



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ELC. CASE NO. 26 OF 2017**

**MULTI BUSINESS SHOOTERS INVESTORS LTD.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**STEPHEN KARANJA T/A DALALI AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

[1] This application is brought under Sec. 1A and 3A of the Civil Procedure Act, order 40 rules 1(a) and 4 of order 51 Rule 1 of the Civil Procedure Rules 2010 the application prays for the following orders;

1. THAT this application be certified urgent and the same be heard exparte in the first instance.
2. THAT this Honourable Court be pleased to issue an interim order for injunction restraining the respondents herein by themselves agents, servants or workers howsoever from selling the charged property LR No. EAST BUKUSU/SOUTH KANDUYI/7010 on 17<sup>th</sup> day of February, 2017, by public auction or by private treaty pending hearing of this application inter-parties.
3. THAT this Honourable court be pleased to issue an interim Injunction restraining the respondents herein by themselves, agents, servants or workers howsoever from selling the charged property LR. No. EAST BUKUSU/SOUTH KANDUYI/7010 on the 17<sup>th</sup> day of February, 2017 or on any other day by public auction or by private treaty pending the hearing and determination of the suit.

The application is supported by the Affidavit of Johnex Wanyonyi Waswa who explains how he applied for and obtained a loan of 15,200,000 from the respondent. That the purpose of the loan was to enable the applicant to finance the purchase of LR No. East Bukusu/South Kanduyi/7010 from one Josphat Njuguna Ngugi for a consideration of Kshs.33,000,000/= out of which the plaintiff company alleged to have paid Kshs.17,800,000. The affidavit states that the plaintiff defaulted paying the loan to the respondent whereupon the 1<sup>st</sup> defendant instructed the second respondent to sell the charged property by public Auction. The deponent states that the 1<sup>st</sup> respondent did not give any or proper Mandatory notices to the applicant plaintiff.

[2] The first respondent filed a replying affidavit on 5<sup>th</sup> April, 2017. The affidavit was Sworn by Lwanga Mwangi a debt recovery Manager with the 1<sup>st</sup> defendant. He explained how the 1<sup>st</sup> defendant herein extended a banking loan of Kshs.15,200,000/= to the plaintiff applicant. Further that the Loan facility was secured by a fixed floating debenture dated 16<sup>th</sup> December 2014 over the entire present and future assets of the plaintiff and a first Legal charge of the suit property dated 16/12/2014 and joint several guarantee dated 16<sup>th</sup> December 2014 by Johnnex Wanyonyi Waswa and Beatrice Khalayi. He explained how the applicant failed and/or neglected to make payment and the same fell in arrears to the sum of Kshs.337,575.95 as at 5/5/2016 which prompted the bank to issue a demand Letter on 5/5/2016 and when the applicant failed to respond the bank in accordance with Section 90(3) of the land Act 2012 issued a statutory notice to the plaintiff dated 10<sup>th</sup> June, 2016.

It is alleged that the said statutory notice was sent to the plaintiff through its address disclosed in the charge aforesaid to wit P. O. Box 1064 - 50200 Bungoma and was copied to the directors/guarantors being Johnnex Wanyonyi Waswa and Beatrice Khalayi Waswa. That following the failure by the Plaintiff to settle the arrears within the stipulated period of 90 days, the bank proceeded to issue a notification of sale under Sec. 96(2) of the land Act 2012 on 20<sup>th</sup> September 2016. The deponent states that upon the expiry of 90 days the expiry of the stipulated Notification of sale, the 1<sup>st</sup> respondent instructed Messrs Dalali Traders Auctioneers the second defendant herein to sell the property by Public Auction after issuing the plaintiff with the requisite Redemption Notice. That the aforesaid Auctioneer served the plaintiffs with a 45 days Redemption Notice. And a letter detailing the said service was annexed to this application and it is dated 13<sup>th</sup> December, 2016.

[3] It is common ground between the parties, that,

(a) a loan of Kshs.15,200,000 was advanced to the applicants by the 1<sup>st</sup> respondents.

(b) That the same was secured by a legal charge over the suit property together with a floating debenture over the entire assets of the plaintiff registered on 19<sup>th</sup> December 2014, and the joint and several guarantees of Johnex Wanyonyi Waswa and Beatrice Khalayi Waswa dated 16/12/2014.

(c) That the applicant defaulted on its obligation to service the said financial obligation to the 1<sup>st</sup> respondent.

(d) It is equally agreed that due to that failure, to repay the bank loan the bank was well within its powers under the charge to exercise its power of sale to realize its money.

[4] The only dispute herein is whether the required statutory notices were issued to the applicant. The applicant contends they were not issued while the 1<sup>st</sup> respondent bank avers that they were issued.

[5] The point for determination is whether or not the statutory notices aforesaid were issued.

[6] Section 96(1) of the land act allows the chargee to exercise his power of sale where a chargor is in default of his obligations where a notice has been served on him. However, under Sec. 96(2) before the chargee exercises the power of sale, the chargee shall serve the chargor a notice in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell. Sec. 96(3) spell out on whom the notice shall be served. Of interest in this case is 96(3) (h) a guarantor of the money advanced under the charge must be served with a notice under Sec. 96(2).

[7] The applicant denies he was served with a notice under Sec. 96(2). The guarantors Johnex Wanyonyi Waswa and Beatrice Khalayi Waswa the directors of the applicant herein and guarantors to the Kshs.15,200,000/= deny any service upon them.

The 1<sup>st</sup> respondent contend that a notice was sent to the applicant on their known address. They aver that Johnex Wanyonyi Waswa and Beatrice Khalayi Waswa were served in their offices and they refused to accept service. In Moses Yator Vs. Eco Bank Kenya Ltd. (2014) eKLR the court stated;

“In instance where a chargor alleges that he did not receive the statutory notice, then the burden shifts to the chargee to demonstrate prima facie, that the statutory notice was served...if the notice was served by way of registered post, the charge ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the charger and that in ordinary course of events, the notice must have reached the charger.”

A perusal of the notification of Sale under Section 96(2) of the land Act 2012 dated 20/9/2016, and copy of the notification of sale, are both indicated “Registered Post” and “Certificate of posting”. If these notices were registered or were under certificate of posting, there was then readily available a certificate showing to whom it was posted to and when and the amount paid for such posting. The certificate would then remove all doubt on the part of the chargee and shift the burden again, on the applicant. None of those certificates of posting are exhibited. It is strange that they are not exhibited taking into account that the applicants case is grounded on the lack of service. Where a proper statutory notice has not been issued the power of sale cannot arise see Office equipment services Ltd. Vs. Corperative Bank of Kenya HCC. 22 of 1995 unreported.

[8] I am not convinced that any proper notice was ever sent under Sec. 96(2) as required by Law. As such no statutory power under the charge could arise. The applicant have to that extent established a prima facie case with a probability of Success. I am also satisfied that no amount of damages can compensate that wrong. As guided by the court of Appeals decision in National Bank of Kenya Ltd. Vs. Shinnners Plaza Ltd. I allow the application and restrain the defendant by itself or its authorized agents, servants or employees from advertising, selling disposing or otherwise dealing with LR No. East Busuku/South Kanduyi/7010 until such time as the 1<sup>st</sup> defendant shall serve the defendant/applicant with a valid statutory Notice in accordance with the law. Cost shall be in the cause.

Judgment read in Open court.

**Dated at Bungoma this 22<sup>nd</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Joy: Court Assistant

Mr. Amani: For Kisinga for the 1<sup>st</sup> defendant

Firm of Kraido for the Plaintiff

Mr. Murunga holding brief