



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 39 OF 2013

**ECOBANK KENYA LIMITED. 1ST
APPELLANT**

**SAMUEL MUTAHI GATHOGO T/A VALLEY AUCTIONEERS. 2ND
APPELLANT**

VERSUS

**GRACE WANJIRU GITONGA.
RESPONDENT**

(From the Ruling and Orders of S Atambo (Ms) Principal Magistrate in the Milimani CMCC No. 4780 of 2012)

J U D G M E N T

This appeal arises from a Ruling made by the Milimani, Principal Magistrate in Nairobi CMCC No. 4480 of 2012 in which the lower court granted an injunction order restraining the herein Appellants from advertising, offering for sale, alienating, transferring, disposing, auctioning or in any other way dealing with the Respondents properties Titles L.R. Nos. Nairobi/Block 82/6416 and L.R. No. Ndonyo Sabuk/Komarock Block 1/130, pending the hearing and final determination of the lower court suit. The said ruling also ordered that an intended public auction sale of the above cited properties then scheduled for 2st August, 2012, was wrongful, irregular and premature. And finally the Ruling ordered the 1st Appellant herein to furnish the Respondent with a true and reconciled statement of the relevant loan account.

The facts behind the orders, as far as this court understands, were as follows: - The Respondent charged the above cited properties with the 1st Defendant-Ecobank Kenya Limited so that the latter should and indeed advanced a sum of Ksh.2,000,000/- in favour of the Respondent's Limited Company known as Oceanian Venture Limited, and to which the Respondent became a Guarantor of the loan. When the borrower defaulted which is not denied, the 1st Defendant Bank proceed to exercise its statutory power of sale.

The Respondent resisted the attempt of the 1st Appellant's attempt to exercise its statutory power of sale by filing the suit at the lower court by raising the following grounds: -

- 1. That the 1st Appellant-Bank had not served the relevant mandatory Notice to the Respondent - Chargor.**
- 2. That in any case, the Bank Chargee, could not directly exercise its statutory power of sale**

before first and foremost seeking remedy from and against the borrower – the Oceanian Venture Limited – by either appointing a Receiver or pursuing the said company.

The Appellant's position in the trial court, however, was that it had properly issued and served the required statutory notice before instructing the 2nd Appellant to issue its notice as well and thereafter proceed to auction sale as authorized in the charge contract.

As to the issue of taking recourse against the borrower first and foremost, the 1st Appellant had argued that the statutory power of sale is exercisable directly and immediately on default of payment as a breach of contract, and that it is not pegged to first pursuing the borrower before turning to the mortgagor. Appellant also argued that in this case, the borrower which is a company owned by the Chargor, was not legally different from the Chargor herself.

In dealing with the two issues above, the trial court first took the stand that the facts between the parties were not in dispute a position that cannot be correct because the two sides had already differed over the issue of service or non-service of the mandatory statutory notice. While the 1st Appellant had averred that it had served the notice in accordance with the contract by sending same by registered post, the Respondent denied having ever been so served or having received the notice.

The same issue was placed before this court and the court has considered it after examining the lower and this court's record. In its Replying Affidavit at the lower court, sworn by one Caroline Mbenge, the Appellant had deponed that it had, in accordance with the Registered Land Act, issued the statutory notice and sent the same under registered post to the Respondent's postal address as provided in the contract of the registered charge. The record confirmed that the said address is the same as the one on a hand-written letter sent by the Respondent at the time or after the Notice was sent to the Respondent (see page 87 of Mbenge's annexures). The same postal address appeared to be the one given by the Respondent's Letter of Offer dated 17th December, 2009 (page 47 – 51 of Mbenge's annexures). In the above circumstances, this court makes a finding that the statutory notices were lawfully and properly served. Indeed this court does not believe that the Respondent's case was anchored on that issue of statutory notice. Furthermore the Appellants had deponed that to confirm that the Respondent had indeed been served with the statutory notice, the Respondent in fact made approaches to the 1st appellant seeking leeway to redeem the two subject properties from intended auction sale as deponed in paragraph 15 of the Appellants relying affidavit which averments was never contradicted by the Respondent.

In conclusion on this issue, although in the court's view it was incumbent upon the Appellant to satisfy the courts that it had indeed issued and served the mandatory statutory notices upon the Respondent/Chargor before embarking on the process of realization of its security, this court is indeed satisfied that the statutory notice was properly served.

The second issue upon which the lower court based its decision to grant an injunction restraining the Appellant from realizing its security was that the Appellant/charge should have, first and foremost pursued the Principal Debtor/Borrower by either appointing a Receiver or by winding up the borrower company – the Oceanian Ventures Limited. It is the Appellants case that the Application for injunction before the trial court, was not based upon any such ground nor did the whole application and canvassing of the application touch on the same as a basis. The Appellant accordingly urged that the issue was alien to the application and a total departure from the application before the court, which therefore, made the court err in fact and law. The Appellant further argued that the above issue was not pleaded in the application, nor canvassed by either party before the lower court to avail it before the lower court a chance to base its finding on it.

I have examined the injunction application which was before the trial court. It indeed was not based on the issue of winding up the borrower company or appointing a receiver.

Bullen and Leake (12th Edition) at page 3 on the issue of making an order which had not been sought by a party pleaded, stated thus: -

“The system of pleading operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

In this case before me accordingly, the parties were not aware of the issue of appointing a receiver or winding up the borrower company. The issue same was not pleaded as a ground upon which the application was based. Could it be proper for such an issue to be later introduced and applied by court without giving opportunity to the parties to respond?

In the case of **North Kisii Central Farmers Limited Vs Jeremiah Mayaka Ambwui and 4 Others, Eldoret Civil Appeal No. 84 of 2006**, the Court of Appeal stated thus on this issue: -

“... One of the issues of determination of appeal in the case of Abdul Shakoor Sheikh Vs Abdul Najeid Sheikh Civil appeal No. 161 of 1991 (UR) was the complaint that the trial Judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this a part of the order dependent on a non-existent appeal, the Judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a Plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation.....”

This court accordingly, concludes that the issues for determination in a suit should generally flow from the pleadings, but in this case before me, the trial magistrate had no right or proper reason to pull into the application an issue which was not pleaded to base his decision on it. In doing so the trial magistrate decided this matter against the Appellants on matters which were extraneous and not arising from the dispute as clearly pleaded in the application for injunction dated 17th August, 2012 I hold that such departure amounted to an error on the face of the record.

Was the lower court, therefore entitled to issue the injunction sought by the Respondent/Chargor on the newly introduced grounds as it did? I have in this investigation examined the Charge document dated 30th November, 2009, Clause 32. The Clause provided thus: -

“Notwithstanding that as between the Chargor and the Borrower, the relationship may be that of the guarantor and principal debtor and that the monies secured by this Charge may be drawn only by the Borrower, the Chargor hereby agrees that all such monies shall be recoverable under this Charge and against the Charged Property as though such monies had been borrowed by and advanced to the Chargor as the sole and principal debtor (s).”

Clearly then, the Chargor, who is the Respondent herein, and not the Borrower Company herein, remained the party to be first and foremost, answerable in case of a default in repayment of any instalments agreed in the Charge document or contract.

Having come to the above conclusion, it is clear that the Respondent failed to demonstrate a prima facie case before the trial court. she failed to demonstrate that auction sale of the charged properties was not what she had contracted for with the Appellant Bank as the consideration for advancing the funds of Kshs.2,000,000/- to the Borrower company. In the circumstances, the Respondent failed to show that unless the injunction order was granted, she was going to suffer irreparable loss which she had not contracted for and which could not be compensated by the Appellant, if she were later to succeed in her suit. In any case, the Respondent herein had sought general damages as a relief if the Appellant auctioned the charged properties. In cases where damages are sought, no injunction should be available to the Plaintiff because damages will avail adequate compensation.

Finally, it is now trite law that in cases where a Chargor contracted to be advanced funds on agreed terms and conditions, in default of which the chargees right to realize its security would be invoked the court would rarely interfere with the said right when it is due. The Plaintiff charger would rarely demonstrate a prima facie case after breaking the terms and conditions in the mortgage contract.

The result is that this appeal has merit. It is hereby allowed by setting aside the orders of injunction of the lower court made on 18th January, 2013 and thereby giving the 1st Appellant liberty to exercise its statutory power of sale to realize its security. Costs are to the Appellants here and below. Orders accordingly.

Dated and delivered at Nairobi this 27th day of July, 2015.

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D A ONYANCHA

JUDGE