

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 96 of 2007

TRUCKLINE LIMITEDPLAINTIFF

VERSUS

TRANS-NATIONAL BANK LIMITED DEFENDANT

RULING

The plaintiff instituted this suit against the defendant and simultaneously filed a Chamber Summons dated 11th May, 2007 seeking for restraining orders against the respondent, their servants, agents or employees from advertising for sale, selling, alienating, and/or disposing by public auction or otherwise the plaintiff's parcel of land known as **Nakuru/Municipality Bock 12/148** pending the hearing and determination of this suit. This application is supported by the grounds stipulated on the body of the application and an affidavit by the Director of the Applicant sworn on 11th May, 2007. The gist of the matter deposed thereto is that the respondent through M/s Legacy Auctioneering Services issued the plaintiff with a notification of sale of their suit premises scheduled to be sold on 28th May, 2007. The applicant contend that they took an overdraft facility from the respondent which was secured with the suit premises. The applicant contends that they have made substantial loan repayment but they were surprised that the respondent did not serve them with the necessary statutory notices as provided for under **section 74** of the Registered Lands Act. Counsel for the applicant argued that the statutory power of sale has not accrued because a statutory notice was not served by way of Registered Post in terms of the principles set out in the case of Nyangilo Ochieng & Another Vs Kenya Commercial Limited Civil Appeal No.148 of 1995 where the court of Appeal held:

“It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the registered Land Act (Cap 300, Laws of Kenya

is section obliges the chargee to serve by registered post, the relevant statutory notice. Three months after the chargers receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale.”

The burden is upon the respondent to demonstrate that they served the statutory notice of sale. Counsel for the applicant submitted that the statutory notice which were purportedly served by the respondent were hand delivered and the service was not by the registered post. The applicant being a Limited Liability Company, the best service would have been to their registered offices.

On the part of the respondent this application was opposed. Firstly, counsel for the respondent submitted that the applicant has not denied that it owes arrears of the loan. The only contention is that they were not served with the statutory notice. Counsel referred to notices dated **21st September, 2006** addressed to the applicant giving them **three** months notice to repay the outstanding loan pursuant to the provisions of **section 65(2)** of the Registered Lands Act. The said notices were served personally upon the Directors of the applicant Mrs. **Mary Wangui Kamau** and **Mr. Newton Kamau**. The service was effected by a duly authorized process server who swore an affidavit of service. There has been no supplementary affidavit to deny there was service and since the provisions of section 74 of the LRA does not describe the mode of service on a company, the service was properly effected upon the directors through personal service.

Counsel further argued that even if the wrong section of the law was referred to that does not invalid the notice which clearly gave three notice to the respondent. Finally counsel argued that the applicant has not established a prima facie case with a probability of success. I have considered the rival submission and

all the material that is presented in this application. What calls for determination is whether the applicant has established a prima facie case with a probability of success. The contention by the applicant is that they were not served with the statutory notices under Section 74 of the LRA. In response to the said allegation, the respondent annexed copies of statutory notices dated 21st September, 2006 which were hand delivered to the applicant's directors on 6th November, 2006 by a process server. This fact has not be controverted by the applicant. The applicant does not deny that he was personally served through their directors. Indeed the Director swore the supporting affidavit. **Mary Wangui Kamau** was also served with the statutory notice personally.

I have carefully looked at the provision of Section **74(1)** of the Registered Lands Act and there is no prescribed mode of service. In my humble view, I see nothing wrong with the personal service of the statutory notice. The argument that the statutory notice cited the provisions of section **65(2)** instead of **74(1)** in my view does not affect the validity of the notice which clearly gave a period of **three months** within which the applicant was supposed to redeem the loan account. In this regard, I am not satisfied that the applicant have satisfied the first condition for granting the orders of injunction. In the Case of **Kenya Commercial Finance Co. Ltd Vs African Education Society & Others C.A. No.142 of 1999** (*Unreported*) the Court of Appeal stated that the conditions of granting an injunction were that if a party failed to prove the first condition, the second condition need not be addressed.

“These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt, then the third one is addressed.”

In this case, the applicant has not satisfied the first condition, the application therefore fails and it is hereby dismissed with costs.

It is so ordered.

Ruing read and signed on 25th day of May, 2007.

M. KOOME

JUDGE