Ø Definition of simple and English mortgages
Ø Under simple mortgage mortagee cannot appoint a receiver Section 69 (F) (1)
Ø But parties to a mortgage can vary or extend the terms of Section 69 (F) (1) to enable mortgagee to appoint a receiver

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 443 of 2001 (1)

EQUATORIAL COMMERCIAL BANK LIMITED ……..1ST PLAINTIFF

SOUTHERN CREDIT BANKING CORPORATION LIMITED……2ND PLAINTIFF

FIDELITY SHIELD INSURANCE COMPANY LIMITED…….……3RD PLAINTIFF

VERSUS

RETREAT VILLAS LIMITED……DEFENDANT

J U D G M E N T

The relationship between the plaintiffs and the defendant began when in exercise of their statutory power of sale; the plaintiff sold a property L R No. 209/354/11 Nairobi, (herein after called the suit property) which property was charged to them by a company known as three A's Investment Ltd, to the defendant. The defendant purchased the suit property for kshs 80 million, of which kshs 72 million was advanced to it by the plaintiffs in different proportions. On that property there stood partially erected structures of villas.

It is admitted that the defendant defaulted in the repayment of the aforesaid loan and since the defendant was selling villas whilst they were being constructed, the defendants had sold 7 villas but had only signed leases for two of those villas. In total the project involved the construction of 16 villas.

The plaintiffs appointed managers took over the said project from the defendants and proceeded to complete the same and in so doing obtained further payments from the purchaser.

The defendants have failed to sign the leases for the villas purchased and amongst the prayers sought by the plaintiff is an order granting and vesting the appointed managers authority to execute the 999 year leases.

The plaintiff further seeks judgment for kshs 135, 305, 371. 34 being the balance of the loan, and judgment for remuneration of the appointed managers.

The defendant denies the plaintiff's claim and counter claims that, the plaintiff appointed manager trespassed the defendant's property; that the plaintiffs have unlawfully attempted to sell 9 villas and that the plaintiff's action interfered with the defendant's business. The defendant then finally prayed that the plaintiff be ordered to pay the defendant damages; that account be taken of the initial loan of kshs 72 million and that the court do order that the plaintiff is not entitled to any amount beyond the amount found due after accounts are taken.

P W 1 ***Vishvesh Dhiratjal Shah*** stated that he was giving evidence on behalf of all the plaintiffs.

He said that since 1996 he has been employed by the 2nd plaintiff as a manager. He is based at the 2nd plaintiffs Westland's branch.

That the 2nd plaintiff is one of the syndicate lenders, together with the other plaintiffs, who agreed to lend the defendant the facility of kshs 72 million. That the suit property which the defendant purchased, was previously charged to all the plaintiffs by a company called Three A's Investment Ltd, who defaulted in their loan repayments.

That by its letter dated 22nd December 1997; the defendant applied for a loan facility of kshs 14.4 million from the 1st plaintiff, Equatorial Commercial Bank Ltd. That amount was to be secured by the suit property, and guarantees of the defendant's directors, namely Navin N Shah and Indravadan J. Shah.

By its letter dated 22nd December 1997, the 1st Plaintiff confirmed that they would offer the defendant kshs 14.4. Million subject to general terms and conditions. The defendant's directors signed a copy of that letter of offer to signify their acceptance thereof.

By letter dated 4th December 1997 the 2nd plaintiff responded to the defendants request for a facility of kshs 36 million, and made an offer for that amount to the defendant for the purpose of the purchase of the suit property. The security was the suit property.

By a letter dated 5th December 1997 the 3rd plaintiff made an offer for a financial facility of kshs 21.6 million. This facility was accepted by the defendant and that acceptance was by means of signature of the defendant's directors.

The 1st and 2nd plaintiffs obtained the first charge over the suit property to secure the facilities each granted to the defendant. The facilities were for a period of 17 months.

The facility offered to the defendant by the 3rd plaintiff was secured by a second charge over the suit property. This was created with the consent of the 1st and 2nd plaintiff.

All the aforesaid charges were executed by the defendants directors and they were stamped and registered. The defendant additionally gave its director's personal guarantee as security. Some of the salient conditions of those charges was that the rate of interest chargeable was 30% per annum and arrears would attract 4% per month compounded.

Both charges provided that the borrower appointing the lenders/plaintiff as attorney. The paragraph provided: -

"That the borrower hereby irrevocably appoints the lender to be the Attorney of the borrower and in the name and on behalf of the borrower to execute and do any assurance acts and things which the borrower ought to execute and do under the covenants and agreements herein contained and generally to use the name of the borrower in the exercise of all or any of the powers hereby or by law conferred on the lender or any receiver or manager appointed by the lenders."

Pw 1 said that the loan, subject of these two charges was dispersed, and accordingly referred to statements showing the same.

He said that the defendant found on the suit property some development, which had been commenced by the previous registered owner, Three A's investments Ltd. That the defendant began to develop that property but did not complete the same. That while the development was continuing, the defendant sold 7 of the villas. The defendant's directors signed sub-leases for two villas but not for the other 5. That the development had in total 16 villas, being developed.

P W 1 stated that defendant defaulted in the repayment of its loans, with the plaintiffs, and the plaintiffs began to make demand for repayment, an example is a letter dated 2nd September 1998.

The defendant, by its letter dated 5th October 1998 wrote to the 2nd plaintiff, with a proposal of getting back on track in the repayment of the loans, that is by the defendant retaining 60% of any sale proceeds received, and 40% going to the plaintiff and being apportioned as follows; 20% to Southern Credit Bank, 2nd Plaintiff, 12% to Fidelity Shield Insurance 3rd plaintiff and 8% to Equatorial Commercial Bank, 1st plaintiff. The defendants, P W 1 said, had indicated that they were short of working capital.

P W 1 said that at the time when the defendant began to default in their repayment, the development was valued by a quantity surveyor, namely YMR, by their letter dated 12th February 1999 the quantity surveyor stated; "**The work is approximately 60% - 65 % complete which amounts to kshs 135, 650, 000/-"**

P W 1 referred the court to a schedule, prepared by the defendants, which showed that the contractor and suppliers were owned kshs 109, 105, 000/-. That the defendant in forwarding that schedule, indicated to all three plaintiffs that it needed more funding to complete the project. By a further letter by the defendant to the plaintiffs, the defendant said that the project was viable, but that the buyer were shying away due to the slow progress in completion.

P W 1 referred to another letter written by the defendant to the 2nd plaintiff, dated 12th April, 1999, which attached another proposal which the defendant entitled, "***Proposed Financial Debt Restructuring with the Lenders."*** The attachment acknowledged indebtedness to the financiers as at kshs 90. 70 million.

P W 1 referred to minutes of a meeting held between 20th and 21st May 1999, between the financiers and the defendant's directors.

The minutes reflect a decision arrived at in order to revive the project that is appointment of receiver/manager. It was also agreed that the defendant's director were to provide; list of creditors to be certified by auditors; schedule of the seven purchasers and the deposit received upto date, and marketing strategies. The meeting finally agreed that David Beglin was to be appointed the project manager/architect.

P W 1 stated that to enable the managers carry out their duties it was agreed that funds be made

available to them, by the financiers, to bring that project to a completion. The defendants directors at that meeting agreed to sign the sale agreements of the new purchasers who the manager would obtain of the remaining villas.

P w 1 said that another meeting was convened on 9th June 1999, where he was in attendance. The meeting brought together five purchasers, of the villas, the defendant's two directors and the financiers.

At that meeting P W 1 pointed out that the minutes reflected that the development had been abandoned by the defendant and that no construction work was going on, and consequently that the purchasers were disappointed at the delay. P W 1 referred to other parts of the minutes, the pertinent being as follows: -

"Rescue package to be put into place, as the construction already done to date would deteriorate. ……..David Begli to be the Head of Professionals/project manager……it was agreed that managers had to be appointed by the Financiers to manage the project as well as to safeguard the financiers interest. It was agreed that Mrs Shehnaz N. Sumar (of Fidelity Shield Insurance Company Limited) and Mr Ashil Shah (of Equatorial Commercial Bank Limited) would be appointed managers of Retreat Villas Limited."

On 18th August 1999, Fidelity Shield Insurance Co. Ltd, Southern Credit Banking Corp Ltd and Equatorial Commercial Bank Ltd, the plaintiffs hereof, appointed Shehnaz Nizarali Sumar and Ashit Shah as joint managers to manage the project. P W 1 stated that on appointment the plaintiffs agreed to put in further finances into the project to ensure its completion in the following proportions; (i) 1st plaintiff kshs 15.5. Million;

(ii) 2nd plaintiff kshs 42.5 million, and (iii) 3rd plaintiff kshs 23, 750, 000/-.

P W 1 stated that the said joint managers took possession of the project and in so doing opened a project completion account to receive the further funding from the plaintiffs. The joint managers open account No. CTR. 98 entitled Retreat Villas Ltd (under manager project completion account); the amount that is seen in that account, P W 1 said, was kshs 92 million. P W 1 also referred to another account opened by the managers, namely Account No. CR 105, which account would be credited with amounts received from new purchasers.

P W 1said that the joint managers completed the project in June 2000 and at the end had paid the contractor about kshs 92 million as per budget.

The witness then said that the joint managers proceeded to sell the remaining villas but the defendant on being requested to sign the sale agreements or sub –leases, they refused and to date have not signed.

The witness stated that the joint managers had fully paid the second loan advanced to them to complete the project. He said that as a consequence the present suit seeks judgment for the balance of the 1st loan advanced to the defendant, namely kshs 135, 305, 371. 35.

The witness denied that the joint managers had in any way interfered with the defendant's business and stated that in any case there was no injunction to stop the completion of the project.

On being cross-examined the witness confirmed that the first loan advanced to the defendants, was to assist the defendants purchase the suit property. On the minutes of the various meetings held to find a way of completing the project, the witness said that they were all sent to all the parties present and

he said that he was unaware of any complaint of their content being raised by any person. The witness denied defence counsel's suggestion that the joint managers locked out the defendant's directors.

P W 2 was ***SHENAZ NISARALI SUMAR,*** the 3rd plaintiff's managing director. She stated that she had worked for the 3rd plaintiff for 16 years.

The witness confirmed that she was appointed as a joint manager of the project by the three plaintiffs.

She stated that the first facility, secured by the 1st and 2nd mortgage, was to assist the defendant to purchase the suit property, with semi completed constructed of villas. That it was conditional on the defendant completing the project within 17 months.

She stated that she and her co-joint manager obtained possession of the project. That the defendants had sold and signed leases for two villas and had also sold a further 5 villas but had not signed the lease for them.

That the plaintiff's due to the defendant's failure to make payment of the instalments towards the loan, as due, made demand for repayment by the letters dated 2nd September 1998, 5th February 1998 and 23rd April 1998. That at the time of this demand the villas had not been completed.

The witness drew the court's attention to the defendant's acknowledgment of its indebtedness to the plaintiffs, by its letter dated 17th September 1998, where the defendant admitted indebtedness of kshs 100, 000, 000. The witness stated that the defendant made a proposal to settle the amount from sale proceeds, but even that proposal the defendant failed to live by it. That the defendant stopped working on the project and stopped paying the loan.

On 12th February 1999, the quantity surveyor prepared a report on the work done on each villa and stated;

"**The work is approximately 60% - 65% complete which amounts to kshs 135, 650, 000/-".**

The witness drew the court's attention to the defendants letter asking for further funding one dated 3rd March 1999 and another undated. She sated that in the undated letter the defendants showed that there would be a shortfall, after sale of the villas, by kshs 13.7 million.

P W 2 referred to a meeting held on 28th May 1999 where the contractor and supplies and the defendant directors attended and stated that the conclusion of that meeting was that the project required kshs 92.7 million.

The witness confirmed that she with her co-joint manager were appointed by the plaintiff and she confirmed that the joint managers opened project accounts as narrated by P W 1. She stated that the further financing was being released as and when it was needed.

The witness testified about the frequent site meetings held with the joint managers and the architect and project manager Beglin – Woods. That it was agreed that the first seven villas, which had been sold by the defendant be competed first to ensure the joint manager would receive the balance of the purchase price. All along the witness said the financiers, the plaintiffs hereof, were kept informed of the progress on the project.

The witness said that when completion was made the joint managers were able to clear the 2nd loan advanced to them.

P W 2 said that the defendants have refused to sign the subleases to the buyers, except the two they had previously signed. That although the buyers are happy with the end result of the project, they are very unhappy with the lack of title documents and have at times threatened to sue the plaintiffs.

P W 1 denied that the joint managers trespassed on the suit property or that they interfered with the defendant's business.

P W 2 finally stated that the joint manager were seeking an order for their remuneration for the period of August 1999 to August 2002. She stated that from August 1999 to July 2001 their involvement with the project was "*active phase*"; August 2001 to July 2002 was "*moderate phase*" and August 2002 to now the "*phase was reasonable*". For the active phase the managers sought kshs 2 million, moderate phase, kshs 1 million and reasonable phase kshs 500, 000/-.

On being cross-examined P W 2 confirmed that she has been involved in building/construction, and particularly pointed out that as a director she was involved in building houses for her employer in Mombasa, and some offices in Wetlands.

She said that on being appointed joint managers she did not cease to be an employee of the 3rd plaintiff and that she continued to receive her salary as usual.

She stated that the instructions to the joint managers came from the financiers board of directors, to whom also the joint manager's reported.

She said that the financiers agreed to complete the project, partly because the purchasers needed to have the villas, completed since they had paid purchase price and also because the suppliers and contractors were owed money.

P W 3 was ***Nyazali Hassanali Nathoo.*** He has purchased one of the villas on the suit property, namely villa NO. 5. he said that he paid the defendant kshs 14.5 million and he confirmed that he obtained a 999 year sub lease.

He confirmed that he attended the meeting of 9th June 1999, which was attended by defendant's directors and the purchasers.

He said the purpose of that meeting was to find a way forward since the purchasers did not trust the directors of the defendant.

On being cross examined he said that he is aware that some of the other purchaser who do not have the sub leases, have wanted to sell their houses but they have not been able to for lack of a title.

P W 4 was ***David Baglin*****.** He said that he has own architectural firm called ***Beglin – Woods***. He said he has been in practice in Kenya for 33 years.

He said that he first got involved in the issue that is this project in 1995. That he drew the architectural drawings for the development of 16 villas of 5 bedroom, three storey and road service, each villa being on ½ acre area.

He said that the project halted, in 1998, because of difficulties in payment to the contractor, who was owned kshs 81 million.

That in 1999, the plaintiffs revived the project and he agreed to be architect and project manager. That at that time he gave his opinion that the project was viable, if there were efficient financial controls and to achieve that he said, that it was prudent to exclude the two, defendants' directors.

He stated that as an architect, his reputation is built on finished projects and further what persuaded him to get involved is because some purchasers were pleading with him to complete. At completion he obtained a certificate of occupation from the Nairobi City Council.

P W 4 said that, such a project, as the one the subject of this suit, cannot now be repeated because the value has escalated upwards. In describing the project he stated that it offers an exceptional investment to the owners and it was therefore important even for the economy for it to be completed

Defence only called one witness, one of the director of the defendant company, Navin Chandran Shah who said that he is involved in property development.

He said that the defendant purchased the suit property from the plaintiffs, whom he said acted both as the sellers and financiers. He said that the money advanced to them was only a book entry, because the plaintiffs were selling, to the defendant, the suit property in exercise of their statutory power of sale. He confirmed that the suit property was the security for the advances given by the plaintiffs.

He accepted that the joint managers could, according to the charge instrument, do any acts that the defendants could, except that hey could not borrow money on behalf of the defendant and he added, that such borrowing had not been authorised by the defendants.

He confirmed that the defendant wrote to the plaintiffs, when they defaulted in their repayment, about June or July 1998. In that letter he said the defendant proposed that the plaintiff's repayment ought to come from the sale proceeds and the defendant was to retain 60%, thereof, and the plaintiffs 40%.

That by May 1998, the project had stalled because the defendant found itself in a "*catch 22*" situation because, since the defendant was not paying the contractor, no work was being carried out, and since no work was being carried out the purchasers were not paying their instalments.

He said that the defendant therefore sought additional financing and also sought the indulgence of the plaintiffs in waiving interest.

He refuted the statement that the contractor did not want to deal with the defendant.

He said that the defendant's directors were refused entry on the project when the joint managers were in possession. He sated "*the bank pushed us to the corner,"*

D W 1 said that going by the statement appearing on page 583, (red bundle) he was of the view that the plaintiffs owe the defendants kshs 42 million.

D W 1 referred to pages 55 (red bundle) and stated that the statement appearing there showed

two different figures, so the defendant cannot know how much it owned the 1st plaintiff.

D W 1 also found it difficult to understand how the 2nd plaintiff's statements appearing on pages 567 to 570 (red bundle) could claim such a large debit balance of kshs 293, 772, 983. 08 and he concluded that the plaintiff ought to give a proper account.

On being cross-examined D W 1 stated that his co-director migrated, permanently to the U.K.

He accepted that there was no agreement, that the loan repayments were to be made form the sale proceeds. He accepted that the defendant defaulted in making the scheduled payments.

He accepted that the joint managers could do all the acts the defendants could undertake but not what the defendant were not authorised to do.

He accepted that the contractor refused to deal with the defendants.

That he at one time went to the suit property but was denied entry by an '*askari'*; on being asked he confirmed that he did not report this to the police nor did he take up the matter in court to try and get back possession.

He confirmed that the defendant had not produced audited accounts or report to challenge the plaintiff's statements.

He stated that if he was to obtain a full account from the plaintiff he would sign the subleases.

He finally stated, "**I expect the project to be given to me because I am lucky".** That was in response to a question on how the defendant expected to obtain the suit property with the now completed project.

On re-examination DW1 said that since the charge document restricted the defendants from obtaining further loan advances, the defendant does not accept that the joint manager were authorised to obtain the further advance.

That is the summary of the evidence presented before court.

Before delving into the issues that come out of the pleadings hereof I wish first to deal with an issue raised by defence in its submissions.

Defence counsel in submissions posed a question, whether the two charges in favour of the plaintiffs, first and second mortgages were simple or English mortgages. He submitted that the answer is vital since if they were simple mortgage, as defined in TPA, then the plaintiff had no right to appoint receivers. He further stated that in simple mortgage there is no delivery of the mortgage property, and there is no transfer of title to the mortgagor. That in English mortgage the mortgagor transfers property to the mortgagee.

He said that both the 1st and 2nd mortgage are simple mortgages, because the plaintiff now seeks orders to vest the receivers with power to transfer the property.

The definition of a simple mortgage is to be found in S.58(b) TPA, as follows:-

"*Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract the mortgagee shall have the right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee*".

An English Mortgage is defined in Section 58 (e) as follows: -

"Where the mortgagor binds himself to repay the mortgage – money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re transfer it to the mortgagor upon payment of the mortgage – money as agreed, the transaction is called an English mortgage."

Defence counsel laid emphasis on the fact that the plaintiffs did not have actual possession of the suit property and also because they have come to court seeking orders to transfer the property to the purchasers, as reason to conclude that the mortgage is a simple mortgage. Having concluded that the mortgage is a simple mortgage, defence argued that by virtue of section 69 F (1) the plaintiffs could not appoint receivers.

I reject that submission by the defendant. By virtue of clause 5 of the mortgage instrument the defendant absolutely conveyed the mortgage property to the mortgage. To say that property can only absolutely be conveyed once, and hence the 2nd mortgage cannot be within the definition of an English mortgage is also rejected. The second mortgage was created with the consent of the first mortgagee. Clause 5 (b) of the mortgage had a proviso to retransfer the property to the mortgagor on payment of the mortgage debt.

On the question whether the plaintiffs could not appoint a receiver by virtue of the restrictions in Section 69 F (1) TPA, I accept plaintiffs submissions that, that section expressly provides the parties to a mortgage instrument can vary extend the provisions under it. The plaintiff and the defendant accordingly extended its provisions by allowing a manager rather than a receiver be appointed.

The defendant plea, raised in the defence that the plaint or rather statement of claim, filed by the plaintiffs must fail for not complying with Order 7 Rule 1 (2) of the Civil Procedure Rules is rejected. I am of the view that a verifying affidavit can be filed at any time even after the plaint has been filed. In this case the plaintiff started this action by originating summons, and after court's directions, a statement of claim was filed. The plaintiffs in filing the statement of claim did not file a verifying affidavit, but subsequently on amending the statement of claim, the plaintiffs filed a verifying affidavit. In my finding that verifying affidavit will suffice for the purpose of this suit.

Now, to consider the issues I believe come out of the proceedings hereof.

Firstly is: Did the plaintiff have authority in law to appoint Receiver and/or manager over the property of the defendant.

I believe this issue is partly covered by my finding that what the parties had was an English mortgage.

Having found that, there is nothing in Section 69 (F) (1) TPA which prevented parties from varying a mortgage instrument, it follows that that left the door open for the parties to enter into a contract which allowed such appointment.

In the first mortgage paragraph 7 (F) and in the second mortgage paragraph 7 (K) the defendant appointed the plaintiff to be its attorney and thereby could execute whatever acts the defendant could do. The plaintiff acting on the strength of that paragraph appointed joint managers to carry out the completion of the project.

The defendant argues that even if the plaintiffs could appoint managers, those managers could only do the acts that the defendant could do. Accordingly defence argued since the mortgage did not allow the defendant to enter into a borrowing, which ranked superior to the mortgage debt, as it happened with the borrowing by the joint manger, that the said managers did not have authority to enter into such an agreement.

I find that I cannot accept that argument. The clause to my mind was included to protect the plaintiff and not the defendant, that being the case if the plaintiff agree to waive such protection the defendant could not raise such a clause as its defence.

It follows that the courts finding in regard to the first issue, hereof, is in the positive.

The second issue: - Did the receiver/manager have power to borrow and if so is the defendant liable.

I find that this issue is covered by the first one. The managers, I find, had power to borrow. Having found so, I also find that the charge instruments, which are the contractual documents between the plaintiffs and the defendant, conferred power upon on any legally appointed manager, to to use the defendants name in exercise of any of the powers conferred by law or the mortgage instrument. I therefore find that the defendant is liable for borrowing by the joint managers.

The third issue is: - Are the plaintiffs entitled to the relief that they seek.

The plaintiff, first and foremost, seek judgment against the defendant for kshs 135, 305, 371. 34.

The plaintiffs, I find on a balance of probability have proved that they are entitled to the amount claimed. The defendant admitted in one of its correspondences indebtedness for kshs 100,000,000/-, to the plaintiff. The plaintiff submitted evidence a statement showing the working out of the amount claimed in the plaint.

The defendant did not produce any accounts to counter the plaintiff’s evidence on this issue. The defendant by evidence simply stated that it did not understand the amount due and even at one time stated that the plaintiff owes it kshs 42 million. With respect, the defendant simply looked at the income account but failed to consider the accounts representing payments made to third parties.

The plaintiffs further pray that the defendant be ordered to pay remuneration to the joint managers.

I find that such an order is akin to special damages and should therefore had been specifically proved by production of invoices or statements of time spent in managing the project. The court therefore finds that it cannot award remuneration to the joint managers.

The plaintiffs other prayer is that the presently constituted joint managers, namely Ms Sandeep Kaur Balrey and Mrs Shehnaz Nzarali Sumar be granted a vesting order to execute 999 years subleases to the purchasers, or their nominee, of the villas.

The defendant argues that the court lacks statutory authority by which it can order the signing of such leases, because the present suit is not a suit for specific performance by a purchaser. That there is no privity of contract between the defendants and the purchasers.

Following the thread of reasoning, of this judgment, the court has already found that the joint managers were lawfully appointed and having found that their acts could bind the defendant the court therefore finds that they had power to find buyers for the villas since such sale proceeds would have the effect of reducing the defendant's indebtedness to the plaintiffs. The joint managers having so sought the buyers and indeed the proceeds having been applied in reduction of the defendants debt it would be unjust to withhold the power of the transfer of those villas to the rightful purchasers. I accept the defendants submission that the prayers for power to vest the sub leases may be novel and does not find statutory provision for its support. To stop there and simply send the mangers away without remedy would be a great injustice and would go against the maxim of equity that, equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go un-redressed if it is capable of being remedied. I do therefore find that the plaintiffs will be granted the relief they seek in this regard.

The judgment of this court is as follows.

(1) That judgment is hereby entered in favour of the plaintiff as against the defendant for kshs 135, 305, 371. 34 with interest at the rate of 30% with effect from 1st July 2001 until payment in full;

(2) That this court does hereby grant and vest the joint managers, namely Ms Sandeep Kaur Balrey and Mrs Shehnaz Nizarali Sumar with full power and authority to execute 999 years leases on behalf of Retreat villas Limited in favour of the Purchasers (or their nominee)) of the Villas on L.R. No. 209/354/11 situated in the City of Nairobi.

(3) The defendant's counter claim is hereby dismissed with costs to the plaintiffs.

(4) **The plaintiffs are awarded costs of this suit and such costs, plus costs of the counter claim, as in (3) above shall be with interest at the rate of 14% per annum from the date of this suit until payment in full.**

Dated and delivered this 14th day of December 2005**.**

MARY KASANGO

JUDGE