IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GBM KARIUKI, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 105 OF 2005

BETWEEN

NAHASHON KARIUKI MBATIA ..……. APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA ....…….....…....…… RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Kasango, J) dated 14th March, 2005

in

HCCC NO. 1042 OF 2001)

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JUDGMENT OF THE COURT

At all material times the appellant, Nahashon Kariuki Mbatia was the registered proprietor under the Registered Land Act (Cap 300, Laws of Kenya, now repealed) of the property known as **NAIROBI/BLOCK 72/989**, situate in Jambo Estate. By a charge dated 4th December, 1997 and registered on 5th December, 1997, the appellant charged his said property to the Housing Finance Company of Kenya to secure a loan of KShs.2,500,000/=. The appellant did not service the said loan, and on 14th May, 2001, the respondent served upon him a statutory notice under ***section 74 of the Registered Land Act*** and subsequently advertised the property for sale by public auction.

On 9th July 2001, the appellant filed a suit in the High Court of Kenya at Nairobi, seeking a declaration that the intended sale of the property was unlawful and an order of injunction to restrain the respondent from selling the property. He also prayed for costs of the suit. The appellant's suit was founded on the averment that the charge did not confer on the respondent the power of sale reserved under ***section 74*** of the said statute. The appellant also deponed that he had approached the respondent to be given time to sell an alternative property and liquidate the loan but the respondent had not acceded to the request; that the charged property was undervalued and that the respondent had unlawfully loaded into the plaintiff's account charges related to the notification of sale.

The respondent filed its defence on 25th September, 2001 and pleaded that its power of sale had properly accrued; that contrary to the provisions of the charge the appellant had neglected to repay the loan which

had risen up to KShs.5,389,270.40/=; that the appellant had made the proposal to sell his alternative property and liquidate the loan way back in March, 1999 which he had not done; that the property was not undervalued and that under the charge, it was the appellant to bear charges incurred in the recovery of the loan.

Nothing happened for the next two years. Then on 12th June, 2003, the appellant took out a Chamber Summons under the then ***Order VI Rule 13(1) a, b, c and d of the Civil Procedure Rules, section 3A of the Civil Procedure Act*** and ***section 74*** and ***79 of the Registered Land Act*** to strike out the respondent's defence and enter judgment in his favour as prayed in the plaint. The main ground upon which the application was based was that since the charge did not contain an acknowledgement of ***section 74 of the Registered Land Act*** in the form prescribed in the Act, and signed by the appellant, the charge did not reserve a statutory power of sale for the respondent. It was also contended that the defence was frivolous, scandalous vexatious and only intended to embarrass, prejudice and delay the fair trial of the suit. The application was supported by an affidavit sworn by the appellant which reiterated the above grounds.

The respondent opposed the application through a replying affidavit sworn by Janet Mwaluma, its assistant manager, legal services. The respondent's position was that the charged property reserved to it the chargee's right to sell the suit property upon default by the appellant and that it had the statutory right to exercise that power as a chargee under both the Registered Land Act and the charge. The respondent also contended that the defence could not be struck out as it raised triable issues for determination by the Court.

At the hearing of the Chamber Summons, the appellant successfully applied to amend the same and rely only on ***Order 6 Rule 13(1) (b) of the Civil Procedure Rules***. The Chamber Summons was heard by Kasango, J, who on 14th March, 2005, found that the defence raised triable issues because there was acknowledgement in the charge which was in conformity with the requirements of ***section 65(1) of the Registered Land Act***. The learned judge accordingly dismissed the application with costs. That decision provoked the present appeal.

The appellant's memorandum of appeal dated 16th May 2005 listed seven ground of appeal. However, at the hearing, Mr Mutiso Mutinda, learned counsel for the appellant argued only one main ground, namely that the learned judge erred in law and in fact in holding that the charge document properly reserved for the respondent a statutory power of sale under ***section 65(1) and 74 of the Registered Land Act***.

Before considering the above ground of appeal, it is important to consider what the appellant was obliged to establish in his application before the High Court. As we have already stated, after due amendment, the application proceeded under the then ***Order VI Rule 13(1) (b) of the Civil Procedure Rules***. That provision read as follows:

> *"At any stage of the proceedings the court may order to be struck out or amended any pleadings on the aground that-*
>
> *(a)…*
>
> *(b) it is scandalous, frivolous or vexatious;*
>
> *(c)…*
>
> *(d)…,*
>
> *and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be."*

There is a long line of clear authorities on how the jurisdiction of the court under the above provision should be exercised. In ***ATTORNEY GENERAL VS EQUIP AGENCIES LTD, (2006) 1 KLR, 10***, this Court delivered itself as follows:

> *"Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination…The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claim…The summary nature of the proceedings should not, however be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable…A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition".*

The Court cited among others, the following passage from its earlier decision in ***KENYA TRADE COMBINE LTD VS M M SHAH, (CIVIL APPLICATION NO. NAI 193 OF 1999 (unreported):***

> *"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go to trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."*

Mr Mutinda's argument before us can be summarized thus: ***Section 65 of the Registered Land Act*** was couched in mandatory terms and required a special acknowledgement signed by the chargor that he understood the effect of ***section 74 of the Act***. In Mr Mutinda's view, the acknowledgement referred to in ***section 65*** must be strictly in the prescribed form which was provided in Form LR 9 in the Third Schedule of the Act. It was not sufficient if the information required in that form was provided in the charge. It had to be strictly in a separate acknowledgement in Form LR 9. Since that was not the case in respect of the charge in this appeal, the respondent's defence was scandalous, frivolous or vexatious and the learned judge erred in declining to strike it out and enter judgment for the appellant. For good measure Mr Mutinda also argued that there was doubt if indeed the acknowledgement in the charge was signed by the appellant because the acknowledgement referred to a "she" whilst the appellant was not a "she" but a "he".

Mr Mutinda relied on the decision of the majority of this Court in ***KENYA COMMERCIAL FINANCE COMPANY LTD VS NGENY & ANOTHER, (2002) 1 KLR, 106*** where Owour JA stated at page 122:

> *"In my view, the most valid complaint against this charge is that it does not comply with the mandatory provision of section 65(1) of the Registered Land Act, Cap 300 Laws of Kenya. In that it does contain an acknowledgement that the chargor understood the effect of section 74. Mr Ojiambo has conceded, and in my view rightly so, that the charge does not consist of the acknowledgement, therefore the Bank cannot exercise any of its rights under the provisions of section 7*4."

On his part, Mr Kibuchi, learned counsel for the respondent adopted a different interpretation from that of the appellant. In his view, ***section 65*** required the charge instrument to contain the special acknowledgement signed by the chargor that he understood the effect of ***section 74***. It did not require in addition the completion and signing of Form RL 9. He argued that the charge document reproduced all the information required in Form RL 9 and therefore it was not necessary to complete and sign the Form separately. Mr Kibuchi further submitted that under ***section 108(1) of the Registered Land Act***, a disposition of land, lease or charge could be effected by an instrument in the prescribed form or such other form as was approved by the registrar and that the charge in this appeal was in a format duly approved by the registrar.

Regarding the use of the term *"she"* instead of *"he"* in the acknowledgement, Mr Kibuchi relied on clause 13 of the charge dealing with, among other things gender in the interpretation of the charge.

Granted, these rival arguments and submissions and the line of cases on the exercise of the court's jurisdiction under the then ***Order 6 Rule 13(1) (b)***, can it be said that the learned judge was in error when she declined to strike out the defence as scandalous, frivolous or vexatious?

Section 65(1) of the Registered Land Act provided as follows:

> *"65. (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal."*

Section 74 of the Act in turn provided for the chargee's remedies in the following terms:

> *"74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.*
>
> *(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -*
>
> *(a) appoint a receiver of the income of the charged property; or*
>
> *(b) sell the charged property:*
>
> *Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.*
>
> *(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only-*

a. *where the chargor is bound to repay the same;*

> *(b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;*
>
> *(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor; Provided that –*
>
> *(i) in the case specified in paragraph (a) -*
>
> *(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and*
>
> *(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;*
>
> *(ii) the court may, at its discretion, stay a suit brought under*

> *paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge."*

Thus, ***section 74*** provided the remedies available to a chargee in the event of default by the chargor and the conditions that the chargee had to satisfy to avail himself of those remedies. The effect of ***section 65 read together with section 74*** was that where the charge document expressly excluded **section 74**, there was no need for special acknowledgement by the chargor because the remedies provided in ***section 74*** would not be available to the chargee. However, where the charge instrument did not expressly exclude ***section 74*** there had to be a special acknowledgement by the chargor because the remedies in that section, including the power of sale were available to the chargee. The chargor was specifically required to acknowledge that he fully understood the provisions of ***section 74***.

Form LR 9 required the following information to be given:

- *the particulars of the property charged,*
- *the name of the chargor,*
- *the amount secured by the charge,*
- *the rate of interest,*
- *acknowledgment by the chargor that he understands the effect of section 74,*
- *the date,*
- *the signature of the chargor duly witnessed; and*
- *the signature of the chargee duly witnessed.*

Page 11 of the charge in issue in this appeal provided as follows:

> *"The above named Chargor hereby acknowledges that she understands the effect of section 74 of the Registered Land Act, 1963.*
>
> *Dated this 4th day of December, One thousand Nine Hundred and Ninety Seven".*

That was followed immediately by a schedule that gave the name of the chargor as that of the appellant together with his address; the property charged as the suit property; the principal sum as 2,500,000.00; the monthly instalment (variable) as 55,332; the rate of interest (variable) as 26% per annum and the date of the first instalment as the first day of the second month after payment of the advance. It was then signed by the chargor and the two attorneys of the appellant (who gave their power of attorney's numbers) in the presence of a witness (an advocate) who countersigned against the three signatures.

This was followed up by the following certificate:

> *"I CERTIFY that the above-named NAHASHON KARIUKI MBATIA appeared before me on the 4th day of December 1997 and being identified by ID No 3430722/66 acknowledged the above signature or marks to be his and that he had freely and voluntarily executed this instrument and understood its contents. The certificate was duly signed and stamped. The same certificate was repeated regarding the two attorneys of the appellant and was also signed and stamped."*

In view of this evidence, can it be said that the respondent's defence, which was that the information required under ***section 74 of the Registered Land Act*** and Form LR 9 was adequately provided in the charge, was scandalous, frivolous or vexatious? We do not think so.

It is obvious to us that the defence raised several strong triable issues among them:

i. *whether use of Form LR 9 is mandatory;*
ii. *if it is, what is the effect of failure to use it;*

iii. *if it is not, whether the information therein contained can be set out in the charge instrument;*
iv. *whether the information required by Form LR 9 was sufficiently provided in the charge instrument;*
v. *what is the purport of section 108 of the Registered Land Act which requires a charge to be effected in the prescribed forms "or such other form as the registrar may in any particular case approve"*
vi. *whether in light of the provisions of the lease relating to interpretation of masculine and feminine terms, the description of the appellant as she was fatal to the charge; and*
vii. *whether under the charge costs incurred in the recovery of the loan could be passed on to the appellant.*

We also note that the decision relied upon by the appellant, that is, ***KENYA COMMERCIAL FINANCE COMPANY LTD VS NGENY & ANOTHER, (supra)*** does not actually support the appellant's position. We are of the view that the learned judge of the High Court was right in dismissing the application to strike out the defence because the defence raised triable issues. We find that this appeal had no merit and the same is dismissed with costs to the respondent. Those are our orders.

Dated and delivered at Nairobi this 26th day of July, 2013.

G. B. M. KARIUKI

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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