REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 152 OF 2018

ENOCK PTINEK MANYU.....APPELLANT

VERSUS

JAMII BORA BANK LTD.....RESPONDENT

(BEING AN APPEAL FROM THE RULING OF HON. V. WAKUMILE (SPM) DATED 20TH SEPTEMBER 2018 IN NAKURU CMCC NO. 929 OF 2015)

JUDGEMENT

1. One Agency for Development Research Limited was advanced by the respondent a loan facility of kshs. 5,099,992 by the respondent and the appellant guaranteed the same. In the cause of time there was default on payment and the respondent sought to recover the security offered by the appellant namely **Nakuru Municipality Block 10/235**. The appellant moved to court and sought orders of injunction which were denied. Dissatisfied with the same the appellant filed this appeal seeking the following orders;

> **a) that an injunction be issued restraining the respondent from selling, transferring, alienating or in any way interfering with the appellant's quiet possession and use of the suit property until the appellant's suit is heard and determined on merits.**

2. The appellant also prayed for the appeal to be allowed with costs.

3. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.

APPELLANT'S WRITTEN SUBMISSIONS.

4. The appellants raised three issues which he found germane, namely, whether statutory notices were served upon the appellant; whether the failure to serve the same was a procedural technicality and whether in light of the foregoing statutory power of sale had arisen.

5. The appellant elaborated on the provisions of **Section 90 and 96 of the Land Act 2012** which gave the timelines within which the notices were to be issued sequentially. Under section 90, 90 days' notice apply and under section 96, 40 days' notice ought to be issued.

6. The appellant submitted that none of the notices were issued to him as the address purportedly used by the respondent did not belong to him or at all. It was therefore on that basis that the lower court failed to appreciate that led it to dismiss his application.

7. That the appellants address is P.O Box 104 Nakuru yet the address on the notices was P.O. Box 16884 -00100 Nairobi.

8. He went on to state that although the respondent stated that he was served personally, what he admitted to receiving personally was the auctioneers notice but not the statutory notice.

9. On the second limb of the issues he raised, the appellant submitted that the failure to serve proper notice cannot be seen to be a procedural technicality but it is a substantive right.

10. Statutory notices cannot therefore be said to have arisen in such situation where the law has not been complied and the trial court ought to have found so and allow the application.

RESPONDENT'S SUBMISSIONS.

11. The respondent generally agreed with the trial court which found that under the legal principles held in **GIELLA V. CASSMAN BROWN LIMITED (1973) E A 358** the appellant had not established any prima facie case and at any rate he would have been compensated by award of damages.

12. The court, the respondent submitted, had found that the appellant had been copied the statutory notices vide his address which he had provided namely PO Box 104 Nakuru. That all that the appellant was doing was hiding under procedural technicalities to defeat paying the debt or blocking the respondent from realising the security.

13. The appellant submitted that despite this the appellant to date has not settle the loan despite being in court for the last six years. It relied on the case of **ETHICS AND ANTI-CORRUPTION COMMISSION & 3 OTHERS V. AFRICAN SAFARI CLUB & 2 OTHERS (2013) eKLR.**

14. The respondent prayed that the appeal be dismissed and the trials court decision be upheld.

ANALYSIS AND DETERMINATION.

15. The issue before this court is whether the trial courts findings that the appellant was served with the notices were properly done. There is no doubt that the notices must be served pursuant to Section 90 and 96 of the Land Act 2012. This the parties are in agreement.

16. The notices however must be served upon the recipient through the address provided and there must be evidence to that effect. In this case the court has perused the charge dated 30th September 2014 and the appellant's address is indicated as P.O Box 104 Nakuru. The borrowers address is PO Box 16884-00100 Nairobi.

17. The notice of recovery by the respondent dated 30th April 2015 is addressed to the appellant vide PO Box no. 16884 -00100 Nairobi giving three months' notice. The same was copied to the appellants using their PO Box 104 Nakuru address.

18. Attached to it is a postal order indicating that the same was registered and delivered to the appellant.

19. The forty days' notice was issued by the respondent on 8th August 2015 and addressed to the appellant vide the said Nairobi address and copied to the appellant vide the Nakuru address. Next to it was another postal corporation document showing that the same was registered and delivered to the appellant.

20. It is therefore clear that although the address used by the respondent was that of Nairobi the same notices were copied to the appellant. They were duly registered and there is no evidence that they were returned to the respondent or to the courier company.

21. If that is the case can one conclude that since the appellant was not the addressee the notices which I presumed, he received were not his? In other words, should this court find that the respondent ought to have addressed the appellant directly and not merely copying the letters?

22. I think respectfully that whereas the notices as of first instance ought to be addressed to the intended beneficiary, denying that since one only received a copy and not the original, the same was invalid would be stretching the matter too far. Both the appellant and the borrower Agency for Development Research Limited were parties to the deal. The money advanced to them were by the respondent. They signed the charge and committed themselves to pay. The appellant promised to pay in the event that the borrower defaulted. Indeed, the borrower defaulted and the only recourse for the respondent was to kick in the recovery process.

23. The notices were issued to them in my view, whether directly or through a copy. The notices contained the same information, namely that the execution process had begun and that the appellant should be forewarned. Indeed, it is not enough to say that *"I did not receive the notices"* without any evidence of settlement of the liability. Even for argument sake the appellant ought to have demonstrated to the trial court that he attempted to settle the debt.

24. I agree with the trial court that the appellant is barely clinching to straw. To deny that he did not receive the notice is farfetched. See the case of PETER **KINUTHIA WATHUO V. COOPERATIVE BANK (K) LTD (2013) eKLR** where the issues of service were almost similar and the court found that the applicant had been served vide registered post.

25. This court agrees with the above observations. The appellant received the notices vide registered posts. The address available in the charge is the same. Although he received a copy, he was still in my view well served and was fully aware of the default. Further clause 39 of the charge document clearly indicates that the notices shall be valid and properly served either by hand or registered post.

26. In this case the notices as observed were registered. In any even one can practically conclude that by every stretch of imagination the appellant was fully aware of the debt and that he had failed to settle the same or for that matter the borrower had defaulted.

27. In the premises, this court does not find any merit in the appeal and the same is hereby dismissed with costs.

Dated signed and delivered at Nakuru vide electronic link this 18th day of November 2021.

H K CHEMITEI

JUDGE