REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1906 OF 1999

MUYOTI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

There is only one main prayer in this application dated 20th December 1999 and filed into the Court on the same 20th December 1999. That prayer is seeking orders that the respondent, or their servants, agents and/or assigns be restrained from interfering and/or selling property known as LR Nairobi/Block 32/296 House No 28 High View Estate in Nairobi until the suit is heard and determined. It is also seeking costs of this application.

The main ground of the application if I understood the applicant's learned counsel well is that the applicant's account was not in arrears and thus the applicant was not in default as at the time he was served with a statutory notice.

That being the case, the applicant contends that the respondent's power of sale had not accrued as such power can only crystallise after it is shown that the mortgagor is in default. However, in the application, the applicant puts down four grounds in support of the application and these are first that if the property is sold, the applicant stands to suffer an irreparable loss as he has paid a substantial amount of money (presumably to the respondent in respect of this property), secondly that the respondent has failed to maintain proper and accurate figures in the applicant's mortgage account, thirdly is the applicant has a *prima facie* case with overwhelming chances of success and lastly the applicant relies on his affidavit in support of the application. There are annexed to the same affidavit several annextures and there are also further affidavits with annextures filed by applicant. I will refer to some of the annextures as may be necessary in this ruling. The applicant has also filed another affidavit sworn by one Mithi Wanjohi, a certified accountant in further support of the application which annexes a summary of payment made to the respondent from 1st July 1993 to 31st January 2000. I will also refer to this affidavit.

The respondent has filed replying affidavit sworn by one Jacinta Mutio Wambua, its Deputy Manager Legal and grounds of objection. In its grounds of objection, the respondent states that the applicant has not shown a *prima facie* case with a probability of success, that the applicant has not shown that he stands to suffer irreparable damage in the event of the temporary injunction being denied; that no undertaking is given as to damages; that the terms of the charge freely negotiated between the parties should be given effect and that the applicant is indeed in arrears and the application is brought to buy time and block the respondent from realising the security. These grounds were filed on 24th January 2000 before the latest amendment to the Civil Procedure Rules. Together with these, the respondent also filed supplementary

affidavit sworn by the same Jacinta Mutio Wambua on 2nd February 2000 which merely annexed statements of account from 1993 in respect of the applicant. There was also an affidavit of one John Kinyanjui Muchiri, an officer in the Risk Management and Recoveries Section. That affidavit was sworn on 28th June 2000. The respondent's learned counsel contends that the complaints raised by the applicant do infact amount to a dispute on the amount and do not go to the root of the entire case. In short, the respondent's case is that the respondent's statutory power of sale had arisen as at the time statutory notice was issued to the applicant, the applicant's account was in arrears.

Thus whereas the applicant says the statutory notice was improperly issued as he was not in arrears and thus respondent's statutory power of sale had not arisen, the respondent maintains that its power of sale had actually arisen and the statutory notice was properly issued.

Thus the question to be resolved is whether this entire complaint amounts to a dispute on the amount or is a matter in which the respondent's right had not arisen and thus the respondent should not have issued statutory notice.

I do feel that the solution to this question must involve looking at the accounts and to see what was the state of account just before the statutory notice was issued.

Statutory notice was issued to the applicant *vide* a letter dated 26th February 1996. Paragraphs 2 and 3 of the same statutory notice states as follows: -

"We are informed by our client that you are indebted to them in the sum of Kshs 1,376,482.90 as at February 1996 together with interest continuing to accrue thereon and that inspite of several reminders you have failed to deposit funds in the above account in order to redeem your indebtedness. The arrears are Kshs 438,203/- as at February 1996.

We are instructed to demand from you immediate payment of the said sum and to give you notice, which we hereby, that unless the payment of the said sum of Kshs 1,376,482.90 as at February 1996 together with interest continuing to accrue thereon at the rate of 26% per month is received in our office in full within three (3) months from the date of receipt by you of this letter, we shall sell the above property on behalf of our client under their statutory power of sale in accordance with the provisions of the Registered Land Act without any further intimation to you in this respect in order to realise the amount due to our said client and secured by the said charge, and will hold you liable for all costs and consequences."

The applicant's accounts as appear in the annexture marked B in the affidavit of Mithi Wanjohi, applicant's certified account, does not state what was the state of this account as in February 1996 when the statutory notice was issued. It gives the account as in 1996 but without the necessary particulars.

It talks of actual position as opposed to expected position. It does not annex the copies of the receipts issued to the applicant for the alleged payments to the respondent. It is difficult to tell from the same annextures as to what was the actual position of the account as claimed by the applicant on 26th February 1996. However, even if I were to consider the position as on 31st December 1995, only two months prior to 26th February 1996, the applicant admits that the balance by his accountant's calculations should have been Kshs 826,619/- and that throughout that year he had paid Kshs 218,784/-.

On the other hand, the respondent's statement appears to me detailed and shows the interest charged on monthly basis. It shows that the applicant had paid as at 31st December 1995, Kshs 60,000/-. That means that throughout the year 1995, the applicant claims he had paid Kshs 218,784/ - whereas the respondent says he had paid only Kshs 60,000/-. Further, looking at 1996 statement of accounts, it seems clear that on 4th January 1996, the applicant paid Kshs 50,000/-. This has not been disputed by the applicant. There is no further payment in that year till on 15th May 1996 when another Kshs 70,000/- was paid by cheque. In short, even going by the statements, it is clear that from 1st January 1995, to end of February 1996, the applicant had paid Kshs 110,000/- according to the respondent whereas according to the applicant he had paid Kshs 218,784/-. The applicant has not annexed any receipts to support his contention, but even if it were accepted that he had paid Kshs 218,784/- in 1995, and Kshs 50,000/- by May 1996, making it a total

of Kshs 268,784/- paid between 1st January 1995 upto the time of issuing the statutory notice on 26th February 1996, can one say the applicant was not in arrears by 26th February 1996? Considering interest, ledger fee and the agreed monthly instalments (which was variable) of Kshs 13,371/- it is clear to me that by the time the mandatory statutory notice was issued, this account was in arrears.

I have perused carefully the affidavit of John Kinyanjui Muchiri, and the statement annexed. I am not hearing this case, but it does appear to me that Muchiri's affidavit reflects a better and more reasonable approach to the applicant's statement of accounts, and I do accept that the applicant's accountant, has, with every respect, not produced a statement that can be useful to the Court. I have also noted that the problem arose because applicant did not pay the required monthly instalments on their required dates for most of the year 1995. He has not shown by acceptable evidence such as receipts that he paid Kshs 218,784/- as he alleges. All that is there is that throughout the year 1995, he paid only Kshs 60,000/- as opposed to over Kshs 160,045/- which (according to the schedule to the charge is worked out at the monthly installment of Kshs 13,371/-) is the very minimum excluding interest, bank charges and assuming the monthly installment had not been varied upwards. As I have already stated, in January 1996, he paid Kshs 50,000/- and paid nothing in February 1996.This in effect means that at the time the statutory notice was issued, the applicant had paid only Kshs 110,000/- from 1st January 1995. In 1994, he had paid close to Kshs 140,000/- which was also representing less payment that what was expected and the year 1993 was no better.

The upshot of all the above is that I am unable to be satisfied that as at 26th February 1996, when the mandatory statutory notice was issued to the applicant, the same applicant was not in arrears. It appears to me that he was in arrears or in default and was thus in breach of the terms spelt out in the charge. The respondent was under those circumstances entitled in law to issue the same notice and in that situation the respondent's statutory power of sale had arisen as at the time the mandatory statutory notice was issued. I also find as a consequence of the above finding that whether the accounts in respect of the applicant are properly kept by the respondent or not, and whether the amount due now is not the correct amount, are matters that go to the dispute on the amount which in law cannot be grounds for stopping a mortgagee whose statutory powers of sale have arisen from exercising the same powers of sale.

Halsbury's Laws of England volume 32 4th edition states at paragraph 725 as follows: -

"725. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive."

This is the law. It was followed in the case of *Lavuna & others vs Civil Servants Housing Company Limited & another*, Kenya Court of Appeal Civil Application No NAI 14 of 1995 where Kwach J A states: -

"I have always understood the law to be that a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."

The case of *Bharmal Kanji Shah & another vs Shah Depar Devji* [1965] EA 91 decided earlier than *Lavuna's* case above held also that: -

"The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage."

Mr Muriithi, the learned counsel for the applicant submitted that the applicant's account was riddled with many entries of penalty interests and monthly interest.

I have carefully gone through the statement annexed by the respondent.

I find that upto 26th February 1996 when the mandatory statutory notice was issued there were only two penalty interest charged from the time loan was granted one on 1st January 1996 and the second one on 1st February 1996. These amounted in total to Kshs 12,578/50 which in my opinion, could not have adversely affected the status of the account as at 26th February 1996 when the mandatory statutory notice was issued. As to the interest charged, these are clearly covered by clause 5(iii) of the charge document .

The applicant further says in the grounds in support of the application that if the property is sold as intended he will suffer an irreparable loss as he has paid a substantial amount.

The answer to that complaint is that the applicant has not satisfied me that the respondent is a "man of straw" who would not be able to make good his losses should he eventually succeed in this suit after the property is sold. I will take judicial notice of the fact that the respondent is a financial institution which has not been put under receivership nor been liquidated.

It can ably compensate the applicant for any losses the applicant may suffer if the property is sold and the applicant later succeeds in his suit.

I do find that the principles as laid down in *Giella's* case have not been satisfied in this case. The applicant has not shown a *prima facie* case with a probability of success. Loss if any will not be irreparable as the respondent will be able to compensate the applicant in respect of the money he claims to have paid to the respondent as that is the only loss he is complaining about and I do not entertain any doubt in my mind in this matter. The application dated 20th December 1999 and filed into the Court on the same date is dismissed with costs to the respondent.

Orders accordingly.

Dated and Delivered at Nairobi this 11th day of October 2000.

T.MBALUTO

JUDGE