



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 122 of 2003**

NORA STELLA SANDHU.....

PLAINTIFF

VERSUS

**NATIONAL BANK OF KENYA LTD.....1ST
DEFENDANT**

**BENJAMIN KISOI SILA t/a LEGACY AUCTIONEERING SERVICES.....2ND
DEFENDANT**

JUDGMENT

The plaintiff filed this suit as the legal representative of the estate of Sital Singh Sandhu hereinafter referred to as “**the deceased**”. The deceased and his late father, Kapoor Singh Sandhu were the joint registered owners of a property known as **NAKURU MUNICIPALITY BLOCK 4/131** hereinafter referred to as “**the suit premises**”. Both the deceased and his late father passed away on 1st September, 2002 and 15th February, 1995 respectively.

By a legal charge registered on 11th May, 1993 both Sital Singh Sandhu and Kapoor Singh Sandhu hereinafter referred to as “**the guarantors**” charged the suit premises to the defendant to guarantee a loan which had been advanced to Ndugu Agricultural Contractors Ltd. (hereinafter referred to as “**the borrower**”). The said guarantee dated 10th May 1993 was for Kshs.2,500,000/-.

The borrower failed to repay the said loan and on 23rd May, 2003 the second defendant acting on the first defendant’s instructions served the borrower with a statutory notice of redemption. On 21st July 2003 the defendants advertised the suit premises for sale by way of a public auction which was scheduled to be held on 4th August, 2003. The plaintiff alleged that the defendants’ manifested intention to sell the suit premises was fraudulent since they knew or ought to have known that the chargors were deceased. The plaintiff further stated that the defendants purported to have served the statutory notice on the family of the deceased when they knew or ought to have known that no grant of letters of administration or probate had been taken out in respect of the estate of the deceased. She argued that the first defendant failed to cite any member of the deceased’s family as a legal representative.

The plaintiff therefore prayed for a declaration that the exercise of the first defendant’s statutory power of sale over the suit premises was illegal, unlawful and null and void. She also sought a permanent injunction to restrain the defendants from selling, alienating, interfering or in any way dealing with the suit premises.

In a statement of defence that was filed on 14th January, 2004, almost six months from the date of filing

and service of the plaint, the first defendant admitted that it set in motion the process of realisation of its security by issuing statutory notices as by law required. It stated that a statutory notice had also been issued in September 2003 to the plaintiff who had not paid the sum of Kshs.39,930,309.75 which was outstanding at the time.

The defendants denied all the particulars of fraud that were alleged against them by the plaintiff. The defendants further stated that if there was any procedural breach in the realisation process, the same had been rectified, arguing that breach of procedure could not defeat the first defendant's statutory right of sale of the charged property. The defendant brought to the court's attention the fact that there were other suits in court over the suit premises being Nakuru **HCCC No. 170 of 1999** and Nakuru **HCCC No. 129 of 2000**. The second defendant further stated that the plaintiff had no capacity to institute this suit against him.

In her evidence before the court given on 28th July 2004 the plaintiff said that on 24th July, 2003 she obtained a Limited Grant of Letters of Administration for the purpose of instituting this suit. The record shows that on 7th August, 2003 the court issued interim orders of injunction restraining the defendants from disposing of the suit premises pending the hearing and determination of this suit. The plaintiff categorically stated that she had not yet obtained letters of administration in respect of her late husband's estate and so she could not assume the responsibility of paying the amount that was due and payable to the bank. She repeated the same assertion during cross examination. However, it later transpired that on 17th May, 2005 the plaintiff and one Anjadeep Sadhu were issued with a Grant of Probate of written will in respect of the estate of her late husband, Sital Singh Sandhu.

The plaintiff said that on 23rd May, 2003, the second defendant, acting on instructions of the first defendant, served a 45 Days Redemption notice upon her daughter. The said notice was addressed to the borrower and was served at the suit premises which was the registered office of the borrower. She produced the same as P. Exhibit 8. A Notification of Sale (P. Exhibit 9) dated 23rd May, 2003 indicating that the sale was to be held on 4th August, 2003 was also left in the suit premises. The suit premises were advertised for sale by public auction on 21st July, 2005. The plaintiff said that she filed this suit because the defendants were harassing her on a matter which she knew nothing about. She further stated that she had not been served with any statutory notice although she was aware that there was one which had been served upon the borrower. She complained that the liability of settling the banking facility lay upon Ndugu Agricultural contractors Ltd. whose directors had died.

In cross examination by Mr. Kiburi for the defendants, the plaintiff admitted that since her father in law died no money had been paid to the bank. The plaintiff further confirmed that a statutory notice dated 8th September, 2003 had been served upon her by the first defendant. The same had been served upon her as a personal representative of the estate of the late Sital Singh Sandhu and Kapoor Singh Sandhu and that was pursuant to orders issued by Lesiit J on 7th August, 2003 when the court made the interim injunctive orders as aforesaid. She said that she was not aware of any other cases which had been filed by her late husband. The plaintiff did not call any witness after she testified.

The first defendant testified through Mr. Richard Rotich, an officer in-charge of debt recoveries at its Nakuru branch. He said that the borrower opened an account with the bank on 5th September, 1992 and applied for a banking facility on 23rd March, 1993. It was given a loan of Kshs.1,500,000/- and an overdraft facility of Kshs.1,000,000/-. The security was a guarantee of Kshs.1,000,000/- by the guarantors supported by a legal charge of a similar sum over the suit premises. The borrower did not service the said banking facility and on 5th May, 1994 the bank served the borrower and the guarantors with a statutory notice. The defendant thereafter severally attempted to exercise its statutory right of sale but the borrowers and the guarantors obtained some restraining orders from the court. The borrower then requested for a limited period of time to settle the amount that was due and owing and the request was granted but it failed to keep its promise. The witness also referred to previous suits which had been filed by the borrower seeking to restrain the first defendant from selling the suit premises. He said that the plaintiff had not paid anything or approached the bank for any negotiations regarding payments. He

denied that the first defendant was harassing the plaintiff and said that it was merely trying to realise its security since the borrower and its guarantors had failed to honour their financial obligation to the bank.

The advocates for the parties did not draw up a list of issues for determination but each one of them framed their own in their written submissions. However, from the pleadings which I have already summarised, the issues for determination are fairly clear. Order XIV rule 1(5) states as follows:-

“At the hearing of the suit when issues have not already been framed the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.”

In my view, there is no dispute that Ndugu Agricultural Contractors Ltd. were granted by the first defendant banking facilities in the sum of Kshs.2,500,000/- sometimes in 1993. Kapoor Singh Sandhu and Sital Singh Sandhu as Directors of the said borrower guaranteed repayment of the said sum and their guarantee was supported by a legal charge over the suit premises which was registered in their joint names. The borrower did not make any effort to repay the advanced sum and on 5th May, 1994 the first defendant served the guarantors with the three months’ statutory notice of sale of the charg property. That notice was received and the guarantors instructed M/S Mirugi Kariuki & Co. Advocates to respond to the same and admit their indebtedness to the bank and further plead for a period of two months to enable them raise some money and clear the outstanding debt inclusive of all the accrued interest. The guarantors failed to pay as promised and the first defendant filed a suit, **HCCC No. 540 of 1994** seeking to recover the outstanding sum. A consent judgment was entered in favour of the first defendant and the borrower agreed to pay the decretal amount on or before 31st March, 1995 in default of which the bank was at liberty to execute the decree. The guarantors failed to pay and for some reasons the first defendant did not execute the decree.

The first defendant caused the suit premises to be advertised for sale by public auction and the sale was to take place on 16th April, 1999. In order to forestall its sale Ndugu Agricultural Contractors Ltd and Sital Singh Sandhu filed Nakuru **HCCC No. 170 of 1999** against the first defendant and sought a restraining order saying that they had not been served with a statutory notice and that they were making effort to sell some of their properties so that they could settle the outstanding sum. The plaintiff failed yet again and the bank set out to sell the property and shortly before its sale, Sital Singh Sandhu filed another suit, Nakuru **HCCC No. 129 of 2000** against the first defendant, this time claiming that the co-guarantor, Kapoor Singh Sandhu had died. He also argued that he had not been served with a statutory notice of sale. The plaintiff was granted a grace period of 120 days but still paid nothing.

It is evident that there was no demonstrated effort on the part of the plaintiff(s) towards payment of the banking facilities. The plaintiff has filed yet another suit seeking to stop the first defendant from selling the suit property. The issues for determination therefore can be framed as hereunder:-

1. Did the defendants serve a notice of redemption upon the borrower on 23rd May, 2003 and if so, was it valid?
2. By the 23rd May, 2003 did the first defendant know that the guarantors were deceased and if so, upon whom was it supposed to serve the statutory notice of sale?
3. Was there any fraud in the defendants’ act of advertising for sale the suit premises on 21st July, 2003?
4. Does the plaintiff have capacity to institute this suit?
5. What order ought to be made in respect of the suit premises?
6. Who is entitled to pay the costs of the suit?

To answer the first two issues, it is necessary to go back to the guarantee which the deceased guarantors executed on 10th May, 1993. Paragraph 21 thereof stated as follows:-

“21. In case of the death of the undersigned (i.e. the guarantors) and pending probate of his will or Grant of Administration in respect of his estate any demand sent by post as aforesaid addressed to him at his last known address or to his address as stated hereon shall for all purposes of this guarantee be deemed a sufficient demand by you upon him and his executors or administrators and shall be as effectual as if he were still living.”

And in the charge document, the chargors who were also the guarantors aforesaid, it was clearly indicated that the expression “**chargor**” was to include heirs, executors, administrators and assigns. The suit premises were also the registered office of the borrower and its postal and physical address was known to the first defendant. The plaintiff was also residing in the suit premises. The first defendants’ witness, Mr. Rotich, told the court that the bank knew that the guarantors had died before it served the notice of redemption and notification of sale on 23rd May, 2003.

The defendants were therefore perfectly entitled to serve the said notices upon the plaintiff in the suit premises. The first defendant had on 5th May, 1994 served upon the guarantors a valid statutory notice of sale of the charged property. Once such notice has been given, there is no legal requirement that if the sale is suspended or not held at all for a good cause, the chargee must serve a fresh statutory notice every other time that he chooses to exercise his statutory power of sale, see **SAMEH TEXTILE INDUSTRIES LIMITED VS DELPHIS BANK LTD** Milimani Commercial Courts, Civil Case No. 2186 of 2000 (unreported).

In my view, it is only the 45 days notice of redemption and notice of sale that ought to be served subsequently thereafter and that was done by the defendants.

The guarantee document clearly spelt out the validity of any demand letter which the chargor could send to a deceased guarantor pending probate of his will or Grant of Letters of Administration.

However, where a chargor dies before a chargee has served upon him the statutory notice of sale, the chargee cannot purport to serve the same upon a deceased person, he will be under an obligation to serve the same upon the chargor’s executor or administrator of his estate as was held in **RAGUI VS BARCLAYS BANK OF KENYA LTD** [2002] KLR 647.

From the foregoing, I hold that on 23rd May, 2003 the defendants served a notice of redemption upon the plaintiff and the same was valid as the first defendant knew that the two guarantors were deceased and the mode of such service was provided for under paragraph 21 of the guarantee as aforesaid.

In answer to issue number three, that is, whether there was any fraud in the defendants’ act of advertising for sale of the suit premises, in my view, there was no fraud as alleged since the defendants were acting in accordance with the Guarantee document.

Turning to issue number four that is, whether the plaintiff had capacity to institute this suit, the answer is in the affirmative. She obtained limited grant of letters of administration for that purpose on 24th July 2003.

However, on 17th May, 2005 the plaintiff and Anjadeep Sandhu were issued with a full grant of probate of written will. That notwithstanding, the plaintiff and her advocate deliberately misled the court that she only held that limited grant which was not so. In its earlier rulings in this matter, the court had expressed its views that the plaintiff was deliberately avoiding and/or delaying obtaining Grant of Probate so that she could equally avoid or delay payment of the outstanding sum to the bank or frustrate the bank’s effort to realise its security.

The plaintiff’s conduct was untruthful. She came to court to ask for an equitable relief but with dirty

hands. She admitted that she was under an obligation to settle the amount owing to the bank upon receipt of grant of probate saying that she would be in a position to sell several assets which belonged to the estate of her deceased husband, both in the country and out of the country but was unable to do so without a full grant. The plaintiff testified before this court on 28/7/05 and it has now turned out that the full grant had been issued to her and Anjadeep Sandhu by the 17th of May, 2005; a fact that was withheld and kept from the court's knowledge. The plaintiff may be liable to be punished for perjury and upon delivery of this judgment, I direct that the court file in **Succession Cause No. 3 of 2004** in which the grant was issued be placed before the court for perusal and further directions.

But even if a full grant had not been issued, in the circumstances of this matter, a permanent injunction cannot issue to restrain the first defendant from exercising its statutory right of sale of the charged property as that would completely negate and render useless a valid charge and guarantee which bind even the executors of the chargors and guarantors.

From the foregoing, the answer to the fifth issue regarding the fate of the suit premises, is simply that unless the outstanding sum is paid to the first defendant forthwith, the first defendant is at liberty to sell the same and apply the proceeds thereof towards repayment of the outstanding debt.

I therefore dismiss with costs the plaintiff's suit.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of February, 2006.

D. MUSINGA

JUDGE

14/2/2006

Judgment delivered in open court in the presence of Mr. Karanja holding brief for Mr. Kiburi for the defendants and N/A for the plaintiff.

D. MUSINGA

JUDGE

14/2/2006