REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 158 OF 1996

NYAGA KABUTE.....APPELLANT

AND

HOUSING FINANCE CO.(K) LTD.....RESPONDENT

(Appeal from the Ruling/Orders of the High Court of Kenya at Nairobi

Mr. Justice E. M. Githinji given on 10th July 1996

in

H.C.C.S. NO. 4610 OF 1990)

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JUDGMENT OF THE COURT

This is an appeal by Nyaga Kabute (the appellant) against the order of the superior court (E. M. Githinji, J.) made on 10th July, 1990, in its Civil Case No. 4610 of 1990 in which the learned Judge declined to review his earlier ruling in which he had granted Housing Finance Company (K) Limited, the respondent in this appeal, a decree for possession of a parcel of land known as Gichugu/Settlement Scheme/232. The said parcel of land had been given as security by the appellant to the respondent to secure repayment by him of a loan the latter agreed to advance to him.

The facts giving rise to this appeal are brief. On 4th March 1988, the appellant executed a charge, which was described as "charge by instalments", in favour of the respondent to secure repayment by him of a sum of Kshs.160,000/= which the latter agreed to advance to him. The loan was to be disbursed in instalments and was to be used by the appellant to construct a house on the charged property. The appellant received the first instalment of the loan amounting to Kshs.120,000/=. The loan was to commence on 4th May 1988, at monthly rate of Kshs.2,226/=. The loan was to attract interest at the initial rate 14 ½% which would be varied from time to time depending on the state of the money market.

By clause 4 of the charge the respondent reserved to itself the right and discretion to elect not to disburse the balance of the loan amount. In that event the respondent was obliged to give the appellant notice in writing but by clause 5 interest would be chargeable at the agreed rate for the whole of the agreed loan amount until 31st December, 1988. Thereafter interest was to be charged on the total amount actually disbursed to the appellant. The other clauses are not material for purposes of this judgment.

The appellant initially paid a few instalments of the loan actually advanced to him but later defaulted. The appellant's explanation for the default is contained in a letter he addressed to the Advances Manager of the respondent, dated 15th September, 1988, which, in pertinent part, states as follows:-

"I just write to inform you that you have cheated me enough by not fulfilling your verbal promises of paying my part loan of Kshs.40,000/=….

Needless to say; if the money will not be paid to me within seven days from the date of this final notice, I will term it that you and your company has (sic) breached the contract of the loan agreement, and the amount of loan repayment I paid on 13/9/88 of Kshs.7000/= will be the last one to be paid to you because I cannot be paying out the money to the breached and unenforceable loan contact (sic). Unless you release to me the alleged part loan of Kshs.40,000/= within (7) days from now, I will claim damages from you of Kshs.6500/= per month in addition to other claims against you."

The appellant, it would appear, considered the loan agreement as having terminated when the balance of the loan amount was not paid to him at the expiry of the seven days notice in the above letter. He did not make any further payments until 13th December, 1996 when by a letter of that date he forwarded to the respondent a cheque for Kshs.109,000/=, to meet what he considered to be the balance of the loan which was actually advanced to him.

In the meantime in or about August 1990, the respondent brought an action in the superior court, at Nairobi, under the Mortgages (Special Provisions) Act, Cap 304 Laws of Kenya against the appellant claiming possession of the above property. The basis of the claim as was pleaded in the plaint was that the appellant had defaulted in the payment of instalments under the charge; that the arrears of instalments stood at Kshs.33,770/=; and that due notice had been served on the appellant requiring him to pay the entire outstanding loan with accrued interest within a given period but that he had failed to do so.

In a written statement of defence and a replying affidavit to the one verifying the plaint, the appellant as defendant in that suit averred and deponed inter alia, that due to the respondent's alleged breach of the loan agreement by its failure to release the balance of the loan amount he became released from his obligations under the loan agreement; that interest on the money actually lent stopped accruing, and that he had no obligation to repay any more money than was actually advanced to him; that the respondent's breach stalled his building project with the result that he lost an anticipated monthly rent of Kshs.6500/= with effect from the date of the breach, and that if his land was sold he would have nowhere else to shift to with his family.

The respondent's suit was heard pursuant to the provisions of section 5 of the Mortgages (Special Provisions) Act, and the respondent was eventually granted a decree for possession of the subject property. The effect of that was that the respondent could register the decree against the title to the property and thereby terminate any rights which the appellant or any other person might have had over the property. It would also have the right to sell it.

The appellant was aggrieved with the decree. He filed a notice of appeal declaring his intention to appeal against it, and actually lodged an appeal which was later struck out for being incompetent. Thereafter he moved the superior court by Chamber Summons under 0.XLIV rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, for orders that that court review the entire proceedings and judgment in the suit by setting aside the decree and thereafter order that it be dismissed with costs. In obedience to the provisions of O.XLIX rule 4 of the Civil Procedure Rules the application was heard by the same Judge who had granted the respondent the decree which was sought to be reviewed. The Judge, Githinji, J., after hearing arguments from both sides did not think the appellant had demonstrated to him that the decree should be reviewed. He therefore declined to review his decision and thereby provoked this appeal.

The appellant's memorandum of appeal is home made. It does not comply with rule 84(1) of the rules of this court as to form. Be that as it may the appellant having been unrepresented we do not take any adverse view on the matter. The gravamen of his complaint is that the learned Judge erred in law in

granting a decree against him in an incompetent suit as in his view the facts set out in the plaint, the affidavit verifying he plaint, the replying and the further replying affidavit were clear on that; and that had he carefully read those documents when considering the application for review he would have come to a different decision.

The basis for the appellant saying that the suit in which the decree earlier appealed against was made was incompetent appears in his two affidavits in support of his review application. It is clear from both affidavits that the appellant thinks that the respondent was demanding from him more money than it lent him. In his view, therefore, the respondent's action was based on a false claim. Consequently, to extent that there was no proper basis for the suit, the plaint did not disclose a cause of action and was, therefore, incompetent.

In his first ruling Githinji, J. found as fact that the respondent had agreed to advance to the appellant Kshs.160,000/= but only Kshs.120,000/= was actually disbursed; that the money actually advanced interest at the contractual rate, and the appellant, in breach of the loan agreement, had defaulted in paying to the respondent the agreed monthly instalments as entitled it to a decree for possession. He also found as fact that the release of the balance of the loan amount was at the discretion of the respondent and that it had properly exercised its discretion to withhold the money in view of the appellant's letter earlier on reproduced in which he had discontinued the repayment of the loan he had already received.

In his submission before us the appellant urged the view that the respondent breached the loan agreement when it declined or failed to release the balance of the loan. Consequently he was released from paying the agreed monthly instalments and therefore, the respondent could not properly base its suit on the agreement. In his view had the trial Judge appreciated this fact, and the fact that the respondent appeared to suggest that it had lent him Kshs.160,000/= and not Kshs.120,000/= there was material on record on which the said Judge would have acted upon to grant him review. He also submitted that the respondent should have but did not give him written notice, in terms of clause 4 of the charge and that it had improperly withheld the balance of the loan.

Mrs. Thuku for the respondent submitted that it would not make any commercial sense to release the balance of the loan to the appellant when he had expressly advised the respondent that he had discontinued payment of the loaned sums and that he considered the loan agreement as having terminated. She urged the view that the trial Judge was right in refusing a review as the appellant was clearly in breach of the loan agreement as entitled the respondent to a decree for possession.

This is a first appeal. We have analyzed the evidence as we are obliged to do and clearly the respondent had the discretion to release the whole or part of the loan amount. Clause 4 of the instrument of charge is clear on that. However, under the agreement it could only properly withhold the balance of it if it complied with the requirement of notice. According to the timetable on the instrument of charge the last date for disbursing the last instalment of the loan was to be 4th November, 1988. That was however conditional on the respondent being satisfied that the state of the security the appellant had given justified it and if he would not have breached the agreement. The appellant breached the loan agreement before the last date when according to the instrument of charge, the balance of the loan would have been disbursed. Because of that the respondent was entitled to proceed under clause 8 of the instrument of charge. According to it, default of at least one instalment entitled the respondent to take steps to realize its security. There is evidence on record that the appellant defaulted in payment of more that one instalment. The plaint and the affidavit verifying it clearly state that due notice was served on the appellant to regularize the payments but he failed to do so. Prima facie therefore, the respondent's claim was in order.

The appellant, however, contends that the suit was based on a false claim. That cannot possibly be so regard being had to the statement of account dated 31st December, 1988. It shows all amounts debited by the respondent in the appellant's account with it. It shows the first instalment of the loan as being Kshs.120,000/= and interest charged as Kshs.13,454.10. The appellant argued that the interest was charged not on Kshs.120,000/= but on Kshs.160,000/=. That may well be so. Clause 5 (ii) of the instrument of charge permitted the respondent to charge interest on the whole loan until 31st December,

1988. There is no evidence before us to show that the respondent continued charging interest on the whole loan amount after that date. That argument is therefore untenable.

In the above circumstances, we find no basis for holding that the plaint and the affidavit verifying it are defective. Nor do we find a basis for finding that the respondent' claim was based on a false premise. The trial Judge was right in granting a decree for possession and his decision on that score was based on evidence which was before him. We also find that there was no basis upon which he would have reviewed that decision. We are therefore of the view and so hold that he properly declined to review that decision. We also think that the only way open to the appellant to redeem his property is to pay the balance of the loan actually advanced to him together with accrued interest, or such lesser sum as may be agreed upon between him and the respondent.

In the result and for the foregoing reasons we have no basis for interfering with the trial court's decision and dismiss the appeal with costs.

Dated at Nairobi and delivered this 14th day of October, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E.O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR