



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIORBI**

**CIVIL CASE NO 744 OF 1992**

**JACOB OCHIENG MUGANDA .....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF**

**KENYA LIMITED.....DEFENDANT**

**RULING**

The plaintiff is the proprietor of plot No LR 37/346/28 Nairobi West which consists of six residential flats and which he charged to the defendant for a loan of Shs 652,000 on 22.8.88.

He states in para 4 of the plaint that the defendant appointed a receiver to collect rent in June 1991. The plaintiff's complaint as disclosed in para 5 and 6 of the plaint is that by virtue of the appointment of the receiver, the plaintiff was not obliged to service the loan and that the advertisement of the plaintiff's property for sale without the defendant revoking the appointment of a receiver is unlawful.

Plaintiff therefore asks for a declaration that the defendant is not entitled to invoke its powers of sale and for an injunction to restrain the defendant from selling or disposing the plaintiff's plot.

The plaintiff filed an application for interlocutory injunction and obtained an interim injunction on 12.2.92. It is the application for interlocutory injunction which is before me for hearing inter parties.

The plaintiff's affidavit in support of the application sworn on 12.2.92 contains one main legal contention and that is in para 5 where the plaintiff contends that once the defendant decided to appoint a receiver to collect rent the defendant is estopped in law from again advertising the property for sale.

To that affidavit the plaintiff annexed a letter dated 14.10.91 addressed by the defendant to the plaintiff's tenants and informing them of the fact of appointment of a receiver wef 1.7.91 it asks the tenants to be paying the rent to the receiver. Also annexed is a letter dated 14.10.91 which the defendant wrote to the plaintiff informing him that as a result of failure to pay arrears of shs 309,146/- due on the account the defendant has appointed a receiver to collect the rent.

The plaintiff has also annexed the statement of accounts from the defendant which shows that the plaintiff owed the defendant Shs 1,108,679/15 as on 11.12.91. The plaintiff does not in his plaint or in the supporting affidavit dispute that he was in arrears of Shs 309,146/- or that he owed the defendants Shs 1,108,679/15 as on 11.12.91.

I say that because the plaintiff in the affidavit sworn on 13.3.91 states that the balance is as per audit report which is merely photostat copy. It seems to exclude all the interest accrued on the sum advanced

and the other bank charges. It is the mortgage instrument or charge which can show whether the interest and bank charges are payable which charge the plaintiff has not annexed. It was important to exhibit the charge because what plaintiff is saying is not that excessive interest was charged but that the interest was not chargeable at all. I seriously doubt the accuracy of the amounts in view of the fact that the plaintiff has not complained about the accuracy of the accounts in his plaint and the supporting affidavit. In any case it is the law that an interlocutory injunction restraining the defendant from exercising the power of sale should not be granted solely on the ground that there is a dispute as to the amount due under the charge – (see *B K Shah and another versus S D Devji* [1965] EA 91.)

Another new matter which was raised by the plaintiff's counsel in the course of his address to Court is that the proper course for the defendant to have taken instead of advertising the property for sale is to file a suit for possession under the Mortgages (special provisions) Act cap 304. The defendant's counsel however contends that the Act is not applicable to this charge. I agree that the special condition in s 3(1) (d) of cap 304 does not apply to this charge for it is conceded by the plaintiff that the flats are not in occupation of the plaintiff or another person who is not an approved tenant.

The words "approved tenant" are defined in the Act. They mean a tenant holding under a lease or tenancy agreement entered into with a written approval of the defendant. Where the dwelling house is in occupation of an approved tenant the special condition in clause 3 (1)(d) of the Act is not fulfilled in this case, it is conceded that the flats are occupied by approved tenants.

The basis of the plaintiff's suit and the application as appears from the plaint and the supporting affidavit is that the defendant's action of appointing a receiver estopped the defendant from exercising its power of sale before the appointment of the receiver is revoked.

It is however a fact that the plaintiff's property had been advertised for sale on 4.3.92 and that the defendant revoked the appointment of a receiver on 24.2.92. It is true that this suit was filed on 12.2.92 before the appointment of the receiver was revoked. The public sale did not however proceed on 4.3.92 and currently the appointment of the receiver has been revoked. It is not contended by the plaintiff that such a revocation is ineffective so, the reality of the matter is that the facts on which the suit is based have been varied and the defendant can now proceed to advertise the property for sale. The injunction being an equitable remedy cannot be given in futility.

Further, the defendant depones which fact is supported by the receiver that the defendant opted to advertise the property for sale because the plaintiff obstructed the receiver by refusing the receiver entry and by collecting rent from the tenants directly. That is of course denied by the plaintiffs but it is not probable that the defendant could in the first place have opted to collect the rent to repay itself and later with no apparent reason decide to realize the security by sale of the property.

Again the plaintiff has not placed the charge before the Court for construction in support of the legal issue he raises. It is the charge which provides the power of the chargee. It is the one which can tell us whether or not the defendant can exercise its power of sale where it has also the option to appoint a receiver or where the receiver is unable to collect the rent. In the absence of the charge the Indian Transfer of Property Act 1882 (ITPA) to which the property is subject does not prohibit the mortgagee from revoking the appointment of the receiver and thereafter proceeding to exercise its power of sale.

S 69 G (1)(a) provides that a mortgagee cannot exercise its power of appointment of a receiver until he has become entitled to exercise the statutory power of sale which means that the discretion is on the mortgagee whether or not he will realize the security or appoint a receiver.

The applicant also complains that the receiver and therefore mortgagee did not collect all the rent. He has not however exhibited the mortgage instrument to prove that the receiver is an agent of the mortgagee. In the absence of any provision in the mortgage instrument then the receiver is by virtue of s 69 G (2) ITPA the agent of the mortgagor.

I have considered all matters canvassed in this application. The applicant does not deny that it owes the

respondent over Shs one million and over Shs 300,000 in arrears. The applicant does not deny that the respondent has been entitled to exercise the power of sale. Further the applicant does not say that he is in a financial position to repay the loan and has not made any offers. The huge debt is still attracting interest. It seems to be that he is merely postponing the date of judgment. I would not be exercising my discretion judicially if I were to allow the application in the above circumstances.

Consequently, I dismiss the plaintiff's application dated 12.2.92 with costs to the respondent and discharge the *ex parte* injunction.

**Dated and delivered at Nairobi this 12th day of May, 1992**

**E.M GITHINJI**

**JUDGE**