



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1817 OF 2000 (O.S.)
IN THE MATTER OF THE ADVOCATES ACT CAP 16
BETWEEN**

**HOUSING FINANCE COMPANY OF KENYA LTD.....PLAINTIFF
AND
WAMBUGU & COMPANY ADVOCATES.....DEFENDANT**

R U L I N G

On 17th October 2000, I delivered my ruling on these three suits and ordered that the accounts be reconciled in accordance with the terms of the said ruling.

Having reconciled the accounts and recorded settlement of accounts the parties are now back. They seek orders on who between them is liable to costs.

It was the submission of Mr. Gachuhi learned counsel for Housing Finance Company Kenya (the applicant) that having proved its claim, and had judgment entered in its favour, his client was entitled to costs. He pleaded section 27 of the Civil Procedure Act and stated that costs should follow the event.

However, Mr. Ongoto the learned counsel for the respondent, submitted that the issue of costs is left to the discretion of the court. It was his submission that had the accounts reconciled at the first instance as per his client's initial request, and then there would have been no need for the plaintiff to file this suit in which his clients successfully obtained an order for reconciliation. It was therefore his submission that each party should bear its own costs.

Section 27 of the Civil Procedure Act stipulates that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

The three suits were all based on undertakings given by the respondent to the applicants in 1998. The respondents did not deny the existence of the undertakings or even the fact that there were sums outstanding against the accounts, they however requested that the accounts be reconciled and based their request on the fact that certain payments had not been credited to the accounts and also that the applicants were wrongfully charging a penalty interest of 1.5% per month.

Indeed after reconciliation the penalty charge was credited back and due credits were given for the

payments in some instance after four to seven months. Granted, the difference in the sums that have been found to be owing as compared to what was originally claimed by the applicants is minimal, but to my mind had the applicants acceded to the requests for reconciliation the whole suits and process might not have been necessary. I find that the respondents had a point and on that ground I do order that each party does bear its own costs of the suits.

The other issue for my determination relates to whether the respondents in HCCC No. 1815/2000 had been effectively served with relevant notice prior to variation of the lending rate of interest. They claim that they were neither served with the same, nor did they receive any notice prior or even after variation of interest on this loan.

It is common ground that the charge documents were executed on 4th October 1993 and that since then the rate of interest has been raised thrice, on 1st January 1994, 1st January 1995 and then on 1st September 1995. It is the applicants contention that notices were sent received and acted upon by the respondents who made remittances severally without raising any objection. The director of the respondent company admitted that it was his company that gave the Postal address which the applicant claims to have used in sending all the notices. The respondents did not at any time notify the applicants of the change of address if any and for this I find that their failure to do so should not penalize the applicant. They were under a duty to notify them of the change and one can only rightly assume that all the notices were sent and received at their last known address.

Clause 4 of the Charge document which is dated 4th October 1993 and which forms the contractual relationship between the parties, stipulates that-

4. "It is hereby further agreed that the rate of interest payable on all money hereby shall be determined as follows:-

i) Until the service of such a notice as is hereinafter referred to interest shall be at the rate of Twenty three per centum (23%) per annum.

ii) The Chargee may from time to time serve on the Borrower notice on demand requiring payment of interest at such increased or reduced rate as shall in the decision of the Chargee fairly represent the rate of interest commonly chargeable in Kenya having regard to such circumstances as it considers to be relevant and the decision of the Chargee in this behalf shall not be questioned on any account whatsoever.

iii) In the event of the chargee requiring an increase in the rate of interest under the provisions of sub-clause (ii) of this Clause the Chargee will notify the Chargor of the amount of the resulting increased monthly installments payable under the provisions of Clause 2 hereof and the first of such increased monthly installments shall become due and payable on the First day of the month next after notification of the amount thereof to the Chargor.

iv) All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effects as referring to interest as fixed or altered by the provisions of this clause."

The issue that comes to ones' mind is whether the applicants served notice as required under the aforementioned clause of the charge. If not, would the applicant be entitled to vary and charge the higher interest. Mr. Ongoto for the respondent urges the court to find that notice was relevant and it should have been served by registered mail and not ordinary mail. Unfortunately mode of service of any type of notice was not catered for in the charge document and Mr. Ongoto relied on section 102 of the Indian Transfer of Property Act which stipulates that-

"102 (1) Any notice required or authorized by this Chapter to be served on a mortgagor shall be sufficient although addressed to the mortgagor by the designation only, without his name, or generally to the person interested, without any name and notwithstanding that any person to be

affected by the notice is absent, under disability, unborn, or unascertained.

(2) Any notice required or authorized by this Chapter to be served shall be sufficiently served if either-

(a) it is left at the last known place of abode or business in Kenya of the mortgagee, mortgagor, or other person to be served; or

(b) in the case of a notice required or authorized to be served on a mortgagor, it is affixed in a conspicuous position to the property comprised in the mortgage; or

(c) it is served on an agent or attorney holding a power of attorney or authority from the mortgagee or mortgagor whereunder such agent or attorney is duly authorized to accept such service; or

(d) it is sent by post in a registered letter addressed to the mortgagee, mortgagor, or other person to be served, by name, at his last known postal address, and if that letter is not returned through the post office undelivered; service by post as foresaid shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.”

But one needs to establish which are the notices that are referred to in the above section, which clearly make reference to “notice required or authorized by this Chapter.”

Chapter IV under which aforesaid section refers to is titled “OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES”.

Upon perusal of sections 58 to 104 which fall within the said Chapter, the only section which makes specific reference to Notices, and under which Notices are required to be issued is section 69 (A) and (G) which stipulate that:

“69 A. A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money or of part thereof, for three months after such service; or

“69G (1) A mortgagee entitled to exercise the mortgagee’s power of appointment of a receiver shall not appoint a receiver until either-

(b) in the case of an equitable mortgage or charge by deposit of documents protected by registration of a memorandum thereof under the Trust Lands Act, the Land Titles Act or the Registration of Titles Act, or the case of a conditional mortgage or an usufructuary mortgage, notice requiring payment of the mortgage-money has been served on the mortgagor or chargor, or one of two or more of them, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.”

From the above section 69, it is not in doubt that the Notices that are referred to therein are Statutory Notices, which should be given by the mortgagor, prior to exercising the statutory power of sale. All other notices, including notices to vary rates of interest would thus be ordinary Notices.

To my mind, section 102 of ITPA would therefore only apply to statutory notices as per section 69 A & G but not ordinary notices. I am thus inclined to agree with Mr. Gachuhi’s line of submission, that notices sent by ordinary mail, were effective notices. A client of a bank, who changes his address but fails to advise his bankers accordingly, does so at his own peril.

Secondly, I have taken into account that the statements of accounts clearly indicated the rate of interest charged over the year and the amount of interest so charged. The director of the respondent company confirmed that some of the statements were collected periodically by their auditors. It is not in dispute that the respondent made payment over the years, and that they never questioned the variation of interest rates of their statements and having acted on them positively by remitting payments periodically. Having confirmed receipt of copies of the statements, and having acted thereon positively, the respondents would now be estopped from claiming that they were not aware of the variation of the interest rates.

In view of the above I find that the applicant acted properly when it sent notices of the variation of interest by ordinary mail to the last known address of the respondents, and they were thus duly served.

Having found as I do, it is ordered that the respondents do pay to the applicants such sums calculated in accordance with Exhibit JMW 6 of the affidavit of Jacinta Wambua, until payment in full.

The respondents shall bear the costs of this application.

Dated and delivered this 16th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:

Miss Kimani holding brief for Mr. Ongoto for the respondents

Mr. Gachuhi for the applicants.