



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.283 OF 1997

FRANCIS OPIYO NG`ONGA ::::::::::::::::::::PLAINTIFF

V E R S U S

HOUSING FINANCE CO. OF KENYA LTD :::DEFENDANT

R U L I N G

This is an application by chamber summons under order 39 rule 1 and 3 and section 3A of the Civil Procedure Rules and Act respectively taken out by the mortgagor to restrain the mortgagee from selling or in any way alienating LR.NO.2727 SECTION II M.N. Mombasa, the mortgaged property. The mortgagee has cited three reasons in his supporting affidavit sworn on 12th September 1997 by Francis Opiyo Ng`onga where he says that he was not served with a statutory notice. Secondly that he has over-paid the mortgage amount in the amount of KShs.200,000/- and that the notification of sale from Ms. Watts Enterprises Court Brokers and Auctioneer dated 18th September 1997 never disclosed how much amount was outstanding on the mortgage. Lastly he has said that on advise the mortgage deed is null and void because he did not sign it before an advocate and neither was it explained to him. Miss Shariff counsel for the applicant argued on these lines and stressed that there was no advocate`s name appearing on the attestation column and that this renders the mortgage deed void able if not null and void. She relied in the principle of *GIELLA VS CASSMAN BROWN* 1978 EA 358.

The mortgage has opposed the application saying in the replying affidavit of JACINTA MUTITU WAMBUA that the statutory Notice was posted to the mortgagor who in fact replied to it and asked for more time, and that in the statutory notice the Applicant was advised of the amount outstanding.

Mr. Njoroge, advocate for the respondent relied on this and on the decision in *Giella Vs Cassman Brown*, 1978 E.A 358 saying that the mortgagor can be compensated by the Finance Company.

I have looked at the evidence the parties here relied on and I must agree with the respondent. Looking at the mortgage account annexed to the affidavit of JACINTA MUTITO WAMBUA as :JMW2” that the payments were sporadic and indeed the balance was indicated on the balance sheet.

I do not believe the applicant when he claims not to have received a statutory notice because by his letter of 9th December, 1996 he refers to facts in the respondent`s letter of reference MMG/TSM/101652 dated 8th November 1996 and asks for a 3 months period natatorium and acknowledging being in arrears and having a loan balance amounting to KShs.282,965.45 and 69,802.45 respectively. But these facts

acknowledged by the applicant although were in the letter referred to above which was a copy of a letter sent to the mortgagee's advocate and only copied to the applicant. They were also in the statutory Notice annexed in Jacinta mutio Wambua's affidavit of 30th September 1997 as annexure JMN3. That Notice is dated 13th November 1996. So it can be that the Applicant got those facts from the letter copied to him and not from statutory notice or it would be vice-versa, but although the applicant denied receiving this statutory notice there is certificate of posting registered as No.1460475 of 14th November 1996 addressed to applicant under Box 19, Voi. I believe this is evidence of service and is acceptable under Section 3 of our Cap.2. There is no denial that box number was the correct address of the Applicant as of then.

The other claim of the applicant is that the mortgage deed was not in proper form in that it was not validly executed having regard to Section 69(1) and (4) of the Transfer of the property Act which provides that:-

69.(1) A mortgagee or any person acting on his behalf where the mortgage is an English mortgage to which this section applies shall by virtue of this Act and without the intervention of the court have power when the mortgage money has become due subject to provisions of this section to sell or to concur with any other person in selling the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting Titles, or evidence of Title or other matter as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at an auction or to rescind any contract of sale and to resell without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage money shall be deemed to become due whenever either the day fixed for repayment thereof by the mortgage instrument has passed, or some event has occurred which according to the terms of the mortgage instrument render of mortgage money or part thereof immediately due and payable. 2
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Sub-paragraph 4 provides that:-

4. This section shall apply only:- (a) If the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of sub-section (1) of this section and he was satisfied that the mortgagor

understood the same. (b)

(c)

What this means to me is that the power of sale arises if the mortgage instrument is executed in the stated manner. The section is couched in mandatory terms, and the question is what happens to the mortgage in case there is default in compliance with this subsection. Whether it remains void, voidable, or becomes null and void or the obligations in it remain binding is what the main case ought to decide. This is only an interlocutory application.

The charge executed by the applicant here as chargor and the respondent on 1st October 1990 shows that an advocate on that day may have explained to the applicant what Section 69(1), (4) (a) of T. P. A requires but it does not show who "that advocate" was if there was one and the applicant says no advocate read and explained same to him, indeed the space meant for the advocate is left blank, and miss Sharriff for him stated that the omission to insert the name of the advocate may mean that no advocate at all read it out to the applicant or that one not an advocate did so. Therefore the charge is ineffective and no power of sale can arise from it but Mr. Njoroge counsel for the respondent counters saying the onus is on the

applicant to prove as a matter of fact that the advocate did not explain to the applicant the meaning of Section 69 (1) and that in any case the sub-section only requires advocate`s signature and not his name.

But this is not entirely correct. The name is not on the charge as the Act stipulates so onus shifts on the respondent to explain why. The sub-section requires that an advocate should witness the chargor`s signature. Such advocate must be a named advocate. He is the one who signs the certificate certifying that he has explained the effect of Section 69(1) to the mortgagor. To adopt Mr. Njoroge`s interpretation would be like placing the cart before the horse. You start with the advocate first not the signature of one deemed to be that advocate. For this reason I believe the advocate should be named after all an advocate is not just anybody. His knowledge of law his learning and ability to understand and explain the intricacies of power of sale, the right of the parties under the English mortgage and other points implied or expressed in the section, aside, he is also statutorily defined in the advocates Act Cap.16 at Section 2 as meaning:- “Any person whose name is duly entered upon the role of advocates OR upon the Role of Advocates having the ranks of Senior Counsel”.

So an advocate`s name is more than the name in Shakespeare`s rose. It exists in the role of advocates. He is the one who should explain and certify, then sign because he, the named advocate has done those things. Does omission to name him vitiate the charge? Miss Sharriff maintains it does, but not so Mr. Njoroge. There was no authority shown to me on the subject. I have no direct authority shown to me on the subject. I have no direct authority for or against the positions made by the two counsels but there are not unsimilar situations reported in the law reports that I have come across. These are:- The High Court in Uganda considering the position in Uganda`s Registration of Titles Ordinance, Cap.125 there then in the case of HARSHAD LTD VS GLOBE CINEMA LTD & OTHERS (1960) E.A. 1048.

In that case the mortgage was signed apparently by the defendants only (who were sureties) and was not signed by both mortgagee and mortgagor in accordance with the form of mortgage set out in the schedule to the Act. It was argued that because of this the purported mortgage was not a mortgage and did not create any rights or obligations between the parties as it was not signed by the mortgages. The court held inter-alia that the defendants had acted on the mortgage and although the form was statutory and not contractual the defendants could not repudiate their liability on the ground that the plaintiff had not signed the mortgage.

The Judge cited the case of CREDIT FINANCE CORPORATION LTD VS ALI MWAKASANGA, (1959) E.A. 79 where it was held that where there had been part performance of a hire purchase agreement the hirer could not maintain that the agreement was invalid for want of execution on the ground that no one had signed it on behalf of the lender.

Again under Section 32 of the Registration of Titles Act, Cap.281 it is provided that upon registration of an instrument in the manner provided in the Act the land specified in the instrument shall pass or as the case may be shall become liable as security in the manner and subject to the agreements, conditions and contingencies set out and specified in the instrument, or declared by the Act to be implied in the instrument, or declared by the Act to be implied in instruments of a similar nature. The privy council held in GOVINDJI POPATLAL VS NATHOO VISANDJI (1962) E.A. 372, that where a charge has been registered under Section 32 of Registration of Titles (Act) it has the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor.

In the case of OLINDA DE SOUZE FIGUEIREDO VS KASSAMALI NANJI (1963) E.A. 381. A Ugandan Registration of Titles Ordinance (Cap 123) then provided on Section 114 that a proprietor could mortgage his land” by signing a mortgage thereof in the form set out in the 11th schedule”. The mortgagee did not sign as provided but the court per Sir Charles Newbold said:

“There is nothing in this mortgage which makes the signature of the mortgagee essential. In my view the mere fact that a form has provision for signature of a party does not make it mandatory that such party shall sign in order to give instrument legal efficacy.”

This is as far as my research has gone, but I cannot say these cases are relevant. The last one dealt with a requirement embodied in a subordinate legislation, a schedule, in fact the same Judge of Appeal quoted the case of WING VS EPSOM URBAN COUNCIL, (1941) 1KB 798 – where the form in issue was not signed by two charges when the order had provided for 2 justices to sign, the court held that on construction of the statute the order had to be both made and signed by two justices. It was not a mere form it was part of the order. The other one dealt with Hire Purchase Act which is not same as T.P.A. I think where the Act as here, the Transfer of property Act commands that an advocate ought to certify and explain. That is not a mere form. It is a matter of substance and an advocate is not defined by his signature. He is identified by his name as appears in the role of advocates. That is when he is an advocate. The first Ugandan case of Harshad referred to earlier does not refer to a statutory provision like Section 69(1) and (4), and even the Privy Council case and Newbold P's decisions on Section 32 of Cap.281 is not directly on Section 69(1) or (4) of T.P.A. There may be a conflict but this can only be resolved at a full hearing.

My belief is that the provisions stipulated under Section 69(1) or (4) are imperative and must exist before power of sale can arise. If therefore an advocate is not shown to have given explanation and given certificate then the power may not arise and therefore the applicant who says that mortgage is defective or void and voidable in my view has a prima facie case with probability of success so that no right to sell should arise out of such a defective instrument. If therefore no power to sell ever arose, the exercise of that power also cannot arise subsequently.

The case of UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA, court of Appeal Civil Application No.NAI.140 of 1995 cited by Mr. Njoroge was not supporting Mr. Njoroge on this point of naming advocate because there the advocate who explained Section 69(1) to the mortgagor was named, Kwach J.A. said at Page 20 of his judgment:-

“All I can say is that the charge contains a certification by DINESH KAPILA, advocate certifying that he explained to MUKESH VAYA and PANKAS RANA both directors of UHDI, the effect of Section 69(1) and Section 100 A(1) of the Transfer of Property Act and he expressed himself satisfied that each of them understood the same. What was being explained to the two gentlemen was an English mortgage.”

If his lordship had to have this charge I have before me, he would perhaps have not said that as No advocate is named in this charge like DINESH KAPILA was named there.

Otherwise, I have found elsewhere that there were arrears due, and that statutory Notice was served. If all were equal and those were the only reasons injunction should be refused unless for other reasons other than the two grounds advanced by the applicant because the law against those grounds as reasons for granting injunction has been explained by Kwach J.A and in the said Uhuru Development case when he said:-

“As I understand the law a court should not grant 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 the mortgage.”

Quoting Halsbury's Laws of England, Vol.32 4th Edition Page 725 the Judge of Appeal said the mortgagee can be restrained however where the mortgagor pays the amount to court, or if upon subsequent encumbrance offering to pay off the first mortgage denies his title to redeem but Mulla on “Transfer of property” adds that mortgagee can be restrained if he is acting fraudulently and in an improper manner contrary to the terms of mortgage deed. He can also be estopped by the mortgagor if waiver can be proved against him.

But these considerations apply against the exercise of the power of sale. In this case I found that the power did not arise ab initio; so under Giella Vs Cassman Brown Co. Ltd; the applicant has made out a prima facie case with probability of success

because power of Sale could not arise on this charge. To me it is defective.

As to the question of damages. It is always not easy to say that a piece of land owned by an applicant can be adequately compensated for by an award of damages but like in any other property, money can usually compensate its loss and I believe to a financial institution property of this nature whose loan was about 190,000/= can be compensated for by an award of damages.

But as I am in doubt I would grant this application on blance of convenience the applicant`s loss. If I refuse the grant will be obviously the property itself, and the forfeiture of the right that may accrue to him if the trial court had to find that indeed the mortgage instrument was defective and that there was no power of sale. In that event the respondent may still apply to court to stop any transfer of the property to a Third Party and even now the respondent still has the security of the same charge until a court declares it void, so they are secured.

I think I would grant injunction to stop the intended sale, which I so do with costs to the applicant.

Delivered this 5th day of June 1998 at Mombasa

A. I. HAYANGA

J U D G E

Delivered to: Mr. Sharriffor Plaintiff

N/Afor Defendant