



- *When does a statutory power of sale accrue*
- *Consequences of failure to issue a notice under S. 74 R.L.A.*

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
Civil Case 64 of 1997

EMMANUEL EGESA WABWIRE.....PLAINTIFF

T/a NEW BUSIA MATERNITY AND NURSING HOME

VS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

J U D G M E N T

In an amended plaint dated 24th November 2000, Emmanuel Egesa Wabwire t/a New Busia Maternity and Nursing Home sued National Bank of Kenya Ltd claiming for:

(a) A declaration that the charge dated 10th February 1994 registered against title number Bukhayo/Mundika/6025 does not entitle the defendant to sell the said property under section 74 of the Registered Land Act.

(b) The defendant be ordered to execute a discharge of charge against Bukhayo/Mundika/6025.

(c) The defendant be restrained from selling the charged property

(d) Costs of the suit

(e) Any other alternative relief as this court may deem fit to grant.

Upon being served with the pleadings National Bank of Kenya filed an amended defence and a counter-claim to resist the plaintiff's claim. The bank counterclaimed for a sum of Ksh.2,322,322/50 and further prayed for the dismissal of the suit with costs for both the suit and the counter-claim.

When this matter came up for the substantive hearing of the suit each side offered the evidence of one witness. Egesa Emmanuel Wabwire testified in support of the plaintiff's case. He told this court that he applied and successfully obtained a loan facility from the defendant in the sum of Ksh.300,000/=. He produced in evidence a letter of offer given to him by the defendant bank dated 12th February 1994. The plaintiff said he pledged L.R. NO. BUKHAYO/MUNDIKA/6025 as a collateral to secure the aforesaid sum. He produced in evidence a copy of the charge which was registered against the aforesaid title. This witness however complains that the bank manager did not explain to him the contents of the charge

before appending his signature on it. He also averred that he signed alone in the absence of the bank attorney. He also told this court that he applied for another facility in the sum of Ksh.300,000/= and the bank readily advanced the amount even before he completed paying the first loan. He was not in a position to know the exact date the loan was advanced to him but he can remember it was in July 1995.

This witness says that after receiving the second loan he failed to service the loan regularly because he was taken to court by N.H.I.F. to face a criminal charge which action distabished his business hence the default.

In the meantime the plaintiff said he received a notification of sale of the collateral and a letter forwarding the notice both dated 20.4.2000 from Insight Company Ltd. He produced the two documents in evidence. He said he was never given prior notice by the bank. He however admitted having received a notice from Regent Auctioneers dated 21.11.97 threatening to sell the Plaintiff's property within a week i.e on 28.11.97. He produced the notification in his evidence.

The plaintiff further challenged the rate of interest applied by the Bank saying the same was not specific though he admitted the charge allowed variation on daily balances. He accused the bank of failing to supply him with bank statements.

The defendant bank, summoned the evidence of Maria Odhiambo to testify in support of its defence. Her evidence concurred with that of the plaintiff that the bank advanced the plaintiff a sum of Ksh. 300,000/= on 31st January 1994 upon which the plaintiff pledged L.R. BUKHAYO/ MUNDIKA /6025 as a security. He produced in evidence a personal guarantee signed by the plaintiff to secure the loan. This witness said the plaintiff regularly paid the first loan only for him to stop making further payments after receiving the second loan of Ksh.300,000/= on 14.2.95. She produced in evidence a letter of application written by the plaintiff requesting for a renewal of the overdraft facility. She also produced bank statements which showed that the outstanding amount owing to the bank from the plaintiff as of 31st May 2000 stood at Ksh2,322,322/50. She also said that the plaintiff was given notice of three months to settle the debt but he failed www.kenyalaw.org Emmanuel Egesa Wabwire t/a New Busia Maternity and Nursing Home v National Bank of Kenya Ltd [2005] eKLR 4 to do so. She prayed to this court to dismiss the plaintiff's suit and allow the defendant's counter-claim with costs. She however admitted that she was unable to establish the rate of interest applied by the bank though interest was to be charged on daily balances.

It is unfortunate the learned advocates appearing in this matter did not file the agreed issues as required. However I will attempt to pick out the issues which came out clearly from the evidence and from the submissions made by learned advocates for both the plaintiff and the defendants. I think the following issues arose for my decision:

(a) whether or not the charge or letter of offer set out the rate of interest and the date of repayment or redemption.

(b) Whether or not the charge instrument was properly executed. If not whether the document is rendered null and void for all purposes.

(c) Whether or not the defendant complied with the provisions of Section 74 of the Registered Land Act

(d) Whether or not the defendant is entitled to the counter claim.

On the first issue Mr. Balongo for the plaintiff is of the view that the charge was not properly executed. He pointed out that the charge was executed by a person holding a power of attorney contrary to the provisions of Section 109 (2) (b) (1) of the Registered Land Act which provides that the seal must be affixed on the document attested by the company secretary, clerk and or one director. Mr. Manwari for the defendant dismissed this ground by stating that it was not raised in the pleadings. I have perused the amended plaint, the defence, the counter claim and the evidence adduced by both sides. I have not seen any iota of a mention of issues touching on the execution of the charge document. It is trite law that

parties are bound by their pleadings. A court of law may in certain circumstances decide an issue which though not pleaded but put to its attention to consider. In this case the plaintiff waited until the stage of the final submissions that the matter was raised. I agree with the submissions of Mr. Manwari for the defendant that this court should not make a decision on it because it was not raised in the pleadings. I will not consider the matter unless the same is put to the attention of the court for decision by both parties. Consequently I will take the charge registered against LR. NO. BUKHAYO/MUNDIKA/6025 to be validly executed.

The second issue which I think I should now consider is whether or not the rate of interest and the date of redemption were specified in the charge or in the letter of offer. The plaintiff is of the view that the rate of interest and the principal sum were not known. Mr. Manwari for the defendant was of the view that the question of can be answered by basic banking law principles that a bank is entitled to charge interest. He however did not go into the details of how the defendant arrived at the outstanding figures specified in the bank statements produced by the defendant's single witness. What is not in dispute is that the rate of interest would vary subject to minimum of 30% per annum to be calculated on daily balances. The letter of offer dated 31st January 1995 relates to the first loan. The second loan was approved on the 14th day of February 1995. The letter of offer sets the expiry date to be 31st January 1996. The rate of interest was set at 28% p.a. on monthly rest for the time being calculated only daily on balances.

My decision over this issue is that the rate of interest and the date of redemption were set out by the charge instrument and letters of offer. But the rate of interest kept on changing in view of the fact that it was to be based on daily balances. The plaintiff has a genuine complaint over this matter. The defendant has not been clear on this point. The rate of interest applied has not been shown. What the plaintiff was given is the outstanding debt due to the defendant. It is not enough for banks to state that it is common knowledge that banks charge interest on loans advanced. They have to show how these rates which kept on changing are applied to existing loans.

The third issue is whether or not the defendant complied with the provisions of Section 74 of the Registered Land Act in an attempt to realize its securities. The plaintiff has complained that defendant failed to issue the statutory notice of 3 months as required under the above provisions of the law. The plaintiff was of the view that the defendant's power of sale had not accrued when the bank failed to issue the statutory notice. The defendant's only witness was of the view that the bank issued a 3 months notice to the plaintiff before moving in to exercise its statutory power of sale. It is not in dispute that National Bank of Kenya instructed Insight Company Ltd, an auctioneer to sell the plaintiff's Land when the plaintiff defaulted in payment of its debt. The aforesaid auctioneer wrote to the plaintiff through a letter dated 20th April 2000 in which it gave the plaintiff 45 days to redeem property failure to which the same would be sold. The aforesaid auctioneer contemporaneously also served a notification of sale dated 20.4.2000 in which the plaintiff was given about 60 days to settle a sum of Ksh.2,160,067/55 or L.R. NO. BUKHAYO/MUNDIKA/602 would be sold by public auction. It is therefore clear that the bank did not comply with the provisions of Section 74 (1) of the Registered Land Act when it failed to give 3 months notice before attempting to exercise its statutory power of sale.

The court of Appeal in the case **NYANGILO OCHIENG AND ABEL OMUOM VS FANUEL B. OCHIENG, GLADYS OLUOCH AND K.C.B. LTD CIVIL APPEAL** NO. 148 OF 1995 had this to say:

“It is trite that before a chargee can exercise its statutory power of sale there must be compliance with section 74 (1) of the Registered Land Act (Cap 300 Laws of Kenya). This 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 reverend court went further to state that:

“It is for the chargee to make sure that there is compliance with the requirements of Section 74 (1) of the Registered Land Act. That burden is not in any manner on the

chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.”

In this matter the defendant only alleged that a three months notice was given to the plaintiff without providing empirical evidence to establish that fact.

I am satisfied that the plaintiff has proved his case on a balance of probabilities. Consequently I hold that the defendant is not entitled to exercise its statutory power of sale without complying with Section 74 (1) of the Registered Land Act. However I am not satisfied that the charge is null nor void hence I decline to grant the prayer to discharge the charge against title no. BUKHAYO/MUNDIKA/6025.

The defendant bank prayed for Judgment in its counter claim. The defendant claims payment of Ksh.2,322,322/50 from the plaintiff. It produced two bank statements as proof that the amount is owing from the plaintiff to the defendant in respect of two overdraft facilities advanced to the plaintiff in 1994 and 1995. The defendant’s witness was however unable to show the rate of interest applied to the facility. Maria Odhiambo, admitted upon intense cross examination that she was unable to prove how the figure of Ksh.2,322,322/50 was arrived at. She heavily relied on the two bank statements she produced as exhibits in evidence.

I have perused these two statements. The rate of interest is not specified. The defendant’s witness who was deemed as an expert as a credit officer within the defendant was unable to unearth the mystery. This court do no better than her. On this front I am convinced that the defendant failed to prove its case as set out in the counter-claim.

The plaintiff’s advocate is of the view that even if the defendant had established its counter claim, still the action would remain premature pursuant to the provisions of Section 74 (3) of the Registered Land Act. The defendant’s counsel did not address me over this submission. I have carefully considered the provisions of Section 74 (3) (b) which reads:

“No action shall be commenced until a notice served in accordance with subsection (1) has expired.”

I have already stated that the defendant did not comply with the provisions of Section 74 (1) of the Registered Land Act. The defendant did offer evidence to prove otherwise. In view of the above findings I think the counter-claim must fail.

In the final analysis therefore the counter-claim is ordered dismissed with costs to the plaintiff. Judgment is entered in favour of the plaintiff in terms of prayers (a) a, (c) and (c) c. Otherwise prayer (b) is ordered dismissed for lack of merit.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE