



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 774 OF 1999

HOUSING FINANCE CO OF KENYA LTD.....PLAINTIFF

VERSUS

PRUDENTIAL DRY CLEANERS LTD.....RESPONDENT

RULING

The plaintiff by way of this Notice of Motion brought under Order XLIV Rule 1 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks orders to review this court's decree of 11.4.2000 and the defendant do pay the costs of this application. The application is premised on the ground that there is a mistake or error on the face of the record.

On 11.4.2000 late Hewett J. delivered a ruling in which he dismissed the suit herein for non-compliance with section 3(d) of The Mortgages (Special Provisions) Act Cap. 304 which section the learned judge quoted in the following terms;-

“the property contains a dwelling house which is in occupation of the mortgagor or of some other person who is not an approved tenant.”

Counsel for the applicant submitted that Section 3(d) as quoted by the learned judge had long been amended by the Finance Act 1999 and judge's reliance on that section of law was a mistake or error upon the face of the record which in effect took away a relief that the plaintiff was entitled to in law. That owing to that error the Judge proceeded to hold that:-

“the failure to meet specified condition “d” amounts to the failure of a condition precedent for the institution of the suit by HFCK under Section 3. That is a defect which I do not have the jurisdiction to cure, the suit is incurably defective.”

That further the learned judge concluded that no affidavit in verification of the plaint was filed as required under Section 4(1) of the Mortgages (Special Provisions) Act Cap 304 when in fact it had been filed and a copy was on record.

The learned judge when dismissing the plaintiff's suit said at page 2 paragraph 3:-

“After a suit is filed the correct mandatory procedure for HFCK to follow is to file the appropriate affidavit under section 4(1) verifying the plaint and testifying to the existence of the special conditions. That has not happened at all so far as I can see from the court file. Such an affidavit once served on the defendant gives him the opportunity to contest the existence of the Specified Conditions under Section 4(1) Cap 304. Assuming for the sake of argument that the evidence of the Mortgage Manager given *Viva Voce* is a fair substitute for the affidavit under Section 4(1) for

the purpose of this case only. I will make that assumption subject to any just exceptions and objections that either party may wish to take. I now decide whether the specified conditions exist. It is clear they do not. Section 5 directs me to give the defendant leave to defend which I would do conditionally upon the defendant filing his defence within 14 days of the service of this notice upon him or his advocate. However the failure to meet the specified condition (d) amounts to the failure of a condition precedent for the institution of the suit by HFCK under Section 3. That is a defect which I do not have jurisdiction to cure, the suit is incurably defective.

HFCK has in more than one way failed to follow the correct procedure and I am left with no alternative but to dismiss this case with costs which I order will not be recovered from the defendant under the terms of the mortgage.”

Counsel for the plaintiffs asks this court to review the said ruling and allow the plaintiff to obtain vacant possession of the premises.

The learned judge dismissed the plaintiff’s suit for non-compliance of the provision of the law. But he added that had these provisions of the law been complied with Section 5 of the Act directs him to give the defendant leave to defend which he would have done conditionally upon the defendant filing his defence within 14 days of the service of this notice upon him or his advocate. This involves a point of law which is not subject to review but appeal to the Court of Appeal in respect of whether his interpretation of the law was correct or not. Being of equal jurisdiction I have no power to entertain such issue.

Further the record shows that counsel for the plaintiff had applied on 22.11.99 for leave to re-amend the amended plaint to insert a new clause 5(a).

Clause 5(a) The suit premises contains a dwelling house which is in occupation of tenants. Not approved by the Plaintiff and believed to be employees for the defendant. Court; Amendment granted re-amended plaint to be filed within 14 days.

Counsel; I wish to call the mortgage manager.

The record is not clear as to whether the re-amended plaint was filed within 14 days as ordered by the court and served.

For the above reasons, I decline to grant the orders sought and dismiss the application with no orders as to costs.

Dated and delivered at Nairobi this 27th day of February 27, 2002

J.L OSIEMO

JUDGE