



Two Calves Investments Limited & another v KCB Bank Kenya Limited (Civil Case 4 of 2020) [2022] KEHC 16481 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE 4 OF 2020
DK KEMEL, J
NOVEMBER 28, 2022**

BETWEEN

TWO CALVES INVESTMENTS LIMITED 1ST PLAINTIFF

DANIEL SHISIA ABUAO 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED DEFENDANT

JUDGMENT

1. Vide a plaint dated July 16, 2020 the plaintiffs sued the defendant, seeking for several reliefs namely; a declaration that the defendant did not issue a 90 days statutory notice; a declaration that the defendant's act to instruct its auctioneers is premature, un-procedural, ill-timed and unlawful; an injunction restraining the defendant, its agents and/or servants from instructing the auctioneers to push further with the process of realizing and/or putting up the securities namely LR Nos East Bukusu/N Kanduyi/6384, 6385,6867 &6931 for auction; costs of the suit.
2. The plaint was accompanied by a verifying affidavit and witness statement all sworn by the 2nd plaintiff and filed on July 16, 2020.
3. In the plaint, the plaintiffs aver that the 1st plaintiff was the defendant's customer and operating a current account with the latter. The 1st plaintiff averred that on its request, the defendant vide a letter dated December 21, 2018 offered to grant an LPO Finance Facility to a tune of kshs 35,000,0000/= (Kenya Shillings Thirty-Five Million) and which was accepted by the plaintiffs. According to the plaintiffs, the purpose of the facility was to service LPOs issued by the County Government of Kakamega and that the same was to be secured by a legal charge over the 2nd plaintiff's property comprised in title numbers East Bukusu/N Kanduyi/6384,6385,6867 and 6931. The plaintiffs averred that it was a term of the facility contract, implied or express, that repayment of the facility sum was to be out of the contract (LPO) proceeds as the facility was utilized by the 1st plaintiff in carrying out a



project for the County Government of Kakamega. The proceeds were to be paid to the defendant by the County Government of Kakamega before April 30, 2019 to enable repayment of the facility. The 1st plaintiff averred that at all material times it kept the defendant apprised of the non-settlement of the contract proceeds and sought for indulgence from the defendant as it pushed for the payment from the County Government of Kakamega. The 1st plaintiff averred that from sources other than the contract, it paid a total sum of kshs 15,000,000/= in installments of first kshs 10,000,000/= and secondly kshs 5,000,000/=.

4. The plaintiffs contend that on or about the 2nd week of March, 2020 the 2nd plaintiff was requested to visit the defendant's regional office at Kisumu where he was given a letter dated February 24, 2020 purporting to be 40 days' statutory notice issued pursuant to the provisions of section 96(2)(3) of the Land Act No 6 of 2012 Laws of Kenya. The plaintiffs averred that the purported Statutory Notice was not served upon all the relevant persons as expected under the law and that the same was not preceded by a 90 days' Notice though the letter dated February 24, 2020 alludes so.
5. The plaintiff argued that the County Government of Kakamega did certify a sum of kshs 55,702,946.73/= as a patch due for payment to the defendant and that the defendant was aware of the same. The plaintiffs averred that the outstanding sum and owed by the 1st plaintiff as at July 14, 2020 was kshs 25,682,925.17/= and that the defendant has already instructed the auctioneers to move forward with the process of realizing the securities.
6. The suit is contested as the defendant filed its Defence on August 5, 2020 and denied all the averments contained in the plaint. It further averred that the loan facility was to be repaid in full by April 30, 2019 by bullet payment or receipt of the LPO proceeds which ever came earlier but that the interest was to be serviced on monthly basis. The 1st plaintiff defaulted in repaying the installments due under the facility. Further that by virtue of the charges, it acquired a valid and legal interest over the suit properties which can only be extinguished upon the plaintiffs fulfilling their covenants and obligations under the charges. The defendant urged the court to dismiss the suit against it with costs.
7. The plaintiffs also filed a notice of motion application filed on July 16, 2020 seeking:
 - i. Service of the application be dispensed with in first instance, owing to its urgency.
 - ii. Pending the hearing and determination of this application inter-parties this Hon. Court be pleased to issue a temporary injunction restraining the defendant, their agents or servants from instructing auctioneers to commence the process of realizing, or putting up for auction all those parcels of land comprised in tiles numbers East Bukusu/N. Kanduyi/6384,6385,6867,6930 and 6931 or any of them.
 - iii. Pending hearing and determination of this suit, this Hon. Court be pleased to issue a temporary injunction restraining the defendant, their agents or servants from instructing auctioneers to commence the process of realizing, or putting up for auction all those parcels of land comprised in tiles Numbers East Bukusu/N. Kanduyi/6384, 6385, 6867,6930 and 6931 or any of them.
 - iv. Costs of the application be provided for.
8. In its ruling delivered on December 14, 2021, this court was satisfied that the balance of convenience tilts towards preserving the status quo pending the hearing of the main suit. It allowed the application for a temporary injunction to issue against the respondent not to sell, alienate or auction the applicant's properties for 90 days pending the hearing of the main suit which must be heard and concluded within 90 days from the date of the ruling.



9. The suit commenced for hearing. I do wish to apologize to parties for the delay in hearing and determining within 90 days as was decreed as the circumstances were beyond the court's control. Any inconvenience as a result thereof is sincerely regretted.
10. The plaintiff called one (1) witness in support of its case. PW1, Daniel Shisia Abua, adopted his recorded witness statement as his evidence in chief and relied on his list of documents which were produced as P exhibits 1-7. It was his evidence that he is a businessman dealing in construction. According to the 2nd plaintiff, he sought for a loan of kshs 35,000,000/= from the defendant. The purpose of the facility was to service an LPO issued by the county government of Kakamega where he was contracted to do a road construction. The agreement was that he will pay what he had and upon payment of the LPOs. He told the court that he completed the construction but was yet to be paid by the County Government and was never served with all the notices save for the one for 40 days' stipulation which he was called to the bank and given. He told the court that they defendant did call him concerning the loan but the requisite 90 days-notice was never served upon him. He stated that he has so far paid half of the loan but due to the non-payment by the County, he was not able to service the remaining balance. According to him, business was not good during the covid-19 pandemic and that the defendant advised that if he paid the facility to a tune of kshs 20,000,000/= then they could restructure his loan. He told the court that he has since paid kshs 21,000,000/=.
11. On cross-examination, he told the court that he is the director of the 1st plaintiff and that the purpose of the facility fronted by the defendant was to service an LPO finance issued by the County Government of Kakamega that was to be paid by April 30, 2019 by bullet payment or receipt of the LPO proceeds.
12. On re-examination, he told the court that during the processing of his facility with the defendant he did indicate his address which is his current address and that the defendant did not call him to inquire as to which address they will be using when writing to him and that the defendant sent the letter to Box 140-50102 Bungoma and then Mumias yet his address is Box 140 Butere. The address Box-140-50102 Bungoma was not his and that the 90 days' notice did not reach him.
13. On their part, the defendant also called one (1) witness. DW1, Valerine Ambia Masitsa, told the court that she works with the defendant and wished to adopt her witness statement and relied on the list of documents which were produced as D exhibits 1-10. On cross examination, she told the court that a customer ought to point out any discrepancy in an address before signing documents and that if a mail is forwarded to a wrong address the same is returned to the sender and then they call the customer over the same. She testified that she was not aware of any discrepancies in the plaintiffs address. According to her, she assisted the plaintiffs in processing the loan and that she saw the affidavit of the spouse of the 2nd plaintiff indicating that their address is Box 140 Butere but they sent the notice to Box 408 Bungoma. She stated that the plaintiffs had a legitimate expectation that they will receive the LPO proceeds by April 30, 2019 and was not in any position to know if they received the same. The defendant was aware that there would be a delay in the payment of the LPO proceeds and that the plaintiffs were to pay the loan using other facilities. She was not aware of how the 90 days-notice was sent but she was the one who called him to pick the 40 days statutory notice letter. She added that a demand letter is usually sent prior to the notices.
14. On re-examination, she stated that the terms of repayment were that payment was to be cleared by April 30, 2019 and that the repayment of interest is always on monthly basis. There was no letter on restructuring of the loan and the same cannot be done orally. She stated that the address provided in the charge document by the plaintiffs was Box 140-50102 Mumias and was not aware if they sought to amend the same.



15. Parties were directed to file and exchange submissions. However, it is only the 1st defendant who filed submissions.
16. The defendant submitted that, parties are bound by the terms of the contract that they validly entered into and the obligations therein. That the address provided for in the charge document was Box 140-50102 Mumias which was confirmed by the plaintiffs and that the postal code 50102 is in respect of Mumias, Kakamega County.
17. I have now considered the suit, the affidavits filed and the submissions made to me by counsels appearing. Having done so, I take the following view of the matter. It appears to me that the survival of this suit depends largely on whether or not the plaintiffs were served with the statutory notice required by law and whether this court should grant the injunction.
18. The defendant did elaborate that the plaintiffs fell into arrears with servicing their loans and it also elaborate that the same defendant is aware that the proceeds of the LPO between the plaintiffs and the county government of Kakamega were to forwarded to it subject to payment of the plaintiffs. It is evident that on delay of payments by the county government of Kakamega, the plaintiffs from other sources made a payment towards the loan to a tune of kshs 15,000,0000/=.
19. The plaintiffs' other complaint was that they were not served with statutory notices before the defendant advertised the property for sale. They argued that if statutory notices were ever issued, there was no evidence that they were served. The defendant on its part maintained that statutory notices including the auctioneer's notices were served through the plaintiffs' postal address and that the postal address was similar to the one provided in the charge documents.
20. I have considered respective parties' arguments, the evidence and perused the documents filed by the defendant on the issue. Section 90(1) of the Land Act is clear that before a chargee can exercise its statutory power of sale in the event of default by the borrower, it must serve a notice on the chargor requiring him to regularize the default and pay the money owing, or to perform and observe the terms of the agreement. The chargee should also inform the chargor of the consequences to follow if the default is not rectified. The period of such notice should not be less than three months.
21. It was the evidence of the plaintiffs that it was only through a phone call from the defendant requesting him to visit their regional office did he get the requisite 40 days-notice and that they came to learn about the intended sale. The plaintiffs averred that they never received any demand letter/90 days-notice from the defendant.
22. Section 96(2) of the Land Act further provides that before exercising the power to sell the charged land, the chargee should serve on the chargor a notice to sell in the prescribed form and should not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice. That is to say, a chargee must serve two notices; the three months' notice notifying the chargor of the default, the nature of default, requiring the chargor to rectify the default and consequences for none compliance. Second, the forty days' notice before the advertising the property for sale commences.
23. The defendant was required by law to serve the plaintiffs with a statutory notice calling on them to rectify the default. The plaintiffs argued that the statutory notice required under section 90(1) (2) and 96(2) of the Land Act were not served while the defendant maintained that it served the plaintiffs with the 90-day statutory notice.
24. The law is clear that it is the chargee's duty to serve the notices on a chargor before it can exercise its statutory power of sale. That duty would be discharged where it is shown that the notices were served



even through registered mail. I have perused the statutory notice and notice of intention to sell that have been produced before it. I have also considered the evidence adduced by the witnesses. It is not in doubt that the plaintiff's address as provided in the offer letter is P.O Box 140-50102, Butere. However, the statutory demand notice confirms that the notice was sent out to P.O Box 140-50102, Mumias. Therefore, it is not in doubt that these two addresses are different and the contention by PW1 that they never received the said Notices is merited. Once a chargor alleges non-receipt of the notices, it becomes incumbent upon the chargee to prove that the notices were sent out. In the instant case, since the notices were sent out to the wrong address, it is evident that the said notices are a nullity as the defendant has failed to prove that the plaintiff received them.

25. In *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR, the Court of Appeal, while dealing with service of notices under section 74(1) of the repealed Registered *Land Act* (Cap 300) the equivalent of section 90 of the *Land Act*, stated:

“It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered *Land Act* (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale...It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered *Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. (emphasis)”

26. In the case of *Martha Khayanga Simiyu ...vs...Housing Finance Co. of Kenya & 2 Others* Nairobi HCCC No 937 of 2001 [2001] 2 EA 540 the court held that:

“...The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice...Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargors equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargors remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor...”

27. Further, in *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto* [2017] eKLR, the Court of Appeal again held that:

“Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.”

28. The defendant did not prove that first, the notice under section 90(1) was served on the plaintiffs. It was that notice that would have given rise to service of the notice under section 96(2). Even if it had been proved that the notice under section 96(2) had been served, which was the case in this instant suit,



failure to prove service of the notice under section 90(1) was fatal to the defendant's case. Service of statutory notices being a legal requirement, service thereof is a matter of fact to be proved by evidence and, therefore, it cannot be left to conjecture or assumption. I find and hold, that the defendant did not serve statutory notice as required by law and, therefore, its statutory power of sale had not crystallized when it moved to exercise that power. The debacle on the part of the defendant's internal processes regarding the service of the statutory notices should not be visited upon the plaintiffs as they played no role therein. The defendant had the requisite postal address of the plaintiffs on the charge documents and they cannot be heard to say that they used a different address while sending the statutory notices to the plaintiffs. It would be unfair and unjust to allow the process of realization of the securities by the by the defendant yet it had not complied with one of the cardinal procedures before the charged properties could be put up for sale by public auction. The court must come to the aid of the plaintiffs who are likely to suffer great prejudice for mistakes not attributed to them.

29. Having considered this matter, the pleadings on record, evidence, submission of the defendant, the decisions relied on and the law, I am satisfied that the plaintiffs have proved their case on a balance of probabilities. Consequently, I find merit in the claim lodged by the plaintiffs and make the following orders:

- i. A declaration is hereby issued that the defendant did not serve the plaintiffs a 90 days' Statutory Notice and consequently their letter dated February 24, 2020 remains just a letter and not a valid Statutory Notice envisioned by the Provisions of the Land Act No 6 of 2012.
- ii. A declaration is hereby issued that the scheduled sale of properties known as LR Numbers East Bukusu/N Kanduyi/6384,6385,6867 & 6931 and any other property of the plaintiffs by public auction is unlawful and is, therefore, voided.
- iii. The plaintiffs are hereby directed to officially engage the defendant with a view to restructuring the payment of the outstanding loan amount with interest based on the interest rate applicable at the time of the alleged default on the basis of the agreed loan repayment period to enable the plaintiffs repay as per the agreed schedule.
- iv. Thereafter, the defendant will be at liberty to take necessary steps to exercise its options under the charge should the plaintiffs fail to repay the correct amount of the loan as per the agreed schedule.
- v. Costs of the suit to the plaintiffs.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022

D.KEMEI

JUDGE

In the presence of :

No appearance for Omagwa for plaintiffs

Atibaz for 1st defendant

Atibaz for 2nd defendant

Kizito Court Assistant

