

REPUBLIC OF KENYA

AT THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 209 OF 2007

NYAKONGO ENTERPRISES LIMITED1ST PLAINTIFF

MARGARET MATENDECHERE KWASA2ND PLAINTIFF

CLEMENT ONYANGO KWASA3RD PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATIONDEFENDANT

RULING

The application for my decision is the one dated 19th April 2007 and seeks;

“that an order of injunction be issued restraining the defendant, its employees, agents, servants and officers from auctioning Nairobi Block 60/182 or in any way interfering with the said parcel of land herein above described, pending the hearing and determination of this suit”.

The thrust of the application is that the defendant never issued and served with the plaintiffs the mandatory statutory notice, hence it is the contention of the 1st plaintiff that it never received any demand and statutory notice from the defendants or its intention to sell the suit property.

It is clear in the application that the subject was granted to **Shadrack O. Kwasa**, who is now deceased sometimes in 1990, whereby the 1st plaintiff acted as a guarantor for that transaction and gave the suit property as a security for the said loan.

The defendant filed a lengthy replying affidavit but made no mention of whether it issued and served a statutory notice on the plaintiffs herein. The law is very clear that the property of a chargor cannot be sold without giving the requisite notice in writing. The notice is mandatory and in the absence of such a notice the right of the chargee to exercise its powers under the charge cannot arise. I am therefore satisfied that the notice and service of a statutory notice is a mandatory legal requirement and unless that step is fulfilled the defendant cannot be allowed to deal with the suit property. A party in contravention of the express provisions of the law cannot be allowed to pay damages in lieu of that legal requirement. I think that is the basis and foundation upon which the right of the chargee’s remedy to sell the property emanates. That was not done by the defendant and this court cannot allow a party in a clear contravention of the law to reap benefits from its own wrong doing. I refuse to do so.

In conclusion I grant prayer No.4 of the application dated 19th April 2007 till interparties hearing of the main suit. I direct the parties to resolve all pre-trials within the next 30 days and list the suit for hearing on a priority basis from the registry. Costs shall be in the cause.

Dated and delivered at Nairobi this 14th November 2007.

M. A. WARSAME

JUDGE