



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 23 of 2008

RINYA HOSPITAL LTD PLAINTIFF

VERSUS

1. CO-OPERATIVE BANK OF KENYA LTD)

2. SPOTLIGHT INTERCEPTS KENYA LTD) DEFENDANTS

RULING

The applicant obtained a loan facility in the sum of Kshs.2,000,000/= from the first defendant on or about the 25th day of August, 1997. The same was secured by a charge over L.R.NO.SOUTH SAKWA/WAWERE/647, hereinafter referred to as “*the suit property*”. Subsequently, the applicant sought for and was granted an additional loan facility in the sum of Kshs.700,000/= from the first defendant. The applicant started repaying the loan but after sometime fell into arrears. On 22nd April, 2008, the applicant’s Managing Director, Dr. Simon Owuor Odede, saw an advertisement in the “Standard Newspaper” in respect of the suit property to the effect that the second defendant was scheduled to sell on behalf of the first defendant the said property by public auction on 24th April, 2008.

The applicant rushed to court in the morning of 14th April, 2008 and filed an application under certificate of urgency seeking to restrain the defendants from selling the suit property. The court granted interim orders as sought.

The applicant advanced the following arguments in his aforesaid application:

- (a) That no statutory notice was served upon her by the first defendant and therefore the first defendant’s purported exercise of its statutory power of sale is pre-mature, irregular and illegal.
- (b) That the intended sale is contrary to Rule 12(d) of the Auctioneers Rules, 1997.
- (c) That she has a prima facie case with overwhelming chances of success.
- (d) That she stood to suffer loss that cannot be compensated by an award of damages unless the order sought is granted.

The applicant’s application was supported by an affidavit sworn by Dr. Simon Owuor Odede.

Mr. Oguttu for the applicant submitted that although the first defendant purported to have served his client with a statutory notice dated 13th November, 1998 that was annexed to the first defendant's replying affidavit, the same was defective in law and was thereof of no legal effect. This is because the same was expressed to take effect "***within three (3) months from the date hereof ---.***" He submitted that the law requires that the three months' notice be effective **from the date of service**. He cited the Court of Appeal decision in **TRUST BANK LIMITED VRS EROSS CHEMISTS LIMITED** [2002] 2.E.A 550. In that case, the court held that the right of sale by a chargor can only accrue three months after service of a statutory notice and that to omit to say so or to state a period of less than three months is to deny a chargee a right conferred upon him by Statute.

Mr. Oguttu further submitted that the second defendant could not lawfully conduct the sale prior to lapse of fourteen (14) days from the date of the first newspaper advertisement.

He added that there had been only one advertisement that was placed in a non-descript portion of "***The Standard***" newspaper.

Mr. Ochoki for the respondents opposed the application. He submitted that the first respondent served the applicant with a statutory notice dated 13th November, 1998 and the applicant wrote back acknowledging receipt of the same. It was therefore utterly false for the applicant to allege that it was not served with a statutory notice. Counsel defended the validity of the said notice, saying that the same cited the provisions of **section 74** of the **Registered Land Act**. The fact that the applicant was required to pay the outstanding sum "***within three months from the date hereof***" did not **ipso facto**, render the notice defective, he added. Mr. Ochoki further submitted that the applicant had not denied that it was indebted to the first respondent. As at the date of hearing the application the outstanding sum was Kshs.17,246,936.25. For that reason, the applicant had not established a **prima facie** case with a probability of success at the trial. He cited **DR. SIMON WAIHARO CHEGE V. PARAMOUNT BANK OF KENYA LTD**, Milimani Commercial Courts, Civil case No.360 of 2001. In that case, the court held that the chargor, having failed to establish a prima facie case against the chargee, an injunction could not issue even if the amount due under the charge was in dispute. He added that the first defendant was capable of compensating the applicant in the event that the charged property was sold and the applicant was successful in its suit.

Regarding the applicant's complaint that the advertisement for sale of the suit property was on a remote part of "***The Standard***" newspaper, Mr. Ochoki submitted that the law did not state that such an advertisement had to be placed on any given page of a newspaper.

Responding to the issue regarding the defective notice issued by the second defendant (the auctioneers), Mr. Ochoki referred to a letter dated April 3, 2008 annexed to the first defendant's replying affidavit as annexure B.N 2. The same notified the applicant that unless she paid the outstanding sum within fourteen (14) days from the date of the letter, the suit property would be advertised for sale on April 7, 2008 and on April 21, 2008 and thereafter be sold by public auction on April 24, 2008. However, Mr. Oguttu pointed out that annexure "***BN3***" in the first defendant's affidavit revealed that the aforesaid letter was sent by registered post on 16th April, 2008.

I have carefully considered the submissions made by counsel. The starting point is to consider whether the applicant was issued with a statutory notice by the first defendant, and if so, whether the same was a valid one. The applicant's Managing Director stated in paragraph 10 of his affidavit as follows:

***"10. That nevertheless, I know of my own that
the 1st Defendant/Respondent has not issued
and/or served upon the Plaintiff/Applicant a***

Statutory Notice or at all.”

The said deponent was less than candid in so stating. The truth is that the first defendant wrote to the applicant on 13th November, 1998 and gave notice as earlier alluded to. The applicant received the said notice and on 15th May, 1999 responded to the same as follows:

***“We refer to your letter of 13th November, 1998
which was registered and collected by our clerk
but misplaced in a most negligent manner, and
only discovered among waste papers on
14th May, 1999. We hold ourselves responsible,
but we beg for understanding for our mutually
beneficial interest.”***

However, the notice dated 13th November, 1998 was not valid in law. In **TRUST BANK LTD VS EROS CHEMISTS LTD** (Supra), the five judges of the Court of Appeal who dealt with that matter were emphatic that it was a mandatory requirement that a valid notice of sale of a charged property states expressly that the sale would take place after a three-month period following the date of service of the notice. The first defendant’s notice stated that ***“the bank intends to exercise its statutory power of sale over land Reference Number South Sakwa/Waware/647 within three (3) months from the date hereof ---.”***

An invalid statutory notice cannot legitimise the exercise of a chargee’s statutory power of sale, even where a chargor is openly in default of payment of a loan, as in this case.

In the circumstance, I believe the only option at the first defendant’s disposal is to issue a fresh compliant statutory notice before it can proceed to realize its security. The applicant has therefore established that it has a prima facie case and ought to be granted the orders sought. Having arrived at the above conclusion, it would be superfluous to consider the other issues raised by the applicant. I grant the orders as sought but make no order as to costs.

DATED, SIGNED and DELIVERED at KISII this 26th day of September, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Mr. Oguttu for the Plaintiff.

Mr. Ogweno HB for Mr. Ochoki for the Defendants.

D. MUSINGA

JUDGE

