



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KARANJA, J.J.A.)

CIVIL APPEAL NO. 232 OF 2014

BETWEEN

HOUSING FINANCE COMPANY LIMITED.....APPELLANT

AND

MARY WAMBUI MUTURI.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at

Milimani, Nairobi (Mutava J.) dated 18th October, 2012

in

Civil Suit No. 346 of 2006)

JUDGMENT OF THE COURT

1. **Mary Wambui Muturi (the respondent)**, filed suit against **Housing Finance Company Limited (the appellant)** on 29th June, 2006 in which she sought the following orders:-

a) “A permanent injunction restraining the defendant by itself, agent and/or servant from alienating, transferring, disposing and/or interfering with the suit property in any other manner whatsoever.

b) A declaration that there existed a valid Mortgage Protection Cover at the time of deceased death and the mortgage debt of the deceased became redeemed in full upon his death OR ALTERNATIVELY the defendants are estopped from claiming the mortgage debt in the deceased mortgage account number 600-0003514 or any part thereof.

c) An order directing the defendant to release forthwith Title Deed No. LR. Dagoretti/Riruta/S.314 to the plaintiff together with a duly executed discharge of charge.

d) Costs of this suit.

2. Contemporaneous with the filing of the Complaint, the respondent filed an application vide the chamber summons of even date pursuant to former **Order xxxix, Rules 1, 2 & 3** now **Order 40 Rules 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, which application was supported by an affidavit sworn by the respondent herself. The respondent had sought *inter alia* the following orders as against the appellant:

(i) THAT service of this application be dispensed with in the first instance.

(ii) THAT the respondent by itself, servants and /or agents be and are hereby restrained by an order of injunction from advertising, selling, alienating, disposing, auctioning or otherwise in any way dealing and/or interfering whatsoever with all that property known as Title No. LR No. Dagoretti/Riruta/S.314 until the hearing and determination of this application or until further orders of this Honourable Court.

(iii) THAT the respondent by itself, servants, and /or agents be and are hereby restrained by an order of injunction from advertising, selling, alienating, disposing, auctioning or otherwise in any way dealing and/or interfering whatsoever with all that property known as Title No. LR No. Dagoretti/Riruta/S.314 until the hearing and determination of this suit hereof.

(iv) THAT cost of this application be provided for.

3. This application was premised on grounds, *inter alia*; that the deceased did not owe the respondent the sum claimed or at all; that there is no justification in selling the deceased's suit property; that the intended sale is premature and/or unlawful; and that the suit hereof needs to be determined first before the respondent is allowed to exercise their right of sale and that the suit would be rendered useless if the intended sale is allowed to proceed causing the applicant to suffer irreparable loss.

4. The application came up for hearing before **Okwengu, J.** (as she then was) who in a ruling dated 13th July, 2007 found in favour of the respondent and granted her an interlocutory injunction on the basis that the deceased's estate would suffer irreparable loss if the suit property was sold.

5. A brief background of the case is that the respondent is the administratrix of the estate of her late husband, **Daniel Muturi Muraya** (*herein referred to as the Deceased*) who died on 12th August, 1999. It is her contention that on 31st March, 1998 the deceased borrowed a sum of Kshs 2,160,000/= from the appellant to finance the purchase of a property in Nairobi being **Title No. LR. Dagoretti/Riruta/S.314 (Suit Property)** which he used as security for the said loan. The loan plus interest was to be repaid within fifteen years at monthly installments of Kshs 47,806.00. He further took a mortgage protection cover of Kshs 3,600,000.00 to secure the said loan. The mortgage cover was also payable by monthly instalments which were to be included in the monthly instalments, payable to the appellant.

6. It is the respondent's case that upon the demise of the deceased on 12th August, 1999, she immediately notified the appellant in accordance with their insurance policy terms of agreement but despite that, the appellant's advocates by a letter dated 21st October, 1999 wrote to the respondent demanding Kshs 2,889,480.09/= failure of which the security would be realized.

7. It is alleged that after several letters between the two parties, on 20th August, 2003 the appellant admitted to having been negligent in handling the deceased's mortgage protection cover and proposed that the respondent pays Kshs 555,387.10 to offset the mortgage debt to which the respondent made a counter offer and instead proposed a sum of Kshs 100,000.

8. In spite of the foregoing, the appellant proceeded to instruct its advocates to realize the security to recover an unexplained sum of Kshs 5,893,392.30 through a statutory notice dated 26th May, 2004 even after admission of negligence on their part.

9. The respondent's case was that the deceased having complied fully with the requirements of the policy, the mortgage protection cover was in force and that the appellant's action of advertising the suit property for sale was unjustified.

10. In its affidavit dated 12th July, 2006 in reply to the respondent's application, the appellant through its Assistant Manager-Legal Services, **Janet Mwaluma** averred that the deceased was in arrears as between January 1999 and July 1999 and as at 1st January, 2000 the debt stood at Kshs 3,016,649.41. It is however not disputed that the insurance company was willing to pay Kshs 1,183,563/= to settle the debt, which sum was deemed insufficient by the appellant as the account was already in arrears.

11. Having failed to reach a consensus on a settlement, the appellant consequently served a 45 day redemption notice to the respondent which prompted the respondent to institute the suit referred to earlier. The Court (**Mutava, J.**) after hearing the matter ruled in the respondent's favour and granted all the prayers sought.

12. Aggrieved by that decision the appellant preferred an appeal to this Court. In its memorandum of appeal dated 20th August, 2014 the appellant has proffered six grounds of appeal as follows:

“(i) Having established that the respondent's husband Daniel Muturi had not paid any insurance premium for the mortgage protection cover, the learned judge erred in law and in fact in finding that there existed a valid mortgage protection cover as at the time of death of the deceased.

(ii) Having established that since the drawdown of the loan, the respondent's husband had not paid a single instalment, the judge erred in restraining the appellant from disposing the suit property and in directing the appellant to discharge and release the title to the suit property.

(iii) The learned judge erred in failing to appreciate that a mortgage protection cover does not cover arrears on a mortgage loan account.

(iv) The learned judge erred when he allowed the deceased's estate to avoid the contractual obligation to repay the loan due.

(v) *The learned judge erred in finding that the deceased's estate was not liable for the mortgage debt.*

(vi) *The judge erred in awarding the plaintiff costs of this suit."*

13. Pursuant to directions given by the Court on 4th November, 2016 the appellant filed its written submissions on 28th February, 2017 but the respondent failed to file a response. When the appeal came up for plenary hearing, Mr. Karungo learned counsel for the appellant sought to rely on the written submissions entirely, along with the list of authorities filed the same day. On ground 1 of appeal, the appellant faulted the learned Judge for finding that the appellant had been negligent by failing to have in place an effective mortgage protection cover despite the fact that he observed that the deceased had not paid any premiums for the mortgage protection cover. He submitted that the charge clearly demonstrated whose obligation it was to insure and keep insured the charged premises in accordance with **Section 3 (i)** of the charge.

14. It was learned counsel's further submissions that the learned Judge ought to have considered the provisions of the charge (**Clause 3 (i) and 18**) which expressed explicitly the final intentions of the parties thereto and the obligations to insure and keep insured the charged property which fell squarely on the Chargor and not the appellant (Chargee). He relied on *Nizar Virani T/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Limited, Civil Appeal No. 88 of 2002, [2004] KLR 269* where the Court held:-

*"...the only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract..." (see also *Allanson Njuji vs British India General Insurance Co. Ltd 1965 EA 58*).*

15. The Appellant asserted that the fact that the deceased borrower had not paid any premium towards the mortgage protection cover entitled the appellant to exercise its power of sale to realize its security as a breach of the borrower's covenant and further that the non-payment of the premiums also amounted to repudiation of the mortgage protection cover. As such, the cover was not in place at the time of the Chargor's demise.

16. According to the appellant the mere fact that the insurer agreed to grant the ex gratia payment to the borrower's loan account cannot be reason enough to infer an admission of negligence on the appellant's part in failing to put in place a mortgage protection cover. Further reliance was placed on **Halsbury's Laws of England, Vol. 25, para 522** on the practice of granting ex-gratia payments by insurers. That it is within the insurer's right to grant ex-gratia payments for purposes of reducing the deceased's loan amount.

17. As regards ground 2, counsel assailed the learned Judge for going against several principles used by courts in determining the granting of injunctive reliefs when it restrained the appellant from disposing of the charged property despite finding that the borrower had since drawdown of the loan never paid a single coin. He contended that in instances where there was no dispute that the loan amount was received by the borrower and such amounts have not been paid, the courts have **not hesitated to decline to grant an injunction** restraining the Chargee from realizing its security under the charge.

18. He emphasized that the respondent as the administratrix of the Estate of the deceased admitted the existence of a debt when she offered to settle the loan arrears at Kshs. 100,000.00 but which offer was rejected by the appellant as being too low. According to learned counsel, this offer by the respondent to settle the amount estops her from denying liability. For this proposition, counsel called in aid this Court's decision in *Habib Bank AG Zurich vs Pop In Kenya Limited & Others, COA Case No. 147 of 1989*.

19. Further, learned counsel urged that the learned Judge failed to appreciate that even though a mortgage account may be insured, the proceeds from the insurer are always not enough to clear the loan balance in the borrower's loan account at the time of the borrower's death, if the loan was in arrears. This is because the mortgage protection only covers the net amount owing to the lender which is conditional on the borrower having serviced his loan account regularly as stipulated in the charge. It was noted that arrears do not form part of the compensation amount from the mortgage protection cover.

20. In conclusion, counsel argued ground 4 and 5 concurrently and stated that the charge binds its personal representatives and assigns of the chargor to all the contractual terms of the charge. To that end the respondent is liable for any outstanding loan amount in the deceased's account. The appellant urged this Court to set aside the entire High Court judgment, dismiss the respondent's application for injunction with costs.

21. The appeal was opposed by **Mrs. Kuria**, learned counsel for the respondent who submitted that it was established that taking out the mortgage cover was a condition precedent in the granting of the mortgage. She was in agreement with the High Court's finding that the cover was presumed. It was the respondent's view that the policy should have crystallized once the appellant was informed of the death of the borrower.

22. Counsel contended that the chargee did not prove that the insurance was conditional on there not being arrears. Arrears were also covered. She further contended that the appellant is the one who had the responsibility to cover the mortgage. She relied on the case of *Anne N. Parmena vs HFCK [2015] eKLR* where the question was whether the cover should crystallize after the insurer refused to submit himself for medical checkup. In this case the court held that the respondent had the responsibility of ensuring that there was a cover before the

mortgage was given.

23. In his reply learned counsel, **Mr. Karungo** for the appellant asserted that arrears were not covered; the borrower has the responsibility of taking out the cover. He stated that the mortgagee paid a gratuitous amount. He maintained that the learned Judge erred when he observed that the letter dated 8th July, 2004 was an admission of the error and refuted that claim.

24. We have considered the pleadings, submissions and evidence on record and find that the issues arising for determination are as follows:

(a) Whether there was a mortgage life protection insurance policy in force in relation to the deceased borrower; If so, which party bears the obligation to pay for the cover upon the borrower's demise.

(b) Whether or not the payment of arrears is included in the mortgage protection cover and who should bear the responsibility of effecting the payment.

25. This being a first appeal, we are obliged to re-evaluate and reconsider the evidence which we have re-analysed above and arrive at our own conclusions. This is in line with **Rule 29 (1) a** of the Rules of this Court and as enunciated in the celebrated case of **Selle vs Associated Motor Boat Co. [1968] EA 123**; see also **(Abdul Hameed Saif vs Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

26. First, we seek to establish if there was a mortgage protection cover in force upon the demise of the deceased borrower. Having perused the mortgage application form it is expressly stated at **Clause D (3)** that ***"the company will at your expense, insure the property for such sum as it considers suitable and insure your life in respect of the loan with an insurer nominated by it."*** In plain reading of the text, our interpretation of the aforesaid clause is to the effect that the mortgage protection cover becomes automatic the moment the loan is approved. This is to say that when the deceased signed the mortgage proposal form and the loan was disbursed to his account, it is presumed that he accepted the terms thereof and the mortgage cover took effect. In this regard, we hold the view that there indeed existed a mortgage protection cover. Indeed existence of a mortgage cover is a pre-requisite to the release of the funds. We hasten to add that from the above clause, whereas the mortgagee was supposed to take out the insurance cover and recover the amount so paid from the mortgagor, the mortgagor had an equal responsibility to ensure that the instalments covering both the debt and the insurance cover were paid as and when due. These answers our first issue for determination.

27. We now advert to the vexed issue as to whether the insurance cover is meant to cover loan arrears. In the **Nizar Virani case (supra)** this Court expressed the view that there is a general rule to the effect that a policy of Insurance remains valid once issued and liability attaches despite non-payment of a premium due. The court however went on to state:- ***"The only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract"***.

28. What did the policy document in this matter provide? We do not find any provision in the policy specifically stating that failure to pay the instalments would amount to a repudiation of the contract. It was incumbent on the mortgagee to pay for the insurance cover and load the instalment on the mortgage debt and claim it with the rest of the mortgage debt. The mortgagor's failure to pay any instalments did not absolve the appellant of the responsibility to insure the mortgage. We are therefore satisfied that there was an insurance cover in place and the mortgage itself was covered. What is in dispute however is whether the insurance policy covered mortgage arrears. We hold the view that when the parties entered into the mortgage contract, it was for a specific amount, and for a specific term. The instalments were calculated bearing in mind the principal amount, the interest rate, insurance fees etc. The issue of mortgage arrears was not one of the considerations. Had the mortgagor kept his part of the bargain, then no doubt the issue of the mortgagee refusing to write off the loan would not arise. In our view, the insurance could not be extended to the arrears because the parties had no way of knowing whether there would be loan arrears in future and how much arrears would accrue. We have also noted that in the mortgage statements demanding payment, there was a rider to the effect that the mortgage insurance cover did not cover the amount in arrears, and any such arrears should be borne by the borrower, in this case the respondent. The arrears we are talking about here are the arrears accruing as at the time of the death of the deceased, or rather, the time the appellant was notified of the death of the deceased.

29. There is also the issue pertaining to the arrears calculated even after the appellant was notified of the demise of the deceased. It is noteworthy that interest charged on the mortgage amount from the date on which the appellant reported the death of the deceased should be removed from any outstanding amounts. In **Anne Parmeno case (supra)** it was held that:- ***"We have stated that interest from the date of death is not payable in the event that a mortgage protection policy is in place."***

30. It is not in dispute that the respondent immediately began the process of realizing the mortgage protection cover by notifying the appellant of the death of the borrower vide her letter dated 16th August, 1999 as required by the insurance policy. It is also noted that this was done before even the deceased was buried. The insurance money on a life policy is payable when proof of death is made. (See **Anne N. Parmena vs Housing Finance Company of Kenya Limited [2015] eKLR** the same views were enunciated in **London Guarantee vs Fearnley (1880) 5 App. Cas. 911, 916)**).

31. An important question that needs to be addressed is when does a mortgage protection cover crystallize? In the case of ***Anne N. Parmena vs Housing Finance Company of Kenya Limited (supra)*** which we note has also been cited by the respondent, this Court stated that “...***the policy crystallizes on the happening of an event which is the death of the insured.***” In this case, the crystallization of the mortgage protection policy was 12th August, 1999 when the deceased borrower died. The right of the appellant to levy and charge interest on any outstanding amount after that date ceased.

32. In this case, we note that the learned Judge in his judgment observed that

“although the defendant retorted that failure to effect the insurance cover was due to failure by the deceased to pay premiums I take the view that it was incumbent for the defendant as a prudent mortgagee and lender to ensure that cover was put in place...” . While agreeing with the learned Judge’s view, we reiterate, as stated earlier, that the borrower also had an equal responsibility to ensure that the premiums were paid, which he did not do. The appellant cannot therefore be burdened with the entire blame in this matter.

33. On the contrary we hold that it would also have been prudent for the borrower to meet his obligations under the contract. In this regard, we cite and quote ***Joseph Okoth Waudi vs National Bank of Kenya [2006] eKLR*** where this Court was of the view that... **“as a default in the servicing of the mortgage had been proved, it cannot be rightly said that the respondent had no basis upon which to exercise its statutory power of sale under the charge...”**

34. Further, the Insurance Company made payment to the respondent of Kshs 1,183, 563/= as an ex gratia payment. It is then that the appellant wrote a demand letter to the respondent demanding Kshs 555,387/= to offset the debt. It is our considered view that by proposing the aforesaid amount vide their letter dated 20th August, 2003 the appellant was acting in good faith. Unlike the learned Judge of the High Court, we do not find this conduct to be an admission of negligence on the part of the appellant.

35. Upon re-consideration and re-evaluation of the evidence on record we find that the High Court misdirected itself in assigning the burden to the appellant without putting into consideration the borrower’s conduct in the matter.

36. In conclusion, for the foregoing reasons, we are persuaded that that this appeal has merit and is hereby allowed. We set aside in entirety the judgment and decree of the High Court dated 18th October, 2012 and all consequential orders arising therefrom. The respondent is hereby ordered to pay the appellant the sum of Kshs 555,387.10 in settlement of the debt due to the appellant within 3 months from the date hereof. The said amount to start accruing interest at court rates from the date of this judgment until payment in full, and in default the appellant be at liberty to execute. In view of the circumstances surrounding this matter, and given the financial standing of the appellant *vis a vis* that of the respondent, we order that each party bears its own costs.

Dated and delivered at Nairobi this 26th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR