KENYA FARMERS ASSOCIATION LTD…...…...……..……..PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD...……...……DEFENDANT

RULING

On 22nd October, 2009, I dismissed the applicant's application for injunction to restrain the respondent from disposing of certain properties in the exercise of the latter's statutory power of sale.

The following day, on 23rd October, 2009 the applicant approached the court once more with the instant application for orders of review pursuant to order 44 rule1 of the Civil Procedure Rules. The applicant is relying only on the ground that there is

" ***some mistake or error apparent on the face of the record……..”***

in terms of Order 44 rule 1 aforesaid.

The applicant has identified two errors, and not one, namely that the court relied on a stamp on the alleged statutory notice to hold that the applicant was duly served as evidenced by that stamp, while as a matter of fact the

stamp in question belonged to the respondent. The second error according to the applicant is in the finding of the court that the applicant had failed to prove that the outstanding facility was realized fully through the sale of certain properties by the respondent.

In response to the application, the respondent through its Nakuru Branch Manager, has averred that the application is misconceived, bad in law and an abuse of the process of court; that the statutory notice was duly served upon the applicant, which service was acknowledged by the applicant's witness in Nakuru H.C.C.C.NO.106 of 2004, **Kenya Farmers Association** Vs. **National Bank of Kenya Ltd**.; that the properties scheduled to be auctioned on 23rd October, 2009 were infact sold and therefore this application has been overtaken by events; that the statutory notices were sent to the respondent by registered mail; that the applicant ought to have appealed if dissatisfied by the ruling of 22nd October, 2009 and; that the order sought to be reviewed is not annexed to the application.

I have carefully considered these submissions. I have also considered the authorities cited mainly by counsel for the applicant. This application was canvassed for nearly one hour, yet an application for review on the ground of a mistake or error on the face of the record should not attract protracted

arguments. Either there is an obvious mistake or there is no obvious mistake. I will return to this shortly.

I turn to dispose first a technical issue raised by learned counsel for the respondent that the application is incompetent for the reason that the order sought to be reviewed is not extracted and annexed to the application. Under Order 41 rule 1, what is to be reviewed is the decree or the order. As early as 1929 it has been held that failure to extract a formal order or decree was fatal to an application for review. See **G.M. Jiranji** Vs. **M. Jiranji & Another**, (1929-30) 12 KLR 44 and recent cases such as **Uhuru Highway Development Ltd**. Vs. **Central Bank of Kenya & 2 Others**, H.C.C.C.No.29 of 1995 as well as **Fidelity Commercial Bank** Vs. **Michael Ruraya Mwangi & Another**, Civil Case No.232 of 2002.

There is no dispute that a formal order has not been annexed to the application. The applicant, however, argues that the order has been extracted and is in the court file but not signed. The Court of Appeal in **Veronica Rwamba Mbogoh** Vs. **Margaret Rachel Muthoni and Another,** Civil Appeal No.311 of 2002, cited in this application, held that;

"***On that score, we agree with Mr. Ngatia that there was substantial compliance with the procedure and it was a drastic sanction to dismiss the***

application on the mere basis that there was no copy of the decree annexed to an application filed in the same record which bore the decree."

Here too, I find that there was substantial compliance as a draft order is in the file, which in my view is in agreement with the ruling of 22nd October, 2009.

I turn now to the substance of this application. I reiterate that the application is grounded on the premise that there is a mistake or error apparent on the face of the record and that there is also an error in the court's finding that the applicant failed to demonstrate that it has fully settled the debt since the judgment of this court (Musinga, J.) in HCCC No.106 of 2004.

Let me start with the last ground. Learned counsel for the applicant submitted that Kshs.228m was realized from the sale of some of the applicant's properties by the respondent; that two other properties in Nairobi were sold and the respondent has failed to disclose the proceeds realized; that the valuation of the two properties is estimated at Kshs.238m. Counsel further submitted that the onus was on the respondent to prove that the value of the two Nairobi properties were insufficient to satisfy the debt. With respect, it cannot be the burden of the

respondent to prove that the entire debt has been settled. It is the applicant that has made that averment and it was incumbent upon it to show, at this stage, only on a *prima facie* basis that that was so. Secondly, where a court has made a finding of fact that there is no *prima facie* evidence that the debt has been finally settled, that finding cannot be the basis for an application for review on the ground of error on the face of the record. It can only be challenged on appeal. Thirdly, at this stage of the suit, the court was only dealing with *prima facie* evidence and not the merit of the application for injunction and on the basis, the court found that there was no evidence of settlement. Valuation and the value of a property is a different thing from, the actual value realized in a sale or auction. That disposes of the second ground.

The first ground is on the court's reliance on a stamp which it described as that of the applicant while in fact, it is for the respondent. The issue at the hearing of the application for injunction was whether or not the applicant was served with a statutory notice in terms of Section 74 of the Registered Land Act. This court in the ruling under reference found as follows:

"***On the statutory notice, it was submitted that the notice annexed to the replying affidavit do not cover all the properties and further that they are invalid for not giving three months from the date of service…….. The third argument against the***

notice is that they were not served on the applicant……..I have seen on record a letter from the respondent dated 7th August, 2006 giving the applicant notice of the former's intention to sell some thirty seven

(37) properties including those the subject of this application. It was argued that that notice or any other has never been served upon the applicant. That contention is not borne out by any evidence in rebuttal of the respondent's position that the same was duly served. That is supported by the applicant's stamp on that letter acknowledging receipt on 10th August, 2006. Prima facie therefore there was a notice which was received and acknowledged by the applicant……."
(Emphasis added).

The issue of service of notice is central in a suit where the respondent's exercise of statutory power of sale has been challenged on the ground of failure to serve the notice. I will shortly revert to this. Is there a mistake or error apparent on the face of the record? I have set out what the court stated in finding that a statutory notice was indeed served. The court based that finding on a letter dated 7th August, 2006 addressed to the

Managing Director of the applicant. That letter bears a stamp dated 10th August, 2006 signifying the date of receipt. But that stamp is for the respondent, National Bank of Kenya – Nakuru Branch, and NOT the applicant.

For a court to review its order or decree on the ground of an error on the face of the record, the error must be obvious. It was held in the case of **National Bank of Kenya Ltd**. Vs. **Njau** (1995-98) 2 EA 249 that:

"***A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."***

Mulla *on Code of Civil Procedure* Vol.2 14th Edition P.2335 describes such error as one which

"*…..**can be seen by one who runs and reads,"***

The error or mistake, if any, must be material. So that if it is an error or a mistake that will not change the order, then it is immaterial and there will be no review.

I have stated that a statutory notice is central in matters where the mortgagee purports to exercise its statutory power of sale. The importance of the notice was considered in **Trust Bank Ltd**. Vs. **Eros Chemist Ltd. & Another**, CA 133/1999 in the following words;

"***In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provides for a three months' period to lapse after service of notice."***

Clearly from the foregoing, by the basing its finding in respect to service of the notice on a stamp that did not belong to the applicant, that constituted, in my view a mistake or error that does not require an elaborate argument to be established. It is an obvious error.

Reference has been made by the respondent to evidence in Nakuru HCCC No.160/2004, where it is alleged that the issue of service was acknowledged by the applicant's witness. Photocopies of the proceedings were annexed. The matter before me was whether or not there was a mistake or error on the record. By making reference to proceedings in

H.C.C.C.NO.185/2009

Nakuru HCCC No.106/2004, the respondent was presenting fresh evidence which ought to have been presented by way of a further affidavit in the application for injunction in which the applicant had categorically denied service of the notice. Secondly, it is difficult to tell from the photocopies of the proceedings in Nakuru HCCC No.106/2004 who the witness was. Again, the averment that service was effected by way of registered post is not for this application. These are matters for the trial now that they were not brought out in the application for injunction.

In conclusion the applicant has not preferred an appeal and was free to seek the review of the order of 22nd October, 2009. There is a clear error on the face of the record, which error is material. The application for review was brought timeously. Both section 80 of the Civil Procedure Act and Order 44 of the Rules have been satisfied.

For the foregoing reasons, the order issued by this court on 22nd October, 2009 is hereby reviewed in terms of prayer (C) of the Notice of Motion dated 23rd October, 2009 with the effect that the applicant's application dated 29th September, 2009 is allowed pending the hearing and determination of this suit or further orders. The costs of that application are awarded to the applicant while I make no orders as to costs in the

H.C.C.C.NO.185/2009

instant application.

DATED, SIGNED and DELIVERED at NAKURU this 30th day of October, 2009.

W. OUKO

JUDGE