



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.272 OF 2016

JULIUS OPIO.....PLAINTIFF

VERSUS

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. On 8th August 2016 a Consent herein was entered in the following terms:-

“By consent of the parties, the Plaintiff/Applicant to pay Kshs. 1 million (Kshs.1,000,000) on or before the 31st August 2016, as the first installment of the payment towards the amount in arrears, of Kshs.2 million as at the end of August 2016, and thereafter the Applicant to service the balance of the arrears by monthly installments of Kshs. 350,000 until payment in full. In the meantime the parties to file written submissions on three outstanding issues namely:-

- **Whether the Respondent were bound to issue fresh Notification before the exercise of their Statutory Power of Sale.**
- **Who should pay the legal fees or costs of this litigation**
- **Who to pay the Auctioneers fees/costs”.**

2. The answers to the second and third issues fall into place naturally on resolution of the first question.

3. The Plaintiff obtained a mortgage facility from the Defendant for the sum of Kshs.18,500,000/-. That facility was secured by a charge over Land reference Number 28/250.

4. The Plaintiff defaulted in repayment of the loan and on 14th December, 2014 the Defendant issued a 3 months Statutory Notice of Sale. Default continued and on 16th March 2015 the Defendant issued a 40 days Notice pursuant to Section 96 of the Land Act. Upon receipt of this 40 days Notice the Plaintiff settled the arrears on or about 2nd April 2015.

5. The Plaintiff concedes that the Law is that Statutory Notices remain valid even where partial settlement of the debt is accepted by the Chargee. Further that it would be unnecessary to re-issue fresh Notices if a promise or agreement to pay is not fulfilled wholly. But the Plaintiff argues that the circumstances here are distinguishable because when the Notices were issued their demands were completely satisfied.

6. This Court has considered the evidence placed before it by way of Affidavit evidence and the submissions of Counsel and has formed the view that the determination of the main issue herein turns on the wording of the 40 day Notice of 16th March 2015.

7. The earlier three months Notice of 10th December 2014 read in part as follows:-

“TAKE NOTICE that you are hereby required to RECTIFY the aforementioned default as follows:-

1. Pay the entire outstanding amount of Kenya Shillings One Million, One Hundred and Sixty Six Thousand six Hundred and Eleven, Cents Ninety Four (KES 1,166,611.94) together with interest accruing per annum at the contractual rates until payment in full together with fees and any expenses incurred (including valuation fees) and rectify the default by three (3) months after the date of postage of this letter (which date shall also be the date for repayment for purposes of Section 56 (2) of the Land Registration Act, 2012). Please note that there is a further oncoming monthly installment of Kenya Shillings Two Hundred and Forty Six Thousand, Three Hundred and Fifty Eight, Cents Fifty Six (KES 246,358,56), due on the 10th day of every month.

2. In the event that the defaults particularized above are not rectified within the time specified in this notice, the Mortgagee shall proceed to exercise its statutory power of sale in respect of the Mortgaged properties Land Reference Number 27/250, Original No. L.R 27/72/13 without prejudice to the exercise of any other statutory remedies it may deem fit to exercise.

3. The Mortgagor is hereby notified in accordance with section 90(2) (e) and 103 of the Land Act 2012 that you may apply to the Court for relief against certain remedies.

MORTGAGEE’S POWER OF SALE PURSUANT TO SECTION 90(3) AND 96(1) OF THE LAND ACT 2012.

The Mortgagee hereby GIVES YOU NOTICE that if you continue to default in making payment of the aforesaid sum three (3) months after the date of postage of this notice, and fail to rectify the defaults within the time lines set out above, the Mortgagee shall sell the above property under its statutory power of sale in accordance with the provisions of section 96(1) as read with section 90(1) and 90(3)(e) of the Land Act 2012 without any further intimation to you in this respect in order to realize the amounts due to the Mortgagee and secured in part by the said Mortgage and will hold you liable for all costs and consequences arising therefrom”

8. It was clear from the Notice that if rectification did not happen within the period of Notice then the Chargee would be at liberty to exercise its statutory power of sale so as to **recover all the amount due to it, ie. the entire debt.** The amount due to it at the date of the Notice was Kshs.16,420,818.85. This Notice, if the Court should observe, was in conformity with the Provisions of Section 90 of the Land Act 2012.

9. It is common ground that the Plaintiff did not pay up the amount needed to rectify the default as demanded in this Notice of 10th December 2014. On default the amount now due would be the entire outstanding debt.

10. Default having persisted and in order to escalate the realisation process, the Defendant would then have to issue a Notice under Section 96 of The Land Act. But when it did so on 16th March 2015, the Defendant chose not to call for the entire debt. The Notice reads:-

March 16,2015

Julius Gordon Anyango Opio

P.O. Box 962-00100

NAIROBI

Dear Sir,

RE: FORTY DAYS NOTICE PURSUANT TO S.96 OF THE LAND ACT, 2012 OF INTENTION TO SELL IN RESPECT OF EH MORTGAGE DATED 26TH OCTOBER 2009 OVER L.R 27/250, ORIGINAL NO. L.R 27/72/13 (“THE PROPERTY”)

We act for CFC STANBIC BANK LTD and refer to the Ninety days Statutory Notice issued to you by us client on 10th December, 2014 for outstanding arrears of Khs.1,166,611.94 as at 10th December, 2014 together with interest accruing at the contractual rate.

The outstanding arrears as at 11th March 2015 now stands at Kshs.1,981,728.22 while the amount due stands at Kshs.17,041,077.73.

In light of your failure to comply with the aforesaid notice, TAKE FURTHER NOTICE that if you persist to default in making payment in respect of the arrears of installments, we have mandatory instructions to sell the above property on behalf of our client, FORTY DAYS after the service of this letter, under the statutory power of sale pursuant to the provisions of Section 96(2) of the Land Act 2012, without any further reference to you for purposes or realizing the amount due to our said client and secured by the said mortgage and shall hold you liable for all incidental costs and consequences arising there from.

Yours faithfully

WAINAINA IRERI & COMPANY

(my emphasis)

11. The Notice was demanding the payment, not of the entire debt, but arrears of installments and it is not contested that those arrears were paid within the Notice period.

12. This Court takes the view that because of the manner in which the 40 days Notice was worded there was total compliance with the Notice when the Plaintiff paid the arrears and a fresh Notice under the provisions of section 96(2) of the Act was necessary if there was default in the future.

13. I reach this decision in the unique circumstances of this case but emphasize that where a statutory Notice calls in the entire debt, receipt of part payment by the Chargee does not waive the validity of the Notice nor does any requirement arise for the Chargee to issue fresh Statutory Notices should there be default in the future. This is in line with the Decision of the Court of Appeal in MBUTHIA VS. SIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] eKLR where it held,

“It is plain that Section 74 did not impose on the Chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the Chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no charge in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgage”.

14. But having reached the Decision I have in the unique facts of this case I order as follows:-

(i) The Auctioneer Fee/Charges shall be paid by the Defendant.

(ii) Costs of this suit to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 15th day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Okubasu for Plaintiff/Applicant

Murugara for Kabaiku for Defendant/Respondent

Alex - Court clerk