



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 56 OF 2018**

**1. KWALE CEMENT FACTORY LIMITED**

**2. RISING STAR COMMODITIES LIMITED.....PLAINTIFF**

**VERSUS**

**BANK OF AFRICA KENYA LIMITED.....DEFENDANT**

**R U L I N G**

1. Even though there are three applications in the file, all were on the 29/8/2018 directed to be heard together because when critically analyzed all boil down to the question whether or not an injunction should be granted and if granted, what terms should be imposed by the court.

2. The applications to be considered in the ruling are; the Notice of Motion by the plaintiff dated 24/7/2018, seeking injunction pending the hearing and determination of the suit; the Notice of Motion dated 1/8/2018 seeking review of the court orders made on the 25/7/2018 and commanding the plaintiff to pay a sum of Kshs.10,000,000/= toward reduction of the debt and to meet the auctioneers costs for the aborted auction and the third application dated 9/8/2018 by the defendant seeking orders of declaration that the *ex parte* interim orders granted to the plaintiff on the 25/7/2018 be set aside, that the same lapsed upon failure to deposit the sum ordered, that the orders lapsed on the 14<sup>th</sup> day provided by law, that the defendant be at liberty to exercise its statutory power of sale and that the application be heard together with that by the plaintiff dated 24/7/2018.

3. At the hearing it was agreed by consent that the plaintiffs' applications be treated heard as one and the defendant application be treated as an opposition thereto.

**What are the grounds of seeking injunction**

**against the defendant?**

4. In both the plaint and the Notice of Motion, the defendant is accused of seeking to exercise its statutory power of sale prior to compliance with the provisions of Section 96(2) and 97(2) of the Land Act as well as Rule 11(b)x and 15(d) of the Auctioneers Rules. The suit however admit service of Notice under Section 90 of the Act.

5. At trial however the advocate for the plaintiffs abandoned the complaint about failure to value the property within 12 months of the sale as it was shown by the documents availed by the defendant that there was a current valuation report. The dispute then remained on whether there had been served Notices under Section 96(2) and Rule 15 of the Rules.

6. In Order to answer to those complainants, the defendant in its application, now treated as an opposition to the application for injunction, filed the Affidavit of BEN MWAURA. In that Affidavit notices and certificates of posting were exhibited at pages 46 – 52. Those documents irrefutably show that the Notices were indeed issued. The question is however whether after issue the same were ever served.

7. This determination will revolve around the question whether or not the notice were served and not whether they were issued. That is the sole issue for determination by the court.

**Analysis and determination**

8. Under section 96(2) Land Act, a valid notice must be given to not only the chargor and the borrower but to all the persons enumerated under subsection (3). There is exhibited to court in the said Affidavit of BEN MWAURA a notice shown to have been addressed to the 1<sup>st</sup>

plaintiff as the chargor and copied to; undisclosed lessees, the second plaintiff as the borrower and two gentlemen named Ali Badrudin and Gulbanu Badrudin Alibhai.

9. The service upon the undisclosed lessees were shown to be by affixing the notice on the property a fact not disputed, while service upon the others was shown to have been intended to be by registered post to the disclosed postal addresses.

10. Equally there are also notices issued by Ms. Watts Auctions and dated 23/5/2018 and directed at the two plaintiff as the registered owner and borrower respectively.

11. As said before the only task of the court is to establish if there was a valid service on the persons intended. For the 40 days Notice, there were two certificates of posting exhibited to show postage. The first problem is that as drafted and exhibited that notice was due for service upon the plaintiffs as well as the two individuals who I take to have been directors of the charger. There is no evidence at all that the Notice to the 1<sup>st</sup> plaintiff as the charger was ever posted. To that extent, there has not been demonstrated due compliance with the requirement of section 96(2), and therefore, in law, the right to exercise the power of sale had not accrued.

#### **How about service o the directors and the borrower?**

12. The Notice shows clearly that it was intended to be sent to P.O. Box 9722 – 00100 Mombasa. The problem here is that there is nothing to show that address to have been that for the borrower. What is shown from the legal charge and even the letter by the borrower to the relationship manager of the bank forwarding the suit titles is that the postal address of the borrowed is P.O. Box 95819-80106 PUNJANI ROAD, SHIMANZI MOMBASA. Even the certificate of realization says the mail sent on 15/02/2018 was destined for GPO Nairobi. To that extend the Notice under Section 96(2) was never served upon the borrower as was mandatory. That is enough to show a prima facie case and therefore right to seek and be granted an injunction.

13. Even though there were other consideration about the notices under Rule 15 auctioneers Rules, to this court, one transgression against the law is enough to demonstrate a prima facie case. I will thus not consider whether or not the Notification of sale was served. I may only comment that at the hearing, when I posed the question to Mr. Waweru whether, on the evidence availed by his client, he was convinced that there had been valid and effective service, counsel readily and candidly admitted that there was a problem with the service.

14. I would also not address the question whether or not there would be a damage incapable of compensation by an award of damages because I hold the view that a transgression against the dictates of the law is a grave matter which when it touches on an immovable property, like in this case, caslades to the level of fundamental right and it should not be the law that one's right may be trodden upon at will merely because the transgressor can pay damages.

15. That would be to say that those with financial muscle are not equal before the law and not subject to it because they can pay damages. I don't believe that is the object intended to be achieved by the test of irreparable loss as established by the court of law as a pre-requisite of grant of temporary injunctions.

16. Having so said, and being aware that the debt is admitted as due and owing, should I grant an injunction pending the hearing and determination of the suit?

17. The injunction I am mandated to grant is to address the right of the plaintiffs to be afforded the benefit of a notice demanded by law. It should not be one that affords to it a benefit larger than permitted by the law. I grant an injunction on the basis that no notice under Section 96(2) Land Act was served, and that injunction shall last till that dictate of the law shall have been complied with.

18. Consequently, an order of temporary injunction is granted to the plaintiffs against the Defendants jointly and severally and restraining them from selling or offering for sale the parcels of land situate in Kwale County and known as **KWALE/SHIMONI ADJ/349, 565,426 and 763** upto the time the defendant shall have issued and effectively served a notice under Section 96(2) of the Land Act.

19. I order that the costs of the application shall be costs in the suit.

**Dated** and delivered at **Mombasa** this **31<sup>st</sup>** day of **August 2018**.

**P.J.O. OTIENO**

**JUDGE**

**Delivered and signed at Mombasa this 31<sup>st</sup> day of August 2018**

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**JUDGE**