaged property. This is found in s.69 "which was not brought" in the charge instrument dated 16th October, 1989. Under the Registered Land Act, a chargee has no power to transfer property when the hammer falls. Captain Wafubwa then contended that if land is registered under the Registration of Titles Act (Cap280) it can be "used under another law." He submitted that the Transfer of Property Act does not apply and should not apply to this matter as it is contrary to section 75 of the Registered Land Act. He further submitted that under the Registered Land Act, a chargee can sell only when he has a power of attorney but the transfer is left to the chargor or proprietor. He also referred to s.50 of Cap. 281.

Captain Wafubwa further told the court that the law on Transfer is found in s.65 read with s.74 of the Registered Land Act. He also referred to s.85(3) thereof and said that when the bank sells property at the fall of the hammer, it gives the documents to the chargor to execute in favour of the purchaser. According to him, the chargor can refuse to transfer, and the transfer itself can be defeated under s.86. Furthermore, according to him, at the fall of the harmer, the transferee is given the documents duly executed and thereafter he has to face the chargor. He thereupon referred to s.92 of Cap.300. In the instant case, United Millers, who were the purchasers, should have come to the chargor, given an account, and once the chargor was satisfied that his constitutional rights were not breached, then he can transfer the property. The transfer of Property Act of India had no application here. Captain Wafubwa finally told the court that the issue of titles was not addressed and therefore urged the court to order that he gets back his titles so that he can consider whether to transfer the title or not.

In response, Mrs. Mbanya for the respondent relied on the grounds of opposition and submitted that the Transfer of Property Act is applicable in Kenya. She further submitted that this application contravenes the provisions of O.XLIV of the Civil Procedure Rules and it is therefore bad in law and should be struck out. Counsel further argued that on 24th September, 2003, the applicant filed a Notice of Appeal against the judgement which he now wants to be reviewed, and that the review cannot be proceeded with.

Mrs. Mbanya also submitted that the orders sought are untenable because the applicant's equity or redemption was extinguished when at the auction of 8th November, 1996, a sale took place and a valid agreement of sale was entered into between the defendant and the purchaser at that public auction. Once a chargee, in the exercise of its statutory power of sale, enters into a valid contract, all the rights and interests of the chargor are thereby extinguished and the chargor ceases to have any interest in the property. She then referred the court to **MATOYA** v. **STANDARD CHARTERED BANK (K)LTD.**, [2003]1E.A. 140 and **ZE YU YANG** v. **NOVA INDUSTRIAL PRODUCTS LTD.** [2003]1E.A. 362, and submitted that the applicant wishes to have possession of the title documents and then deal with the purchaser. However, such a request cannot be granted as his equity of redemption has been extinguished and he has nothing to convey. She finally submitted that the application is a total abuse of court process and that it should be struck out with costs.

In his reply, Captain Wafubwa said that the Indian Transfer of Property Act came into operation in 1882 and was last amended in Kenya in 1959. In 1963 Kenya was a young baby with a new constitution,

and the Laws enacted thereafter removed the right of the chargee to transfer property. The chargee now can sell property but cannot transfer. In 1963, the Indian Transfer of Property Act became void because Kenyans are not Indian Nationals. S.85 of the Registered Land Act does not give the chargee the right to transfer property, and that is why he was asking for the documents so that he can finalise the matter. He concluded by saying that the chargee in this matter is a nuisance.

After hearing both parties, the first issue that I think calls for determination is whether this court has the jurisdiction to hear this application under O.XLIV of the Civil Procedure Rules, if the applicant has also filed an appeal. O.XLIV, so far as is material to this application, reads-

> **"1. (1) any person considering himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or**
>
> **(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

For one to retain the locus to apply for review, it is imperative that one should not have preferred an appeal. The converse of this is that a party who considers himself aggrieved and prefers an appeal cannot thereafter apply for review.

The judgment which is the subject matter of this application was delivered on 23rd September, 2003. Counsel for the respondent submitted from the bar that the applicant filed an appeal under s.74 of the Court of Appeal Rules by filing a Notice of Appeal on 27th September, 2003. A copy of that Notice was not exhibited. Assuming that such notice was duly filed as alleged, and I have no reason to doubt counsel's statement even though it was made from the bar, the issue arises as to whether in so doing the applicant thereby forfeited his option to apply for review. Counsel referred the

court to O.XLI rule 4 which states-

> **"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given."**

In my view, the presumption as to the time of the filing of an appeal given in that rule is given "for the purposes of that rule" only, and is neither meant nor intended to be of general application. That presumption arises in respect of applications for stay of execution. Being of that persuasion, I think that in ordinary parlance, an appeal is filed only upon the filing of the record of appeal. No suggestion has been made that such a record has been filed in respect of the judgment delivered on 23rd September, 2003. For that reason, I hold that the applicant has not yet preferred an appeal, and that therefore this court has jurisdiction to hear the application for review.

The application seeks one main order that this court do review the judgment in question and grant further orders that the certificate for L.R.209/10485/85 be kept by the plaintiff. Such an application is misconceived for several reasons. In the first instance, there is an abundance of authorities in this country to the effect that a party seeking a review of a decree or order should extract and attach a copy of the decree or order in respect of which the review is sought. In this application, the only document which is attached to the application is a copy of a letter dated 14th October, 2003, addressed by the applicant to the mortgage manager of the respondent company. Failure or omission to attach a copy of the order or decree sought to be reviewed is fatal, and on that ground alone, this application ought to fail. Suffice it to quote Justice Mbaluto in **TRUST BANK LTD. v. GEOFFREY MAKANA ASNAYO**, Civil Case No.118 of

1998, one of the latest in the series, wherein he said-

> **"it is trite law that in an application for review of a decree or order, the decree or order sought to be reviewed should not only be extracted, but should also be annexed to the application. Since no such decree or order has been extracted or annexed to this application, there is in law nothing to review."**

If a copy of the decree or order sought to be reviewed had been attached, then the applicant would have to establish one or more of the three grounds upon which alone a review can be undertaken. These are either the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error on the face of the record, or for any sufficient reason. If I understood the applicant properly, his discourse was that new matters arose out of that judgment which could not have been argued. If the new matters were precipitated by the judgment itself, it would stand to reason that such matters were not in existence and therefore were not amenable to production at the time when the decree was passed or order made. That automatically removes the matter from the purview of the first ground upon which an application for review can lie, which happens to be the only ground upon which the application is predicated. Since the application does not allege an error on the face of the record, nor does it urge or advance a sufficient reason, I find that it does not properly lie within the four corners of O.XLIV Rule 1, and that, therefore, it cannot be accommodated.

For the avoidance of any doubt, the originating summons which led to the judgment which is the subject matter of this application prayed for only three orders-

> 1. That the Honourable Court do make a declaration that the charge dated 16th October 1989 over Land Parcel
>
> No.109/10481/85 NAIROBI charged to the defendant by the plaintiff has been fully redeemed.
>
> 2. That the defendant be ordered to re-convey to the plaintiff the aforesaid L.R. No.209/10481/85 and that the defendant do execute all requisite document (sic) to facilitate the registration of the re-conveyance
>
> 3. That the costs of this application be borne by the defendant.

To avoid unnecessary controversy, I would like to believe that land parcel L.R.109/10481/85 referred to in paragraph 1 of the originating summons and L.R. No.209/10481/85 in paragraph 2 thereof, and L.R. No.209/10485/85 referred to in this application all refer to one and the same parcel of land, which is the subject of this litigation. The court considered the application and found that the charge had not been fully redeemed as suggested in prayer 1, whereupon prayers 2 and 3 automatically collapsed with prayer 1. The court therefore considered only the prayers before it and could not have ventured for a swim in existent waters. Even if the prayer in the application for review had been incorporated in the originating summons, it would have been dependent upon the grant of prayers 1 and 2, and with the two prayers collapsing like a house of cards, it would have collapsed with them. And even without the company of the other orders, that order has now to collapse alone. It cannot be accommodated as it is premised on wrong legal principles which are nothing better than quicksand.

The only reason why the applicant's property was sold was that he was unable to service his loan account. Much as he may not like it, his property is registered under the Registration of Titles Act, and not under the Registered Land Act. Any transactions touching upon that property are therefore governed by the Transfer of Property Act and not by the Registered Land Act. Any reference to the Registered Land Act in relation to this property is therefore misconceived and irrelevant. The Indian Transfer of Property Act was first applied to Kenya by section 11 (b) of the East Africa Order in Council, 1897. It has since undergone some metamorphosis and domestication, and it is not open to anyone to challenge its validity or applicability. It is part and parcel of the law of this land.

The charge instrument under which the applicant's property was charged is replete with references to the Transfer of Property Act. Under that Act, section 60 is very clear that the chargor's right of redemption is extinguished as soon as the chargee sells the charged property by public auction as in the instant case. Once the property is sold by public auction in exercise of the chargee's statutory power of sale, the chargor's rights and interest in the property in question are thereby extinguished. If any authority were required for this proposition, one need not look beyond **MATOYA** v. **STANDARD CHARTERED BANK (K) LTD**. & ORS (supra). In the same breath, one may also look at **ZE YU YANG** v. **NOVA INDUSTRIAL RPODUCTS** (supra) for the further proposition that the existence of a valid sale agreement extinguishes the equity of redemption and thereafter the chargor has no rights touching upon the property both as against the mortagee as well as against the purchaser. The chargor's remedy, if any, lies in damages against the person exercising the power of sale.

In total, the above considerations lead me to only one conclusion, to wit, that the application for review is misconceived and incompetent. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of July 2004

L. NJAGI

JUDGE