



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

civ case 4449 of 91

**MR. & MRS. EPHANTUS M. KWENJA PLAINTIFFS
VERSUS
THE HOUSING FINANCE COMPANY OF KENYA DEFENDANT**

JUDGMENT

The defendant is a financial institution duly incorporated under the Company's Act. In or about the year 1979, it advanced a loan under mortgage Account No. 89567 to the plaintiffs who are husband and wife. The security for the loan was L.R. Nairobi/Block 75/81. The initial sum secured by the charge over the property was Shs.91,880/= and repayment was to be made through the check-off system by monthly deductions from the 1st plaintiff civil service salary.

On April 1988, the 1st plaintiff received a statement from the defendant indicating that his account was in arrears. He immediately went to the defendant and confirmed that the account was indeed in arrears to the extent of Shs.13,510/=. There upon he made arrangements to clear the arrears and did so through the following payments:-

<u>DATE</u>	<u>AMOUNT</u>
(a) 19.4.88	Shs.2,880.00
(b) 9.5.88	Shs.3,000.00
(c) 30.5.88	Shs.7,710.65
Total	<u>Shs.13,510.65</u>

But despite clearance of the arrears, the defendant's advocates wrote to the plaintiff on 10th June, 1988 in the following manner:-

“Further to our demand letter of 18 th April, 1988, proceedings have now been commenced for possession of the charged premises. Take notice that if payment of the amount of Shs.13,510.65 being the arrears of mortgage repayments referred to in the demand let ter aforesaid, is not paid within three (3) months from the date hereof, our client shall proceed to exercise its statutory power of sale conferred on it by Section 74 of the Registered Land Act (Cap 300) without any further reference to you.”

It will be seen that by that letter the defendant gave the plaintiff 3 months from 10.6.1988 to clear the arrears on the mortgage then allegedly standing at Shs.13,510.65 in default of which the defendant would

exercise its statutory power of sale conferred upon it by Section 74 of the Registered Land Act. It will also be noted that as at the time the letter of 10.6.1988 was written, two things are said to have happened:-

(a) Proceedings for possession of the charged premises had commenced. Regarding this claim, it is not quite clear what exactly the defendant was doing and whether what is stated in the letter is correct. I say so because no evidence was led to show that any proceedings had been instituted.

(b) Secondly it does not appear to make much sense to serve a statutory notice of sale while at the same time commencing legal proceedings for possession. If the defendant had the power and right to sell the property by auction or otherwise, what would be the purpose of obtaining an order for possession at the same time.

But be that as it may, the apparently contradictory action taken by the plaintiff appears to have gravely disturbed the plaintiff for on 14.6.1988, he wrote to the defendant as follows:-

“Reference is made to your letter of 10 th June, 1988. Please refer to the following payments made to Housing Finance Co. of Kenya Ltd. In respect of the above account: -

<u>DATE</u>	<u>AMOUNT</u>
19/4/88	Shs.2,800/=
9/5/88	Shs.3,000/=
30/5/88	<u>Shs.7,710/65</u>
TOTAL	<u>Shs.13,510/65</u>

With the foregoing, I am not clear why you have written to me. Please clarify the situation.”

The defendant clearly noticed the contradictory nature of its action because on 6.7.1988 it acknowledged the error by stating in a letter to its advocate with a copy to the plaintiff that:-

“We refer to our letter of the 30 th June, 1988 and wish to confirm that the payments shown in the borrowers’ letter dated the 14 th June, 1988 have been received as per the dates shown. The said payments have cleared all the arrears as at the 31 st May, 1988.

On the 27 th June, 1988 a further payment of Kshs.2,778/= which covers the instalments for the months of June and July 1988 was made. Thus we confirm that the Company might consider withdrawing the suit for possession subject to the borrowers paying the legal fees which you are requested to advise them and further to their making acceptable arrangements to ensure that the monthly loan repayments of Kshs.1,389/= are received on the 1 st of every month with effect from the 1 st August 1988 without fail.”

The above letter was followed by another one by the defendant’s advocates to the plaintiff dated 11.7.1988 in the following terms:-

“It has now been confirmed to us by our client that the arrears of instalments have been received. Our client might, therefore consider withdrawing the suit for possession subject to the following conditions:-

(i) that you make arrangements acceptable to our client to ensure that the monthly loan repayments of Kshs.1,389/ - are received on the first day of each month with effect from 1 st August, 1988 without fail.

(ii) that you make immediate payment to us of Shs.6,740/ - to clear the legal fees incurred in this

matter to date.

Take note that in default of the above two conditions being met within seven (7) days from the date hereof, our instructions are to proceed with the suit for possession at your risk as to the further costs to be incurred.”

The last letter did not of course help; instead it created more confusion because the arrears having been cleared, it is not clear why the defendant would in those circumstances wish to proceed with the suit for possession. It was also far from clear when the alleged suit was filed and in what court. In any event, having given the plaintiff the statutory notice dated 10.6.1988 there does not appear to have been any basis for taking further legal action against the plaintiff before the expiry of the notice and when in the first place the notice had been issued in error long after the arrears on the account had been cleared. It was by reason of that confusion that the plaintiff refused to pay the legal fees of Shs.6,740/= demanded by the defendant's advocate; instead he wrote to the defendant on 6.9.1988 indicating his reluctance to meet the legal charges.

The claim for Shs.6,440/= represents legal fees paid by the defendant to M/S J. M. Kibuchi Advocates for allegedly acting for the defendant in the suit for possession. There is no evidence that the plaintiff was in arrears when the alleged legal action was commenced; nor is it clear that any proper demand was made before action was taken. Indeed the so called itemised bill of costs tendered to the defendant by M/S J. M. Kibuchi & Co. Advocates is nothing more than a naked attempt to justify the demand for payment of Shs.6,440.00 which said demand the plaintiff and his Advocates M/S Njiru Mbogo & Co. Advocates had rejected.

The balance now outstanding on the plaintiff's account with the defendant is clearly the product of the illegal debit of Shs.6,440/= plus interest accrued thereon which the defendant made in the plaintiff's account after payment of the sum to M/S Kibuchi and Co. Advocates. That payment was improper in the circumstances described above and the defendant was not entitled to recover it from the plaintiff. There is therefore no justification for the defendant to continue to retain the plaintiff's title documents allegedly because that balance remains unpaid. For that reason the plaintiff's suit succeeds and judgment is entered in their favour as prayed in the plaint with costs.

Dated at Nairobi this 9th day of April, 2001.

T. MBALUTO

JUDGE