



REPUBLIC OF KENYA



Zeki Wanjala Wanyama t/a Zeki Motors Agencies v NCBA Bank Kenya PLC & another (Civil Suit 2 of 2021) [2023] KEHC 19344 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 2 OF 2021**

DK KEMEL, J

JUNE 30, 2023

BETWEEN

ZEKI WANJALA WANYAMA T/A ZEKI MOTORS AGENCIES PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. Vide a plaint dated January 24, 2018, the plaintiff sought the following reliefs:
 - a. A declaration that the entire execution process in respect of land parcel No. E. Bukusu/S. Kanduyi/2028 was defective, null and void.
 - b. A mandatory order compelling the defendants to render account as to ascertain the accurate indebtedness of the plaintiff.
 - c. An order of injunction restraining the defendants either by themselves, agents, or representatives from proceeding with the intended sale of land parcel No. E. Bukusu/S. Kanduyi/2028.
 - d. An order compelling the 1st defendant to conduct valuation in respect of land parcel E. Bukusu/S. Kanduyi/2028 and in the alternative order independent valuation by the plaintiff.
 - e. A mandatory order compelling the defendants to declare a reserve price being not less than 75% of forced sale value of land parcel Bukusu/S. Kanduyi/2028.
 - f. Costs of the suit.



2. The plaintiff pleaded that he took a loan from the 1st defendant in the year 2013 and a charge was registered over land parcel E Bukusu/S. Kanduyi/2028 where he runs a hotel business. That due to the prolonged electioneering period, he fell into arrears.
3. He stated that as at 24/1/2018, his indebtedness to the 1st defendant was at Kshs 17,788,079.84 however in their redemption notice, the sum is indicated as Kshs 20, 685,205.24.
4. That earlier on 7/11/2017, he received a 45-days redemption notice and notification of sale from the 2nd defendant and on 22/1/2018, an advert for the sale of the property was put up in one of the local dailies.
5. He avers that a forced sale value was not done on the property since the value as at 2013 was Kshs 28.2 million despite the improvements he has made thereon. He also pleads that he was not issued with the 90 and 40- day statutory notices as required by law before engaging the 2nd defendant. That any steps taken by the defendants before issuing the notices were null and void.
6. The 1st defendant filed its statement of defence admitting the advancement of the loan to the plaintiff save that the figure advanced was Kshs 21,000,000/-. That the amount was duly disbursed to the plaintiff but that the plaintiff defaulted and as at 2/2/2018, the default stood at Kshs 21,181,377.44. That as a result of the default, the 1st defendant issued several demands in vain.
7. It is averred that indeed a moratorium was extended to the plaintiff but failed to abide by the terms thereof and that all the requisite notices were issued and served upon the plaintiff.
8. The suit proceeded by way of viva voce evidence. The plaintiff testified as PW-1 stating that he was advanced a loan in the sum of 24,000,000/- to improve his hotel business within the charged property. That due to the prolonged electioneering period, the business failed to pick as expected and his account fell into arrears. He further reiterated his averments in the plaint and therefore sought orders as prayed in the plaint.
9. On cross examination, he agreed that he had been advanced the loan in the sum of Kshs 21 million and subsequently executed the letter of offer and the charge document. He confirmed the postal address on the statutory notice is his address and the addressee is Annah Wanjiku Muthoni and himself. He admitted that he had defaulted in the payment of the installments and requested the bank to restructure his loan. The request was responded to. He also admitted being served with the notices by the auctioneer. He also confirmed that there is nothing stopping the bank from selling the property.
10. On re-examination, he stated that his land is reference E. Bukusu/S. Kanduyi 2018 and not Bukusu/S. Kanduyi/2028.
11. DW-1 Ibrahim Ngatia Mbogo testified that the plaintiff was advanced the sum of Kshs 21 million by the bank and secured by a charge over the suit parcel of land. That upon default, the bank issued statutory notices for the sale of the charged property. That as at 2nd February, 2018, the outstanding sum was Kshs 5,214, 017. 40 in principal sum and Kshs 21,181, 377.44 in total outstanding balance.
12. That as a result of the persistent default, they issued the notices and later a valuation report was done by an independent valuer for purposes of ascertaining the current market and forced price value. He stated that the bank was well within its rights to sell the property.
13. On cross examination, he stated that the notices were sent to the address provided by the chargor on the charge document and that valuation was conducted prior to the issuance of the notices. He stated that the property had not been sold. He stated that the security charged is E. Bukusu/S. Kanduyi/2028. He denied that a valuation was conducted on a different property other the one charged.



14. On re-examination he stated that the certificate of postage has the names of the addressees and address provided in the charge documents. He also stated that forced valuation was conducted prior to issuance of the notices.
15. The parties also filed their written submissions. Both parties complied.
16. On the issue of service of notices, the plaintiff submits that there was no evidence that the notices issued under section 90 of the *Land Act* actually reached the plaintiff as they do not bear the postal address of the intended recipients. That a mere certificate of postage is not sufficient proof that the notices reached the plaintiff and his wife. Counsel cites Section 90(1) and 96(2) of the *Land Act*. In this regard, the authority in *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* (1996) eKLR, *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto* (2017) eKLR was cited.
17. On the issue of valuation, the plaintiff argues that there is gross undervaluation of the property and therefore failed to comply with the provisions of section 97(2) of the *Land Act*. In support, *Cuckmere Brick Co. Ltd v Mutual Finance Limited* (1971) ALLER 633 has been cited.
18. The defendants on the issue of whether the statutory notices were served submit that the bank served the three months' statutory notice, 40-days' notice to sell and the 45 days redemption notice. That in the circumstances, they complied with section 90 and 96 of the *Land Act* and Rule 15 of the *Auctioneers Rules* 1997. This assertion is buttressed by the authority in *Joseph Ndirangu Wabeho t/a Zeeco Auto & 2 others v Cooperative Bank of Kenya Limited* (2019) eKLR and Nyangilo Ochieng (supra).
19. On the issue of whether a forced sale valuation was done, the defendants submit that the same was done in 2021 which document was produced without objection from the plaintiff. The decision in *Palmy Company Limited v Consolidated Bank of Kenya Limited* (2014) eKLR and *Silas Misoi Yego t/ a Siro Investments v Transnational Bank Limited & another* (2020) eKLR have been cited in support.
20. On whether there is a difference between the amount demanded and the arrears appearing on the plaintiff's statement, the defendants submit that the statement provide by the 1st defendant is conclusive and in the absence of proof by the plaintiff, the amount is due and owing and must be paid. Counsel cites *Sammy Japheth Kavuka v Equity Bank Limited & another* (2014) eKLR.

Analysis.

21. I have considered the evidence of the plaintiff and the 1st defendant as well as the rival submissions. The fact that the plaintiff took out a loan with the 1st defendant is undisputed. The fact that he is in arrears is also not in dispute. The plaintiff does not also dispute the fact that he was served with notice of default and that he had entered into negotiations with the bank with a view of restructuring the loan is also proved.
22. The bank on its part asserted that the restructure was received with conditions given to the plaintiff on the steps he ought to take to rectify the default. Both parties admit this was not complied with by the plaintiff.
23. My analysis of the pleadings, the evidence and the submissions show that the plaintiff took issue with the 1st defendant's valuation of the property, the service of notices on him and that the amounts claimed by the 1st defendant varied.
24. On the issue of valuation of the property, the 1st defendant asserted that it conducted a valuation exercise of the property and a valuation report tabled before the court as contained in page 72 of the 1st defendant's bundle of documents.



25. The plaintiff's complaint on the issue is that there is a variation of the forced market value and the market price as at the time of taking out the loan and the time the advertisement was put up for sale.
26. From the evidence on record, I find that the plaintiff has merely thrown allegations at the court in that he did not provide an alternative and an independent valuation report showing that the defendants had under valued his property.
27. In *Palmy Company Limited* (*supra*), it was held as follows:
- “The Court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97 (2) of the *Land Act* by the defendant as to entitle the court to call for an explanation or rebuttal from the defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction.”
28. Similarly, in the case of *Zum Zum Investments Limited v Habib Bank Limited* (2014) eKLR which was cited in the other case of *Olkasasi Limited v Equity Bank Limited* [2015] eKLR Kasango J held as follows: -
- “The Applicant needs to show, for instance, that the Respondent's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale.”
29. Further to the above, it is a cardinal principle that he who asserts must prove as provided for under section 107(1) and 109 of the *Evidence Act*. The Sections provide;
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
30. According to the valuation report of 12/4/2021, the property's market value is Kshs 20,800,000/- while the forced market value is indicated as 19,500,000/-. The bank explained this valuation as honest and done by an independent valuer.
31. In light of the above legal authorities, the plaintiff was duty bound to advance cogent evidence showing that the value of the suit property is not as put by the defendants. In the absence of such evidence I find this line of argument to be without merit.
32. On the service of notices upon him, the plaintiff argued that the statutory notices were not served on him. The defendants deny this assertion by contending that they duly served the notices to the address provided by the plaintiff as at the time of applying for the loan.
33. To this end, I note that on cross examination, the plaintiff stated that;
- ‘Yes, I have seen the copy of the notice on page 42 of the defendant's documents and is addressed to me through P. O Box 5134-30100 Eldoret which is my rental box address’.



34. I note that at this juncture, the plaintiff would have disputed the allegation that he was served with the notices. He did not dispute the address on the letter as being his.

35. As a legal requirement that statutory notices have to be served, section 90 of the Land Act provides;

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- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

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- (2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –
 - a) the nature and extent of the default by the chargor;
 - b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
 - d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

36. The letter of offer, the charge and the statutory notices were all addressed to the same postal address number. The plaintiff did not allege that he no longer uses the postal address had had given to the bank.

37. The issue of notices and their service was discussed in Lameck Mbaka Motegi v Bank of Baroda (Kenya) Ltd & another [2017] eKLR where it was held;

In Tubro Highway Eldoret Ltd and 2 others v Bank of Africa Ltd (2016) e KLR, in very similar circumstances as in the present application concerning service of statutory notices the court (Munyao Sila J, on February 18, 2016) rendered himself that the only way the applicant could get relief from the sale of his property was to demonstrate that the notices were not served. Having seen the said statutory notices and satisfied that they were indeed served by registered post and certificates of postage exhibited, the court rejected the application for an injunction against sale of the charged property.

38. Having carefully perused through the pleadings and the parties respective submissions, I find that the notices were properly and sufficiently served upon the plaintiff.



39. In the result, it is my finding that the plaintiff's claim has no merit. Consequently, the suit is hereby dismissed with costs to the 1st defendant. The orders in force against the sale of the suit property are hereby vacated.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023

D.Kemei

Judge

In the presence of:

No appearance Nyagacha for Plaintiff

Kioko for Mumia for 1st Defendant

No appearance for 2nd Defendant

Kizito Court Assistant

