



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 444 of 2005

JOSEPH KIARIE MBUGUA1ST PLAINTIFF

MBWANJI LIMITED2ND PLAINTIFF

VERSUS

GARAM INVESTMENT LIMITED.....1ST DEFENDANT

NATIONAL BANK OF KENYA LTD.2ND DEFENDANT

RULING

By a Chamber Summons dated 8th August 2005, the plaintiffs moved the court for an injunction to restrain the defendants from selling-off his five properties, which he had charged to the 2nd defendant.

The plaintiffs cited the following seven grounds as the foundation for their application;

1. **THAT no statutory notice has been issued to the Applicant.**
2. **THAT the Applicant, with the knowledge of the 2nd Defendant has completed sub-division of his property known as L. R. No. 6755/1 (situated at Kamiti Road, Kiambu District) into 185 plots ready to be sold and all the proceeds will be released to the bank.**
3. **THAT the plots are scheduled to be sold at a minimum prices of Kshs.600,000/=, thus they will fetch a sum of Kenya Shillings One Hundred and Eleven Million.**
4. **THAT the Plaintiff has appointed through Special Power of Attorney a firm of Professional Real Estate Agents, M/s Wainaina Real Estates, to deal with the aforesaid property and the 2nd Defendant is making sure that the total debts are paid to the 2nd Defendant.**
5. **THAT the 1st and 2nd Defendants have not given the mandatory statutory notice required by law before immovable property can be sold by way of public auction.**
6. **THAT the sub-divided property aforesaid was advertised in the Standard Newspaper on 17th and 22nd February, 2005 on 15th and 17th March 2005, and 7th April 2005, and the response has been overwhelming.**

7. **THAT all that is remaining for the aforesaid plots to be sold is the deed plans and titles which the Plaintiff is about to acquire from the Commissioner of Lands."**

When prosecuting the application, Mr. Wachira, advocate for the plaintiffs, emphasized that the main complaint was to the effect that the 1st defendant had failed to comply with the mandatory provisions of Rule 15 (d) of the Auctioneers Rules. In the understanding of the plaintiffs, the said rule makes it obligatory for auctioneers to issue a 45 days' notification, on every occasion when they were preparing to conduct a public auction, for the sale of immovable property.

In this case, it was pointed out that the 2nd defendant, as the chargee, had previously taken steps to realise the securities. On those occasions, the 2nd defendant issued appropriate notices. However, in relation to the occasion in issue, the defendants are faulted for failing to issue appropriate notices.

The plaintiffs pointed out that the "notices" which were issued on the occasion, and which were dated 18th July 2005, did not constitute appropriate notices. Each of the said "notices" was clearly marked in bold capital letters, with the words;

"P/S: THIS IS NOT A NOTICE"

Secondly, the plaintiffs' contend that the notification of the sale, previously issued by the auctioneers who had been involved in the earlier endeavours to sell-off the charged properties, could not constitute appropriate notices, for the current effort. As the previous notifications of sale cited a specific date of sale, as being 24th June 2004, the plaintiffs submit that the notifications did not have any connection with the sales which had been scheduled for 9th and 15th August 2005.

Meanwhile, as regards L.R. No. NDUMBERI/NDUMBERI/ T.307, the plaintiffs point out that there was absolutely no notification of sale, even in relation to the sales earlier scheduled for June 2004.

For those reasons, the plaintiffs believe that they have made out a prima facie case with a probability of success, thus entitling them to an injunction.

In opposing the application, the 2nd defendant submitted that all the matters raised in the application herein, had been heard and determined in previous applications. The said applications were said to have been made in **HCCC NO. 1247 OF 2002.**

The court was notified that on 5th December 2003, the Hon. Ringera J. (as he then was) rejected the plaintiffs request for more time to repay the debt. Then, on 28th October 2004, the Hon. Emukule J. dismissed another application by the plaintiffs for an injunction. And, on 26th May 2005, the Hon. Njagi J. is said to have ruled that the chargee was under no obligation to issue fresh statutory notices.

In the light of the said three decisions, the defendants hold the view that the current application was no more than an abuse of the process of the court.

In any event, the "notices" which the plaintiffs have described as falling short of the notifications of sale pursuant to rule 15 (d) of the Auctioneer's Rules, were said to be no more than pieces of information regarding the re-advertisement for the sale of the charged properties.

It is the defendants' case that appropriate notifications for sale had been issued in 2004. Therefore, when the court stopped those sales, in reality, the sales were only put on hold. And, after the plaintiffs had failed to repay the sums owed to the 2nd defendant, it is the defendants' contention that they were entitled to put up the properties for public auction, without having to issue any new 45 days' notifications of sale.

The defendants relied on the authority of **NATHAKA MONJI RAI –VS- STANDARD CHARTERED BANK (K) LIMITED & ANOTHER, HCCC NO. 830 OF 1999,** to support their proposition that they

were not obliged to issue any new notifications of sale.

In that case, the plaintiff had taken up a point of law that was similar to the one in this case. In other words, the plaintiff had contended that by failing to issue a new 45 days' notification of sale, specifically relating to the impending public auction, the auctioneer was in breach of Rule 15 (d) of the Auctioneers Rules 1997. In response to that contention, the defendant in that case stated that as a similar notice had been served on the plaintiff, in relation to an earlier attempt to realise the security, another notice was superfluous. The court was thus called upon to determine whether or not a 45 days' notification of sale was mandatory even when there was a previous one, in relation to a sale which was then halted, either by consent of the parties or upon an order of the court.

In a reasoned ruling, the Hon. Onyango Otieno J. (as he then was) expressed himself thus;

"The Auctioneers Act seems to me to be silent as to whether once an auction scheduled for a particular day is suspended or stopped temporarily, the Auctioneer should, on the next scheduled sale, go through all the rules all over again. One may ask, once an auctioneer has got the instructions letter in respect of the sale of a particular property, and he had complied with all the rules, and then the sale is suspended or temporarily stopped at the eleventh hour, should the auctioneer go through all the rules again when he is again instructed to go ahead with the sale on another day? In case of notification of sale, should he issue a fresh one?"

In my opinion, there are some rules that he needs to go through once again, but I respectfully think that there are some rules which to repeat, would make a mockery of the rules and may make it difficult if not impossible for the judgement creditors or mortgagees to realise their power of sale, and thus may make it impossible for the judgement creditor to enjoy the fruits of judgement given in his favour or the mortgagee, to realise the recovery of the money loaned.

.....

However, in my humble opinion, once he (the auctioneer) has received such letter of instructions, and has given the debtor 45 days' notice, it would be unfair to insist that if that sale is suspended, and he gets another letter instructing him to proceed with the sale of the same property, in respect of the same loan and from the same mortgagee, he should give the same 45 days' notice afresh. I think one has to look at the purpose for such a notice. In my opinion, such a notice is as clearly stated in the rules, to give the debtor opportunity to redeem the property. I cannot see any good reason for giving the same opportunity every time the sale does not go through."

From a logical perspective, I would agree wholly with the learned judge. If it was mandatory that 45 days' notifications of sale be issued every single time when the chargee or the judgement-creditor wished to publicly auction immoveable property, borrowers and judgement-debtors would never persuade their creditors to put-off sales, so as to allow the debtors an opportunity to redeem their properties. Thus, a strict application of rule 15 (d) of the Auctioneers Rules would actually be counter-productive to the borrowers and judgement-debtors.

Meanwhile, I note that in arriving at the decision cited above, the Hon. ONYANGO-OTIENO J. borrowed a leaf from the sentiments of the Hon. APALOO J. A. (as he then was) in the case of **GEORGE GIKUBU MBUTHIA –VS- JIMBA CREDIT & ANOTHER, CIVIL APPEAL NO. 111 OF 1986**

In that case, the Court of Appeal addressed the provisions of Section 74 of the Registered Land Act, which mandates the issuance of a statutory notice to a chargor before his security can be put up for public auction. The question that then arose for determination was whether the chargee, who had given a statutory notice, who then suspended an intended sale on the basis of the chargor's promises to make payment, would be obliged to issue another statutory notice before he could have the charged property sold subsequently, if the chargor failed to honour his promises.

The learned judge of appeal held as follows;

"It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notices to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale, as a matter of favour or indulgence to a defaulting mortgagor."

In my considered view, those words, although made in relation to Section 74 of the Registered Land Act, would apply also to the provisions of Rule 15 (d) of the Auctioneer's Rules, much in the same manner as per the ruling of the Hon. ONYANGO-OTIENO J., in **NATHAKAI MONJI RAI –VS- STANDARD CHARTERED BANK (K) LIMITED** (Supra)

Rule 15 (d) reads as follows;

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immoveable property –

(a)

(b)

(c)

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

The rule does not impose an obligation on the chargor or the auctioneer to issue notices every time before the charged property can be put up for sale. It says that "a notice" will be issued; and that is singular. The time of issuance is when the auctioneer received the letter of instruction.

In this case, appropriate notifications of sale have been exhibited for four, out of the five, properties in issue. The only property in respect to which no notification of sale has been exhibited is L. R. NO. NDUMBERI/NDUMBERI/T.307. Therefore, unless the 2nd defendant can demonstrate that it did issue, through the auctioneer, a 45 days' notification of sale, in relation to that property, an injunction will issue to restrain the defendants from selling it off. However, as to the terms of such injunction, I will revert in due course.

Meanwhile, as regards the four properties in respect to which 45 days' notifications of sale were issued previously, I still need to consider whether or not new notifications were necessary. In my considered view, the decision by the Hon. ONYANGO-OTIENO J. (as he then was) in **NATHAKA MONJI RAI – VS- STANDARD CHARTERED BANK (K) LIMITED** (Supra), correctly spelt out the law.

The rationale for that decision can be discerned from page 308 of *Fisher & Lightwoods "Law of Mortgages"* 8th Edition, whereat the learned authors wrote as follows;

"The bill suspended the remedy by auction of the mortgage debt and prima facie suspended also the running of the notice. Both revived when the bill was dishonoured and the plaintiff was then remitted to the position in which he stood when the bill was given. It cannot infer an agreement that if the bill was not paid, the plaintiff should begin and give a fresh notice which would be to place him into a worse position than he was in when he consented to give time."

When commenting on that passage, in the case of **GEORGE GIKUBU MBUTHIA –VS- JIMBA CREDIT & ANOTHER** (Supra), the Hon. APALOO J. A. said;

"Every word of that passage applies to this case, and it seems to me, if I may say so, makes business sense."

I wholly agree. Therefore, I find no merit in the plaintiff's application herein, save in relation to the one property, L. R. NO. NDUMBERI/NDUMBERI/T.307.

In relation to that one title, a temporary injunction shall issue to restrain the defendants from selling it until the hearing and determination of this suit. However, for the avoidance of doubt, this order only restrains the defendants from selling-off the property in question if they were to try and do so without issuing a compliant notification of sale. So, if the defendants did give an appropriate notification of sale after this ruling; and if thereafter they took steps to realise the security pursuant to such a notification, they will be at liberty to proceed accordingly.

As the plaintiff has succeeded only in relation to one of the properties in issue, he will pay the costs of the application.

It is so ordered.

Dated and Delivered at Nairobi this 16th day of June 2006.

FRED A. OCHIENG

JUDGE