

THE MORTGAGES (SPECIAL PROVISIONS) ACT 1968

No. 40 of 1968

Date of Assent: 26th June 1968

Date of Commencement: 28th June 1968

An Act of Parliament to enable the Housing Finance Company of Kenya Limited to obtain possession more easily of property in respect of which it is able as mortgagee to exercise its power of sale or appoint a receiver

ENACTED by the Parliament of Kenya, as follows:—

1. This Act may be cited as the Mortgages (Special Provisions) Act 1968.

Short title.

2. In this Act—

Interpretation.

“approved tenant” means a tenant holding under a lease or tenancy agreement entered at any time into with the prior written approval of the Company;

“the Company” means the Housing Finance Company of Kenya Limited incorporated under the Companies Act;

“mortgage” includes charge;

“the specified conditions” means the conditions specified in paragraphs (a), (b), (c) and (d) of section 3 (1) of this Act.

3. (1) Where—

(a) immovable property is mortgaged to the Company (whether mortgaged before or after the commencement of this Act); and

Suit for possession of mortgaged property.

(b) the Company as mortgagee has power to sell the property by virtue of section 69, or to appoint a receiver of the property by virtue of section 69F, of the Transfer of Property Act 1882 of India, or to sell the property or appoint a receiver of the income of the property under section 74 (2) of the Registered Land Act; and

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(c) there has been a breach of some agreement on the part of the mortgagor contained in the mortgage; and

(d) the property contains a dwelling house, which is in the occupation of the mortgagor or of some other person who is not an approved tenant,

the Company may institute a suit in the High Court in accordance with this Act for the possession of the property.

(2) Upon instituting a suit under subsection (1) of this section, the Company shall file an affidavit verifying the plaint and testifying that the specified conditions exist in relation to the property and giving full particulars concerning them.

(3) In a suit instituted under subsection (1) of this section, the mortgagor shall be made the defendant, and the summons shall—

(a) require the defendant, if he believes that all the specified conditions do not exist in relation to the property, to file an affidavit and serve a copy on the Company in accordance with section 4 (1) of this Act;

(b) give notice to the defendant of the Company's rights under section 5 (1) of this Act,

and a copy of the affidavit filed by the Company shall be served on the defendant with the summons.

(4) Where the person serving the summons and affidavit, after using all due and reasonable diligence, cannot find that defendant, he shall affix the copy of the summons and affidavit on the outer door of the property, and shall return the original to the Court with a statement endorsed on it or annexed to it that he so affixed the copy and of the circumstances in which he did so, and the summons and affidavit shall then be deemed to have been duly served.

(5) The person serving the summons and affidavit shall also leave a copy of the summons and a copy of the affidavit with some person appearing to reside on the property, or, if no such person can be found, affix them on the outer door of the property.

4. (1) Within fourteen days of being served with the summons, the defendant, if he believes that all the specified conditions do not exist in relation to the property, may file an affidavit in response to the summons testifying to such belief and giving full particulars of the reasons why he holds it, and where he does so he shall forthwith serve a copy thereof on the Company.

Affidavit in response to summons and affidavit in reply.

(2) Within seven days of an affidavit being filed under subsection (1) of this section or a copy thereof being served on the Company (whichever is the later), the Company may file a further affidavit in reply to the defendant's affidavit, and where it does so it shall forthwith serve a copy thereof on the defendant.

5. (1) At any time after the expiration of twenty-one days after the summons has been served on the defendant, the Company may apply to the Court for a decree for possession of the mortgaged property, and on such application the Court shall read the affidavits filed and shall pass a decree for possession accordingly, unless it is satisfied on such reading that the specified conditions do not exist or that there is reasonable doubt whether they exist, in which case the Court shall grant leave to defend, either unconditionally or on such terms as to giving security or time of trial or otherwise as the Court may think fit.

Decree for
possession.

(2) Notice of the application shall be given in writing to the defendant if he filed an affidavit in response to the summons.

(3) A decree for possession passed under subsection (1) of this section shall have the effect of conferring on the Company the sole right to possession of the mortgaged property, and, upon its being registered under the law under which the title to the property is registered, it shall have the effect of determining every lease, tenancy agreement and licence to occupy, whether registered or not, which is then subsisting in respect of the property (other than the lease (if any) under which the property is held by the mortgagor).

6. The procedure under this Act shall be governed by the Civil Procedure Act and the rules made thereunder, so far as the Act and rules are not inconsistent with this Act, and the Rules Committee established by section 81 of the Civil Procedure Act may make rules of court to provide for any additional matters of procedure under this Act for which provision may be necessary.

Procedure.
Cap. 5 (1948).

7. This Act shall have effect notwithstanding the terms of a lease or tenancy agreement, and notwithstanding any other written law.

Saving for
other laws.