



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 31 OF 2013

FREDRICK A. MAKUMBIPLAINTIFF

-V E R S U S-

KENYA COMMERCIAL BANK LTDDEFENDANT

RULING

ON NOTICE OF MOTION DATED 20TH SEPTEMBER, 2013

BACKGROUND

1. Plaintiff is the registered owner of land known as L.R. No. 1956/888, 889, 890 (**the property**) situated in Voi, Taita Taveta County. He charged the property to the Defendant to secure Kshs. 40 million.
2. The Plaintiff by this action pleaded that the Defendant served on him, in February 2013, with statutory notice of auction of the property. Plaintiff further pleaded in his Plaint as follows-
 - **The Plaintiff avers that the aforesaid intended sale is unconscionable, unlawful, null and void insofar as the defendant has not previously served upon the plaintiff, its agents, and/or servants the requisite three (3) months' notice nor has any such notice been served as aforesaid within the stipulations of the law or at all.**
 - **The Plaintiff will aver that the relevant charge was at inception amenable to the provisions of Transfer of Property Act (1882) of India (now repealed) insofar as it was instituted prior to the 2nd May 2012 and that in any event the securities thereunder cannot be realized without service upon the mortgagor or chargor of at least three (3) months' notice of intention to sale in accordance with the provisions of Section 69A thereof (now replaced by Sections 90 and 96 of the Land Act, 2012) which requires that the appropriate notice be for a period of at least 3 months (Section 90(1) followed by a further notice of at least 40 days (Section 96(2) both issued by the chargee.**
 - **The Plaintiff will further contend that the notice left on the premises as hereinbefore referred to has purportedly been issued under the Registered Land Act (now repealed) which statute does not apply to the suit property and that the same is in any event ineffectual, null and void insofar as the statutory notice precedent thereto has not been issued. The Plaintiff will augment that the auctioneer's notice left on the property is in fact**

the 45 day notice contemplated by rule 15 of the auctioneer's rules and the statutory requirements relative to the notices precedent to sale have therefore not been met.

- **The Plaintiff contends that the aforesaid mode of proceeding by the Defendant is intended and will defeat his right to redeem his property and would in effect constitute a clog on his equity of redemption.**
 - **The Plaintiff's claim is therefore for a declaration that the intended sale of the suit property by auction is in the circumstances unlawful and for an injunction restraining the defendant permanently from selling and/or disposing of the suit properties in the absence of a valid redemption notice(s).**
3. The Plaintiff final prayers in his Plaint sought a declaration that sale by auction of the property “**in the absence of lawful service upon the Plaintiff of valid redemption**” was null and void; and for an injunction to restrain the Defendant from selling the property “**in the absence of a lawful redemption notice having been served upon the Plaintiff.**”
 4. Plaintiff filed a Notice of Motion dated 3rd April 2013 for interlocutory injunction which application was heard by this Court and a Ruling was delivered on 23rd August 2013.
 5. In the Ruling of 23rd August 2013 this Court grappled with the issue of whether the Defendant was obligated to serve Statutory Notices under Registration of Titles Act (**now repealed**) or under the Land Act 2012. The Defendants notices, that Ruling found, had mixed up the two Acts in the Statutory Notices it served on the Plaintiff. The Court discussed, in that Ruling, the confusion caused by those Notices as follows-
 - **If RTA was the law, it can be said that the defendant complied with the law by serving the three months notice. However, if the Land Act was the law, the Statutory Notice fell short of the mark. This is because the first Statutory Notice was dated 17th September 2012. In its body that notice indicated that service was deem to be 10 days from posting. It was posted as stated before on 20th September 2012. It follows that the three months ran out on 21st December 2012. The Defendant however proceeded to give the Plaintiff forty days on 19th December 2012. That forty days notice was at least one day before the legally determined period.**
 - **It goes without saying that the action that would follow those notices was not only drastic but would have had catastrophic effect on the Plaintiff. His property would have been sold following those notices. In his affidavit, he described the effect of such sale as '*ruinous consequences on the prospects on the business being carried thereon, not to mention the effect on the reputation and good will too.*' It was imperative therefore that the Plaintiff receive from the Defendant notices that were not only clear on which regime of Law the Defendant relied upon but also notices that complied with time computation set by the law. Failure to be clear on the law that the notices were served upon and failure to give sufficient time as required by the law on a prima facie basis will lead this court to issuing the injunction that is sought.**
 6. The Court proceeded to grant an injunction to the Plaintiff. It is that injunction that the Defendant seeks to be varied by the Notice of Motion under consideration. It is important to state that the Defendant filed a Notice of Appeal on 29th August 2013 against that Ruling.

DEFENDANT'S SUBMISSIONS

7. Defendant by the Notice of Motion seeks variation of the injunction and proposes that the Court in so varying do grant the following orders-

“2. THAT this Honourable Court be pleased to vary the order of injunction granted in this matter on 23.8.2013 as proposed below-

- a. **The Kenya Commercial Bank Limited be and is hereby permitted to proceed and serve upon the Chargor fresh Statutory Notices of Sale that comply with the provisions of the Land Act 2012 in the event that the Plaintiff continues to be in default.**
 - b. **The injunctive orders issued on the 23.08.2013 to subsist up to and until the fresh and compliant Statutory Notices shall have been served by the Bank upon the Chargor under the provisions of the Land Act 2012.**
8. Defendant by the affidavit sworn by its Legal Manager and through its Learned Counsel’s submissions stated that it does not now contest that the applicable law in respect of Statutory Notices is the Land Act 2012 (the Act). That this has become more clearer with the decision in the case **OVERSEAS PRIVATE INVESTMENT CORPORATION & 2 OTHERS –Vs- ATTORNEY GENERAL [2013]eKLR** where the Court determined that Section 78(1) of the Act was not unconstitutional. That is the Section which provides that the provisions of the Act apply to charges on land including any charge made before the enactment of the Act. In other words, the Section made the Act to be of retrospective effect. The charge, in respect of these parties before Court, was made before the enactment of the Act.
9. The Defendant by the affidavit in support of the application deponed that the Plaintiff has continued to default in the repayment of the loan granted to him.

PLAINTIFF’S SUBMISSIONS

10. Plaintiff filed Grounds of Opposition which grounds were captured in his written submissions.
11. Firstly Plaintiff submitted that Defendant having filed a Notice of Appeal against this Court’s Ruling the Defendant cannot seek to vary the very same injunction because that would amount to be an abuse of the Court’s process. According to the Plaintiff the Notice of Appeal remained “alive” until formally terminated and that if this Court did grant orders of variation as sought such variation would embarrass the Court of Appeal.
12. Secondly Plaintiff submitted that Defendant had failed to give sufficient basis which can lead to variation of the injunction. In support of that submission Plaintiff argued that the Defendant had not, in its pleadings, stated that the Act and its provision did not apply to the charge.

COURT’S ANALYSIS

13. Defendant application is brought under Order 40 Rule 7 of The Civil Procedure Rules. That Rule provides-

“Any Order for an injunction may be discharged, or varied, or set aside by the Court on application thereto made by any party dissatisfied with such order.”

That Rule gives the Court liberal power to vary or set aside an injunction order. The Defendant deponed in the affidavit, of its Legal Manager, that it desired to serve upon the Plaintiff Statutory Notices which comply with the Act because the Plaintiff’s default in repayment of its debt with Defendant has continued. It is important at this stage to state it has not been Plaintiff’s case that it is not indebted to the Defendant. What the Plaintiff faulted in this case was the Notices issued by the Defendant. Indeed the Court in issuing the injunction found that the issue for determination at the trial would be the applicable law on the Statutory Notices to be issued to the Plaintiff.

14. The Plaintiff did not deny that he has continued to default in the repayment of his loan and if that be so the debt has grown and will continue to grow whilst the injunction subsists. Justice J.

Kamau in the case SHILLINGI INCORPORATED –Vs- OVERSEAS PRIVATE INVESTMENT CORPORATION & 3 OTHERS [2014]eKLR on what can occur when the debt grows stated-

“The issue of depreciation of charged property was addressed in the case of Andrew Muriuki Wanjohi –Vs- Equity Building Society Limited & 2 Others [2006]eKLR where Ochieng J stated as follows-

‘... In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years ...’

15.The Court of Appeal in the case NATIONAL BANK OF KENYA LTD –Vs- SHIMMERS PLAZA LTD (2009)eKLR in considering the effects that injunction have to banks stated thus-

“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.”

That decision is on target with the facts of this case. The Defendant now says it is willing to issue the Plaintiff with Statutory Notices that comply with the law and accordingly there cannot be any reason to deny the Defendant that opportunity. After all, that would not take away Plaintiff’s right to challenge, if need be, the legality of such subsequent Notices.

16.On whether Defendant is estopped from seeking a variation of the injunction the Defendant relied upon the case DUNSON NJOROGE KAMWE A.K.A. NJOROGE KAMWE AND ANOTHER –Vs- THE DISTRICT LAND REGISTRAR MURANGA & ANOTHER CIVIL APPLICATION NO. NAI. 48 OF 2000 (UR 23/2000) where the Court of Appeal Ruled thus-

“The question as to when an appeal is filed in the Court of Appeal was conclusively decided by the Court of Appeal for Eastern Africa way back in 1954 in 1954 in Motel Schweitzer Vs Thomas Edward Cunningham & Another (1955)22 EACA 254 in which the Court held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its Registry, fees are paid and security lodged as provided by Rule 58 of the Court of Appeal Rules 1954. This decision was followed by our Court of Appeal in Yani Harvanto Vs E. D. & F Mann (Sugar) Ltd., Civil Appeal No. 122 of 1992 in which the Court (Gicheru, Kwach & Cockar, JJA) stated-

“The only issue before the Judge on this particular point was whether the filing of a notice of appeal constituted a preferment of appeal or not, because if it did, then clearly he had no jurisdiction.

The learned Judge was of the view that the only purpose that Rule 74(1) of the Court of Appeal Rules served was to enable a party to manifest its desire to appeal. We entirely agree with him. A notice of appeal, apart from manifesting a desire to appeal, appears to have a twofold purpose.

One of the two purposes is apparent from the rules that follow upto and including Rule 79. The other purpose and which in our view is the real purpose for the provision of the facility of filing a notice of appeal, is to enable the High Court to entertain an application for stay of execution before the appeal is filed under Rule 81 in this Court.”

So then the filing of a notice of appeal, which in any case is filed in the High Court in the same case filed from which an appeal is to be preferred, is not the preferment of an appeal to the Court of Appeal. An appeal is instituted in the Court of Appeal when a Memorandum of Appeal is drawn and incorporated in the record of appeal and duly filed in the Court of Appeal registry or sub-registry as the case may be. In this case only a notice of appeal has been filed. Consequently I hold that the Appellants in this case have not preferred an appeal to the Court of Appeal against the decree of this court which they seek to review and this application is not incompetent. This court has jurisdiction to entertain it.”

17. The Court of Appeal has also had occasion to express itself with specific reference to Order 40 Rule 7 which is under consideration in this Ruling in the case **NGURUMAM LIMITED –Vs- JAN BONDE NIELSEN & 2 OTHERS [2013]eKLR** viz-

“We agree with Mr. Pheroze Nowrejee, Senior Counsel, that the authority from Mulla on the code of the Civil Procedure relates to an application for review under the equivalent of our section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules rather than an application for discharge, variation or setting aside of an order under Rule 40(7). We are cautious against applying that authority in the present appeal because even a plain reading of Order 45 leaves no doubt that an application for review and an appeal are intended to be alternative remedies. We do not find a similar limitation under Order 40(7), although it must be plainly obvious whether an appeal can be sustained after a successful application for variation must depend on the extent of the variation of the order appealed from.

In our view, it would be too restrictive an approach, to adopt the position that an appellant who resorts to Order 40(7) by that fact alone, forfeits his right of appeal. First, the law has availed to an aggrieved party the remedy of appeal and that of an application for discharge, variation or setting aside of the order without any express edict that the remedies are available only as alternatives. Secondly, it is conceivable that an application under Order 40(7) may result in the discharge, variation or setting aside of an order, or it may be allowed in part or entirely dismissed. It cannot be the case that in all those eventualities an aggrieved party must forfeit the right of appeal. In our view, the true test of whether an application under 40(7) precludes an appeal is the extent to which the order appealed from has been varied or altered.”

It follows that Defendant’s Notice of Appeal is not an impediment to it moving the Court under Rule 7 of Order 40.

18. The Plaintiff’s argument that the Defendant had not shown sufficient reason why variation should be granted was not at all convincing. This is so in the light of Defendant stating that it shall issue Plaintiff with new Statutory Notices and in the light that Plaintiff’s default in repaying the loan has continued. Accordingly that submission is rejected.

CONCLUSION

19. In the end I find that Defendant’s Notice of Motion dated 20th September 2013 has merit and I do grant the following orders-

- a. **The injunction granted on 23rd August 2013 is hereby set aside on condition that the Defendant does issue the Plaintiff with fresh Statutory Notices of Sale in compliant with the Law.**
- b. **For the avoidance of doubt the injunction granted on 23rd August 2013 shall subsist until fresh Statutory Notices as ordered under (a) above are issued and legally take effect.**

c. The costs of Notice of Motion dated 20th September 2013 shall be in the cause.

DATED and delivered at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE