



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, SHAH & BOSIRE J.J.A.)
CIVIL APPEAL NO. 214 OF 1996
BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPELLANT
AND
1. FAITH W. KIMERIAH
2. HARRISON C. KIMERIAH.....RESPONDENTS

**(Appeal from a Ruling and Order of the High Court of
Kenya at Nairobi (Mr. Justice Khamoni) dated the
19th day of May, 1995**

**in
CIVIL CASE NO. 873 OF 1993)**

JUDGMENT OF THE COURT

Sometime in 1993 Faith W. Kimeria (hereinafter referred to as "the wife") filed a suit against Harrison C. Kimeria (hereinafter referred to as "the husband"). In that suit (H.C.C.C. No. 873 of 1993) filed by way of an Originating Summons under Section 17 of the Married Women's Property Act, of 1882 of England (an Act of general application in Kenya) the wife seeks orders against the husband for a declaration that immovable property known as L.R. No. 7763/6 situate in the city of Nairobi and registered in the sole name of the husband is owned jointly by her and the husband. She also claims that the husband is registered and owns the said property for the benefit of himself and the wife as trustee. She also seeks further orders for registration of the said property in their joint names.

By a chamber summons taken out by the wife in that suit she sought orders that the appellant (Housing Finance Company of Kenya Limited) be joined in those proceedings as a codefendant and that pending the hearing and determination of that suit the husband and the proposed defendant (the appellant) be restrained, stopped and prevented from selling, transferring, charging, alienating, disposing of or in any other way parting with the said property. In the same application the wife sought orders that pending the hearing and determination of that suit, the defendants be stopped, prevented and restrained from evicting or ejecting the wife from or interfering with her quiet possession and occupTahteionw ioffe 'tsh e aspapildi captrioopne rtcya.me up for hearing before the superior court (Khamoni, J) and the court granted the orders sought by the wife despite objections by the appellant. It is against these orders that the appellant now appeals. The appellant's stand in the superior court was that the provisions under which the orders were sought did not apply, that there was no cause of action against the appellant at all and that the appellant's statutory power of sale could not be curtailed by such an application.

The learned judge said in his ruling:

"From what has been brought to my attention during the hearing of the chamber summons, there appears to be some straining in the matrimonial relationship between the plaintiff and the defendant her husband. The suit property is registered

in the sole name of the defendant and it would appear that the property was mortgaged to M/s Housing Finance Company of Kenya Limited (HFCK) by consent of the plaintiff and the defendant."

"Repayment of the loan is in arrears and as a result the H.F.C.K is threatening to sell the property in the exercise of the Company's statutory Power of Sale."

The ground upon which the wife sought the addition of HFCK as a second defendant in the suit (the other defendant being the husband) boils down to saying that if HFCK were to be brought in as a defendant "all the parties will be enabled to realize their fair rights."

Order 1, rule 10 of the ***Civil Procedure Rules*** provides for addition of a party to a suit so that his presence before the court may enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit, or to enable the court to determine the real matters in dispute.

Now the matters in dispute in the suit in the superior court are clearly between the husband and wife. These disputes have nothing to do with HFCK who is merely the chargee whose interest simply is to realize the loan. We see no basis whatsoever, in this case, upon which HFCK could be implanted in the proceedings. Clearly the wife seeks to obtain more time by virtue of the application so that HFCK may postpone the inevitable sale of the property and so far she has succeeded in doing so.

Any suit filed by the wife under Section 17 of the Married Women's Property Act of 1882 of England is for a speedy resolution of the issue of what share, if any, the wife is entitled to in the matrimonial property; that issue can be of no concern to the chargee.

The application which was before the superior court, in the circumstances of the case, was really an abuse of the process of the court. The relevant circumstances are that the wife knew that the property was charged to HFCK; that she had herself paid some of the instalment; that arrears had mounted up giving rise to the right of HFCK to exercise the statutory power of sale; that the wife knew of the arrears.

Despite all these undisputed facts the learned judge not only ordered HFCK'S joinder as a defendant in the suit but proceeded to grant an injunction restraining HFCK from selling the property pending the hearing and determination of the suit on the premise that the wife had a prima facie case with a probability of success. The wife probably has a case with

probability of success against her husband; she has no cause of action at all against the appellant.

The upshot of all this is that this appeal must be and is hereby allowed. The orders made by the superior court on 19th May, 1995 are set aside in their entirety. The appellant is dismissed from the suit. The appellant will have its costs of proceedings in the superior court and costs of this appeal which shall be payable by the first respondent. As the second respondent had nothing to do with what transpired in the superior court and this court there will be no order of costs as against him.

Dated and delivered at Nairobi this 17th day of June,

1998.

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

**I certify that this is
a true copy of the original.**

DEPUTY REGISTRAR.