



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA DISTRICT REGISTRY
CIVIL, COMMERCIAL AND ADMIRALTY DIVISIION

CASE NO. 31 OF 2013

(FAST TRACK)

FREDRICK A. MAKUMBI PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. The Plaintiff is the registered owner of Parcels Nos. 1956/888/889 and 890 situated at Voi, Taita Taveta County (the '*suit property*').
2. The Plaintiff has erected on his properties apartments, two restaurants and two conference rooms. He charged those properties to the Defendant as security for a financial facility of Kshs. 35,000,000/-.
3. The Plaintiff has come to Court by Notice of Motion dated 3rd April 2013 seeking an injunction to restrain the Defendant from selling by public auction the suit property. From the exhibits before court it is clear that the Defendant had intended to sell the suit properties on 19th April 2013 but an exparte injunction was issued by this Court restraining the Defendant from selling. This Ruling now relates to interpartes herein of the Notice of Motion dated 3rdApril 2013.
4. The Plaintiff by his supporting affidavit of April 3rd 2013 does admit encountering financial problems with his business but fails to disclose whether he had maintained the repayment of his loan to the Defendant. He however denied receiving from the Defendant the prerequisite statutory notice before the proposed auction of his property.
5. This is what the Plaintiff said in his supporting affidavit in regard to the statutory notice-

“That however, I wish to state that at no time has there been any notice served on me personally or by registered post, a fact I have established from my relevant staff and mail records. I verily believe the information from my staff as truthful.”

6. The plaintiff deponed that he thus came to know of the Defendants intention to realize the security in February 2013 when a letter from Keysian Auctioneers was delivered on his property. That letter is dated 8th February 2013. It is a 45 days notice of the auction of the security as required

under the Auctioneers Act.

7. It is on the basis of the Plaintiff's allegation that he was not served with the statutory notice of the sale of his property that he seeks an injunction to restrain the Defendant from realizing his security.
8. The Defendant in his replying affidavit stated that the Plaintiff had defaulted in the repayment of his loan facility which as at 7th April 2013 stood at Kshs. 41,671,787.82/-. That amount would continue to accrue interest.
9. Further that the defendant issued the plaintiff with 3 (three) months statutory notice dated 17th September 2012. That Notice was sent by registered post. That the Statutory Notice had not been returned to the bank as undelivered item.

10. Further that on 19th December 2012 the Defendant issued the

Plaintiff with 40 (forty) days notice which was also sent by Registered Mail.

11. Because the Plaintiff had failed to repay his loan as demanded the

Defendant stated that it was entitled to place the charged property on sale by public auction or private treaty.

12. In the Defendant's view the present suit had been filed to delay the

auction of the Charged property. The Defendant further stated that it being a financial institution it needed its funds in order to run its operations and it would suffer loss if the Plaintiff default was sustained. In submissions the Plaintiff's counsel stated that the Defendant's notices were not in accordance with the law. In that regard he referred to Clause 12 of the charged document which provided as follows-

“Any written demand or other notice given by the Lender to the charger for any of the purposes of this charge or of the said Act shall be deemed to have been received by the charger on the date on which it is served on the charger personally or left for the charger at the charger's last known place of residence or business or sent by registered post to the charger at the charger's last known postal address in Kenya or served on the charger's attorney or displayed on the charged property.”

13. Further the Plaintiff's learned counsel referred to the Defendant's replying affidavit which alluded to the law under which the statutory notice was issued. Under the replying affidavit the Defendant stated that the applicable law to the charge was Registration of Titles Act (RTA) (*now repealed*). Under that Act the Defendant is only obligated to issue the Plaintiff with (3) three months statutory notice.

14. The Plaintiff however referred to the statutory notice dated 17th September 2012 addressed to the Plaintiff. That notice is entitled **“Statutory Notice under Section 90 (1) (2) (3) (e) of the Land Act 2012 Laws of Kenya.”**

15. The Plaintiff's submission are that if indeed the relevant law to the charge is the Land Act 2012 (hereinafter called the 'Act') then the Defendant was obligated to issue the Plaintiff with (3) three months statutory notice. In this regard the court was referred to Section 90 of the Act. Thereafter if the Defendant intended to exercise its power of sale Section 96(2) required it to give the Plaintiff a (40) forty days notice before proceeding to complete any contract for the sale of the charged property.

16. In response learned counsel for the defendant submitted that the relevant law in respect to the

charge was Transfer of Property Act and Registration of Titles Act (*both now repealed*). Under those statutes a Chargee was obligated to only give three months notice before exercising its power of sale of the charged property.

17. The Plaintiff relied on the following authorities **Trust Bank Ltd -Vs- Eros Chemists Ltd (2000)2 EA**. The Court of Appeal in reference to the Statutory notice prior to the sale of charged property had this to say-

“The object of a notice to sell under Section 69A(1) was to guard the mortgagor’s rights, because if the statutory right of sale was exercised the mortgagor’s equity of redemption would be extinguished. Accordingly, there was a positive and mandatory requirement that a valid notice of sale of charged property had to expressly state that the sale would take place after a three-month period following service of notice had elapsed.”

18. In the Case of **Aikman -Vs- Muchoki (1984) KLR** the Plaintiff in this case relied on the portion of the Court’s judgement where it stated-

“A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.”

19. The Defendant on its part relied on the case of **Maithya -Vs- Housing Finance Corporation of Kenya HCCC No. 1129 of 2002** to support its submission that it had supplied to Court copies of the Statutory Notices served upon the Plaintiff together with copies of the Certificate of Posting. In that case the Court was satisfied that a party had discharged its burden of proofing service effected on the Plaintiff when it exhibited the Statutory Notice and Certificate of Posting.

20. The Defendant cited the case of **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. In that case the Court of Appeal stated-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

21. On the irreparable damage the Plaintiff alleged in his affidavit that he would suffer if his property was sold by auction. In response the Defendant relied on the case of **Thomas Nyakamba -Vs- Co-op Bank of Kenya Ltd [2012]e KLR** where the quote stated-

“However, the Plaintiff contends that the charged property is the family’s residential property. Whereas in appropriate cases, the fact that the property being sold is a residential or family property may be considered in deciding whether or not to grant an injunction that consideration must be weighed against the fact that once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached. Otherwise, financial institutions would be reluctant to extend financial accommodation to genuine borrowers whose only security is their place of abode. In other words, the fact that the property is a residential home as well is just one of the many factors that the court takes into account.”

22. I have seen the Statutory Notice addressed to the Plaintiff through P.O. Box 661, MTWAPA giving the Plaintiff three months notice in which to pay the defendant Kshs. 37,789,705.42. I have also seen the certificate of posting which indicates that that statutory notice was sent to the plaintiff on 20th September 2012.

23. The first thing I wish to deal with in regard to that notice is to determine whether there is proof of service on the Plaintiff of that notice. Two issues arise firstly the burden of proof on whether service was effected shifted to the plaintiff. I say so because a copy of the statutory notice and the

certificate of postage that was exhibited by the defendant required the plaintiff to disprove that service. That holding is supported by Section 107(1) of the Evidence Act Cap 80. That Section provides as follows-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

That holding is also supported by the case of Maithya (supra)

24. It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that ***“he who asserts must prove.”*** See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.
25. The 2nd issue is that the Defendant posted the three month’s notice and the forty days notice to the Plaintiff through P.O. Box 661, MTWAPA. The Defendant in realizing its security relies on two charge instruments. One is dated 23rd March 2006. In that charge the plaintiff address is reflected as P.O. Box 661, MTWAPA. The second charge instrument is dated 18th May 2009. In that second charge the Plaintiff’s address is reflected as P.O. Box 41125-80100, MOMBASA. Both the three months and forty days Statutory Notices were sent to the Plaintiff through P.O. Box 661, MTWAPA. The Defendant was aware of the two different addresses shown as the Plaintiff’s address in the two charge instruments. Both addresses are different and distinct. It does not escape the court’s attention that the address P.O. Box No. 411-80100, MOMBASA was reflected on the latter charge instrument. The Defendant did not take care to ensure that Statutory Notice was served through both addresses. It instead choose to use one address for service of those notices. On the question of what is the pertinent law under which the party’s rights arise, whether RTA or the Act that issue becomes secondary if the notices were not received by the Plaintiff at all. The failure to serve the Plaintiff will amount to the defendant clogging the Plaintiff’s equitable right of redemption. It would amount to denying the Plaintiff information about the pending sale of his properties.
26. The purpose for which statutory notice of sale is given is to notify the mortgagor of the default and to give him notice to rectify the default. In this regard Section 90(1) and Section 96 of the Act are very instructive. The mortgagees will need to take particular care to ensure that notices that are given of their intention to exercise their right of sale do comply with those Sections. One of the requirements under Section 90 amongst others is for the mortgagee to inform the mortgagor of the amount of default. The purpose of giving that notice is to enable him to rectify the default. In this case, if the pertinent law was the Land Act the Defendant could not require the plaintiff to pay the whole outstanding amount but ought to have calculated the amount that make up the default and demand payment of that amount. I refer to the requirements of land act only on passing because one of the issues to be determined at the full hearing is the relevant law to which the exercise of the statutory power of sale falls under.
27. It is instructive to note that the Defendant has by the statutory notices issued to the Plaintiff created confusion on which law the exercise of statutory power of sale relate to. The charge instrument indicates that the relevant law is RTA. The statutory notices sent to the plaintiff for three months and forty days notice both reflect the applicable law as the Land Act. This dichotomy can undoubtedly lead to confusion on the part of the Plaintiff. If indeed the correct law was RTA all the Plaintiff required a three months statutory notice. However, if the applicable law was the Land Act the Defendant was obligated to give the plaintiff three months statutory notice and then forty days notice before completing any contract of sale.

28.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 deemed 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.

29.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.

30.The Defendant relied on the case of **Patrick Maguta Mwangi & Another -Vs- Consolidated Bank Ltd [2012]e KLR** to argue that if the court found that the statutory notices wanting it ought to order that the defendant was at liberty to serve other fresh statutory notices with a view to realizing its security. In the case quoted above the court had this to say-

“There is however, no doubt that the Defendants are owed a large sum of money and the only basis of granting a temporary injunction is the want of service of the statutory notice of sale. If that impediment is removed, the defendant’s statutory power of sale will arise and will become exercisable. In the circumstances, I allow the application dated 5th July, 2012 to a limited extent. The injunction sought to restrain the Defendant from selling the charged property is granted not until the suit is heard and determined but until the Defendants serves the Plaintiffs with the requisite statutory notice of sale.”

31.Such an order as sought by the Defendant I must admit and endeared itself to me. But I believe there is an issue for determination which ought to be determined before other notices are served on the Plaintiff. If RTA is the law the question is why would the Defendant site the Land Act in its notice? If the Land Act is the applicable law, the question is did the defendant serve the Statutory Notices as required under that Act? Additionally if the Land Act applies when did the rights accrued as per Section 162(1) of the Land Act? That Section provides as follows-

“Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

32.If the right accrued before the commencement of the Land Act that 2nd May 2012 then RTA as claimed by the Defendant would apply. If it was after this date then the Land Act would apply. It is for that reason that I find that the Plaintiff has shown a prima facie case with probability of success. This will lead this court to grant restraining order against the defendant. Since I do not entertain any doubt on this first principle of granting an injunction as set out in the case of **Geilla - Vs- Cassman Brown & Co. Ltd [1973] EA 358** I will not proceed to consider where the balance of convenience lies.

33.I grant the following orders-

(a) An injunction is hereby granted restraining the

Defendant itself, servant or otherwise from selling and or disposing of LR Nos.

1956/888, LR 1956/889, LR 1956/890 by public auction or otherwise until the determination of this suit or one year from today's date whichever occurs first. The limitation of the injunction does not affect the Court's power to extend the injunction where sufficient reason is shown as stated in Order 40 Rule 6 of the Civil Procedure Rules.

(b) The Plaintiff is granted costs of the Notice of Motion

dated 3rd April 2013.

Dated and delivered at Mombasa this 23rd day of August, 2013.

MARY KASANGO

JUDGE