



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 33 OF 2013

LEMMY KABURI MBOGORIPLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK LIMITEDDEFENDANT

RULING

1. Plaintiff obtained a financial facility from the Defendant and charged, as security, his property **Plot L.R. No. MOMBASA/BLOCK XII/73 (the property)**. In his plaint in this matter Plaintiff pleaded that due to “harsh economic constraints in business” he had been unable to effectively service his said loan facility. That despite Defendant knowing the Plaintiff was trying to pay the facility it proceeded to serve Plaintiff with notification of sale of the property. The sale was scheduled on 12th April 2013 but was stopped by an interim injunction issued by the Court on 10th April 2013.
2. Plaintiff seeks interlocutory injunction be issued by Notice of Motion dated 10th April 2013 stopping the auctioning of the property on the ground that Defendant failed to issue him with 90 days notice of default and 45 days notice of sale of property. Plaintiff does not therefore deny that he is in default of payment of the loan.
3. The only issue for determination is whether Defendant served Plaintiff with the Statutory Notice as required by law.
4. The Defendant attached to the Replying Affidavit sworn by Clement Kasena, Defendant’s Branch Manager of Defendant’s Mvita Branch, the two Notices sent to the Defendant. Along side with those Notices Defendant annexed a form entitled ‘Postal Corporation of Kenya list of Registered Postal packets, Registered and Ordinary Parcels.’ This form bears columns showing various names of persons and their address and number assigned to their parcel sent to them by Defendant. Amongst the names is Plaintiff’s name.
5. The Plaintiff in my view bore a burden to prove that did not receive the parcel addressed to him through Post Office Box Number 88660-80100, Mombasa bearing Registration or Parcel No. 869. With that information Plaintiff ought to have made inquiry of the fate of that Parcel No. 869. It

was not enough for Plaintiff to merely deny being served with the Notice having been given that information about the postage. Plaintiff failed therefore to shift the burden upon him as required under Section 107 of the Evidence Act Cap 80.

6. That apart, my decision in this Ruling will more be influenced on the adequacy of the Statutory Notices sent by Defendant to the Plaintiff. Defendant sent two Notices.
7. The first is dated 11th September 2012. It is entitled “**STATUTORY NOTICE UNDER SECTION 90(1) (2) (3) (E) OF THE LAND ACT 2012 LAWS OF KENYA**”. By that Notice Defendant inform the Plaintiff the following-
 - **That the Defendant Kenya Commercial Bank is the Successor in title of Savings and Loan Kenya Ltd.**
 - **That the Defendant is the chargee of the property.**
 - **That the Defendant was demanding Kshs. 9, 201,653.60 as amount due and owing in Plaintiff’s account as at 16th July 2012.**
 - **That the outstanding amount would continue to attract interest at the rate of 19% until payment in full.**
 - **That interest would be calculated on daily balances and applied at the end of every month and was last applied on 30th June 2012.**
 - **That if that amount plus interest was not paid to Defendant three months from the date of service of the notice the Defendant would commence sale of the charged property to recover the amount outstanding.**
 - **That the date of service would be 10 days from the date of posting.**
 - **That the sale of the property would be by public auction.**
 - **That any part payment or proposal made by Plaintiff would be on without prejudice basis and would not constitute a waiver of the Notices unless the entire amount was paid.**
8. The first thing I will mention about that first Statutory Notice dated 11th September 2012 that it was posted, according to Exhibit No. “CK 3” on 18th September 2012. Accordingly as per the Notice I have reproduced above the Plaintiff will be deemed to have been served with that Notice ten days after 18th September 2012, that is 28th September 2012. The three months Notice would then have expired on 28th December 2012. The Defendant however served Plaintiff with another Notice dated 20th December 2012. That second Notice was dated eight days before the expiry of three months.
9. That second Notice dated 20th December 2012 was entitled “**STATUTORY NOTICE TO SELL UNDER SECTION 96(2) OF THE LAND ACT, 2012 LAWS OF KENYA.**” Apart from that title which quotes Section 96 the information communicated to the Plaintiff by that Notice is a replica of the first Notice dated 11th September, 2012.
10. I have taken the trouble to set out the contents of the Notices because in my humble view Defendant’s Statutory Notices fall short of those required under The Land Act. There are two Sections of that Act that obligate the chargee to give charger Statutory Notice before exercising the right to sell a charged property. The provision of Sections 90 and 96 of the Act call upon chargees to have paradigm shift in their formulation of the Statutory Notices to the chargor. In my

humble view there is a reason why the legislature required chargee to give two Statutory Notices. Those two Sections call upon the chargee to meet very specific perimeters in the Notices they serve.

11. Section 90(1)(2) and (3) provides as follows-

“90(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. The notice required by subsection (1) shall adequately inform the recipient of the following matters-

- a. The nature and extent of the default by the chargor;
 - b. If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d. The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
3. If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may-
- a. sue the chargor for any money due and owing under the charge;
 - b. appoint a receiver of the income of the charged land;
 - c. lease the charged land, or if the charge is of a lease, sublease the land;
 - d. enter into possession of the charged land; or
 - e. sell the charged land;”

That Section calls upon the chargee to give not less than two months Notice to the chargor of his default and to seek the chargor to rectify the situation and to inform him the consequence of failure to rectify. In addition I see that Section requiring the chargee to inform the chargor the remedies available to him in those circumstances. Subsection (3) provides the options available to the chargee if the chargor does not rectify.

12. Section 96 relates to the chargee’s power of sale. Section 96 (1) and (2) provides as follows-

“96.(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under Section 90(1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell 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.”

Under the above Subsections chargee has to give not less than 40 days of intention to sell charged property. Subsection (3) gives a list of persons to whom such a Notice should be copied to.

13. I do find that Defendant's Notices of Statutory Notice did not meet the legal requirements of Sections 90 and 96 of the Act. For that reason Plaintiff will be granted an injunction to restrain Defendant from selling the property under those Notices. Such an injunction however will be limited to the Notices so far issued. The chargee will be free to issue fresh Notices which comply with the law if the Plaintiff continues in default. This indeed was the holding of the case **NATIONAL BANK OF KENYA LIMITED -Vs- SHIMMERS PLAZA LIMITED (2009)eKLR** where it was stated-

“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”

14. Accordingly the Court grants the following orders-

- a. **An injunction is hereby granted restraining the Defendant from selling by public auction Plot L. R. No. MOMBASA/BLOCK XII/73 if such sale shall be based on the Statutory Notices so far issued. For the avoidance of doubt the Defendant can sell the said property in exercise of its Statutory Power of Sale once it serves Plaintiff with valid Statutory Notices.**
- b. **Plaintiff is awarded cost of Notice of Motion dated 10th April 2013.**

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE