

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 554 OF 2000

HOUSING FINANCE COMPANY OF KENYA LTD.....PLAINTIFF

VERSUS

FRANCIS MBURU KAMAU.....DEFENDANT

RULING

This is the plaintiffs application dated 7.9.2002 seeking an order of possession of Land title kabete/Kibichiko/549. The application is brought under section 3 and 5 of the mortgages (special provisions) Act – Cap 304 which was purposely enacted to allow the plaintiff in this case to obtain possession more easily of mortgaged properties.

As section 5(1) of the Act provides, the hearing of the application is done in a summary manner as the court is only required to read the affidavits filed and if satisfied that the special conditions specified in section 3(1) do apply, the court is required to grant a decree for possession. Thus the court is required by statute to grant a decree of possession if satisfied that the special conditions do exist.

Reading the affidavits and provisions of section 3(1) of the Act, there is no dispute that special conditions in section 3(1)(a)(b) and (d) apply to the mortgaged property.

The dispute raised by defendant is in respect of special condition in section 3(1)© of the Act – that is whether or not there is breach of the mortgage by non payment. Defendant says that he has repaid the whole amount. Plaintiff says that there were arrears of shs 10,375,955/35 at the time of filing the suit.

The loan given to defendant on the security of his land was shs 540,000. That loan was given in 1988. Almost all the sum claimed to be owed is comprised of interest and other charges. It was shs 10,375,955/35 at the time of filing the suit on 7.4.2000. Janet Mwaluma – a legal Officer of plaintiff states in para 5 of the supporting affidavit that the sum owed had amounted to 15,029,550 as at 31.3.2001. Defendant says that all the payments he has made are ignored and that the sum claimed is made up wholly of charges which are not recoverable.

The amount claimed is over 30 times of amount loaned to the defendant. Plaintiff has not annexed a full statement of account which would show how much defendant has already paid out the loan amount. The defendant has raised a genuine triable issue – that the huge amount claimed as interest and charges are not recoverable. Considering that plaintiff is claiming over 30 times of the loan amount, I am satisfied that's defendant has shown on prima facie basis that there is a serious dispute on whether or not he is in breach of the conditions of the charge. This is a case where defendant should be given unconditional leave to defend.

Consequently, I dismiss the application for decree for possession and given defendant unconditional leave to defend the suit. Costs in the cause. Defendant at liberty to file a formal defence within 21 days.

For avoidance of doubt, the dismissal of the application for decree for possession does not stop plaintiff from exercising its right of sale under the charge.

E. M. Githinji

JUDGE

21.11.2002

Mr. Mbogua holding brief for Jan Mohanned for applicant present

Mr. Amuga absent