



**REPUBLIC OF KENYA  
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**IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 918 OF 1999**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT**

**VERSUS**

**PALM HOMES LIMITED.....1ST DEFENDANT**

**MOHAMED ALI MADHANI.....2ND DEFENDANT**

**PULIN HARANCHAD SHAH.....3RD DEFENDANT**

**RULING**

By a notice of Motion dated 29th September, 1999 the applicant is asking for a summary judgement to be entered against the defendants. The facts leading to this application are that the first defendant had in 1997 borrowed some money from the plaintiff which was guaranteed by the 2nd and 3rd defendants.

The first defendant defaulted in the repayment and the property which was sold by Public auction and realised a sum of Shs. 9 million leaving a balance of Shs.10.7 million as at 17-2-99. The plaintiff then sued the sureties for this balance. In support of the application Jacinta Wambua a deputy manager of the plaintiff company gives the facts from the time the mortgage agreement was entered into on 25.8.1997 and how eventually the plaintiff in exercise of its Statutory rights sold the property. She says that the defence filed by the 2nd defendant is a sham and does not raise triable issues.

The 2nd defendant has filed a defence in which he says that he was a nominee of the 1st Director and not a substantive director of the 1st defendant and as such no liability attaches to him. He also raised the points that the plaintiff did not exercise its right of sale with diligence in the manner it sold the charged property, as it would have fetched an amount, which would have covered the loan amount. It is also the 2nd Defendants contention that the plaintiff had a duty to pursue the 1st Defendant vigorously for the payment before coming to the sureties for redress Mr. Mohamed for the plaintiff argued that in the main mortgage agreement there is no entry to show that the 2nd Defendant is a nominee.

I have considered the defence and the submissions by the counsels for the parties. At this stage of these proceedings the plaintiff is required to show that there are not triable issues raised by the defence which has been filed. One of the points raised during the hearing of the application by Mr. Sethi for defendant No.2 is that the 2nd defendant was an agent and a nominee of the 1st defendant. Mr. Mohamed for the plaintiff maintained that the 2nd defendant as a director of the company cannot be a nominee. Although the counsels presented detailed arguments on these points, I find that these are issues, which cannot be resolved by evidence through affidavit. Summary Judgement should only be given in plain and obvious cases and not where evidence is clearly needed to resolve some issues raised by the defence. See the D.T. Dobie & Co. V. Joseph Mbaria Mudia in Civil Appeal No. 37 of 1978.

I, therefore find and hold that the defence raises some triable issues which can only be resolved through a hearing. I therefore decline to grant the order for summary judgement.

The costs of the application shall be in cause.

Dated and delivered this 14th day of March, 2000.

**KASANGA MULWA**

**JUDGE**