



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 525 of 2003

MURAD EBRAHIM MURAB & ANOTHER.....APPELLANTS

VERSUS

KENYA COMMERCIAL BANK.....RESPONDENT

R U L I N G

The Chamber Summons herein, dated 26/8/03, under Order 39 rules 1,2, & 3 of the Civil Procedure Rules, and Section 3A of Cap. 21, Laws of Kenya, seeks the following orders:

(a)]

(b)]Already spent

(c)]

(d) To restrain Defendant/Respondent, its servants, agents and/or advocates from advertising for sale or selling by public auction or private treaty or completing any conveyance of L.R. no. 209/7723, Mbaruk Road Golf Course Nairobi, pending the hearing and determination of this suit,

(e) Cost of this application.

Supported by an Affidavit by Murad Ibrahim Murad, the application is on the grounds, **inter alia**, that:

(a) The Respondent has, without serving the requisite statutory Notice, through the 2nd Respondent's Baseline Auctioneers, advertised for sale the applicant's property L.R. No. 209/7725, Mbaruk Road, Nairobi.

(b) The purported sale, scheduled for 28/8/03 is wrongful and illegal;

(c) The Respondent has failed/ignored issuing the mandatory statutory notice as by law requires.

(d) The Respondents agents – auctioneers – have failed to adhere to the mandatory procedures and rules laid down in the Auctioneers Act, 1996 and Rules 1997;

(e) The Respondent has violated Section 44(1) of the Banking Act (1995) of the Laws of Kenya.

(f) As a result the scheduled sale of the applicant's property is premature; unlawful, malifide and unprocedural.

In opposition, the Respondents aver, **inter alia**, that:

Before the legal action to realize the charged property was started, a statutory Notice was duly issued and served upon the Plaintiff/Applicant, as required by law, on 28/3/02; as a result of the Applicant's failure to comply with the Notice, the Respondent, through their lawyers commenced realization proceedings against the charge property; that the Plaintiff was physically served with Notification of Sale on 17/7/02; that as a result of the notification, the Plaintiff pleaded, through his then Advocates, for postponement of the intended auction, vide a letter dated 17/9/02 from M/S Mutunga & Rebiro Advocates; that the letter admits plaintiffs indebtedness to the Defendant and hence Plaintiff's allegations of illegal debit charges are false and unsustainable; after receipt of the Plaintiff's pleas the defendant suspended the impending auction; and extended indulgence; which Plaintiffs still failed to keep, then Defendant resorted to its rightful legal action; the Defendant through their lawyers instructed Baseline Auctioneers to undertake fresh auction proceedings in compliance with the law; a fresh Notification of Sale was served on the Plaintiff on 13/6/03; before instructing the auctioneers, the Defendant carried out a valuation of the charge property on 20/3/02 and 12/5/03 respectively; the Defendants have not clogged the plaintiff's equity of redemption, the Defendant stands to suffer more as interest continues to soar, thus eroding the value of the security.

Having closely perused through the pleadings and the massive annexures thereto, and considered the submissions of the learned counsels for both sides, I have reached the following findings and conclusions.

The gist of the dispute between the parties is not whether the Plaintiff/Applicant is indebted to the Defendant/Respondent. That, in my view is not in dispute. The dispute revolves on whether the Defendants claim/or right of sale of the charge property had accrued, and if it had, have the legal provisions been adhered to in efforts to realize the debt by sale of the charge property.

The law on this area is that where a mortgagee wishes to exercise his statutory power of sale, he/it shall give the Mortgagor three(3) months Notice, and the mortgagee has no such power of sale until and unless the 90 days notice has lapsed. The relevant provisions are S.69A of the Transfer of Property Act, 1882, (of India) which states as under:

“A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until a notice requiring payment of the mortgage-money has been served on the mortgagor...and default has been made in payment of the mortgage-money, or part thereof, for three months after such service”

The dispute in this suit is whether such Notice was served upon the Plaintiff/Mortgagor by the Defendant/Mortgagee.

It is important to stress that the mortgagor must be given three months (90) days notice, and until those three months have lapsed, and the mortgagor has not paid the mortgage- money or part thereof, the mortgagee cannot exercise the mortgagee's statutory power of sale.

The document claimed by the Defendant to be a statutory Notice, under S.69A of the Transfer of Property Act, 1882,states, at the relevant paragraph, as follows:

“TAKE NOTICE that unless we receive, in our chambers the amount herein demanded together with our collection fees within three (3) months from the date of service of this statutory notice our strict instructions are to cause the sale by public auction ofL.R. No. 209/7725 without further reference to you.....”

The above is the purported statutory notice that went from the Defendant's Advocates to the Plaintiff. The simple question is “does the above meet the statutory notice as per S.69A of the Transfer of Property Act?

My humble answer is in the negative. The Mortgagor must be given 3 months (90 days) and nothing less, and until that period has lapsed, the mortgagee cannot exercise his statutory power of sale. The words “**WITHIN THREE MONTHS** do not, in my view, mean three months. They mean **before the expiration of three months**, while the simple and clear meaning of the words **in the statute** is that **after, and not before, the three months**, the mortgagee can set in motion the exercise of his statutory power of sale.

I therefore hold that the mortgagor/plaintiff was not given the statutory notice required by the relevant section.

Having found and held as I have hereinabove, it would be superfluous to proceed and look at the equally important provisions to be adhered to by the auctioneer, under the Auctioneers Act and Rules, 1996 and 1997, respectively. This is because those provisions and rules are underpinned on the mortgagee’s statutory power of sale having arisen, and then the auctioneer comes in to facilitate the realization of the power of sale.

Here, that has not arisen and does not arise until and unless S.69A has been complied with.

Put differently, the role and place of the auctioneer, the Notice of, Sale and the conditions thereto, would be premature and in a vacuum. I accordingly do not consider it a useful exercise of judicial time to embark on an issue as yet to arise.

All in all, and for the reasons above, I grant the application herein, dated 26/8/03 and Rule as under:

1. Grant the orders prayed in prayer No.(c) of the application.
2. I further order that the costs of this application be borne by the Defendant/Respondent

DATED and delivered in Nairobi, this 12th day of February, 2007.

O.K. MUTUNGI

JUDGE