



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 13 of 2004

JOHN CHRISTOPHER KAMAU.....PLAINTIFF

- VERSUS-

THE CO-OPERATIVE BANK OF KENYA.....DEFENDANT

RULING

By a charge dated 4th March, 1994 and executed between the plaintiff and the defendant, the plaintiff, as chargor, charged his property known as Title Number Dundori/Lanet Block 4/22/Nyonyoroto secure a loan of Ksh.700,000/= advanced to a third party or third parties. The third party did not service the loan. On 8th September, 1998, the defendant sent a statutory notice to the plaintiff demanding payment of the outstanding sum plus interest. By a letter dated 10th November, 2003 M/S Baseline Auctioneers, sent a 45 days notification of sale to the plaintiff threatening to sell the said property by public auction on 23rd January, 2004.

Arising out of the above state of affairs, the suit herein was commenced by a plaint dated 24th December, 2003 but filed in court on 9th January, 2004. True to what seems to have become a common practice, along with the plaint was filed a chambers summons "under O.XXXIX and High Court Vacation Rules, Rule, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The main order which the application seeks is that the defendants be restrained from selling or advertising for sale or alienating Title Number Dundori/Lanet Block 4/22 (Nyonyoro) until the determination of this suit. The main grounds upon which the application is premised are that the intended sale of the plaintiff's property by the defendant is illegal for want of service of a proper statutory notice and that the intended sale is also illegal for want of a proper notification of sale.

On 22nd January, 2004 the advocates for the defendant filed a notice of a preliminary objection. It stated that the defendant would, at the hearing of the plaintiff's injunction application herein, raise a preliminary objection that this court has no jurisdiction to entertain the said application on the ground that the issues raised by the plaintiff regarding the statutory notice served on him by the defendant were also raised in the plaintiff's earlier suit filed at Nakuru, i.e. HCCC No. 28 of 1999, whereof the plaintiff's injunction application filed therein was dismissed and therefore the present application herein is res judicata. Mr. Kimondo Mubea, for the defendant/respondent, took up this point when the matter came for hearing on 6th February, 2004.

Mr. Mubea argued that when the plaintiff filed suit No.28 of 1999 at Nakuru, he was already in possession of the statutory notice which had been served on him. In spite of being in possession, he never challenged

the validity of that notice. Mr. Mubea referred to s.7 of the Civil Procedure Act and submitted that if there was any defect in that notice, then the plaintiff ought to have raised the issue in that suit. The matter is therefore res judicata.

Secondly, Mr. Mubea referred to the allegation that the intended sale is illegal for want of proper notification. This was one of the issues between the parties in the application at Nakuru in HCCC No. 28 of 1999, which application was dismissed by Justice Visram. Consequently, Mr. Mubea submitted that the issue was also res judicata. Thirdly, Mr. Mubea also submitted that this application is an abuse of the process of the court. In paragraph 15 of the Plaintiff, the plaintiff says that there is another suit pending in Nakuru, yet, although he resides in Nakuru and the property is in Nakuru, he does not file this application in Nakuru, and he does not disclose that the initial chamber summons application at Nakuru was dismissed. Mr. Mubea urged the court to uphold the preliminary objection.

In response, Mr. Obura for the plaintiff argued that in the application at Nakuru, what was being challenged was the statutory notification of sale, and that the issue of the statutory notice was neither raised nor canvassed. He submitted that the issue of the validity of the statutory notice under s. 74 of the Registered Land Act was not finally heard and determined. Counsel said he knew that Mr. Mubea would say that the issue ought to have been canvassed, but that it would be contrary to public policy if the chargee herein was allowed to hide under doctrines. Mr. Obura admitted that it was true that the plaintiff had not pleaded that the statutory notice was invalid but at the same time, he submitted, the court did not find it valid. He further submitted that res judicata does not absolve a chargee from complying with the law and serving a valid statutory notice, and that the notice cannot validate an invalid notice. He concluded by stating that the doctrine of res judicata does not apply to the present suit.

In a short reply, Mr. Mubea stated that the plaintiff had an opportunity to raise these matters in the Nakuru application, but since he didn't do so, the matter is now a closed chapter. He urged the court to uphold the preliminary objection and strike out the application.

After hearing these rival submissions, I find that the question to be determined herein is whether the two issues of the statutory notice and notification of sale were issues in the suit and chamber summons application in Nakuru HCCC NO. 28 of 1999, and if not whether they ought to have been made issues. The relevant portion of paragraph 8 of the plaintiff file in Nakuru HCCC No. 28 of 1999

reads-

"...the 1st and 2nd defendants... have failed to service the loan and the 3rd defendant has now issued a statutory notice against the plaintiff's property, and threatens, unless restrained by this Honourable Court, to sell the same in order to recover the loan and interest thereon."

In the clause for prayers, the plaintiff reads-

"REASONS WHEREFORE the plaintiff prays for judgment and orders against the defendants jointly and severally in the following terms:-(a)

(b)

(c)

(d) an order restraining the 3rd defendant from realizing the security or otherwise exercising its powers of sale over the said property." (e) It goes without saying that even at the time of the filing of the case in Nakuru, the plaintiff had already received the statutory notice threatening to sell his property. If he had any misgivings about the propriety of that notice, this was the right forum to raise the issue.

Indeed, any shortcomings in the validity of that notice should have strengthened his prayer for an order restraining the third defendant, who is the sole defendant herein, from realizing the security or

otherwise exercising its powers of sale over the property. The invalidity of such a notice is so central to the success or otherwise of a suit claiming an injunction of this nature that it is one of the issues that the chargor would invariably be on the look out for. Although that notice was specifically mentioned in the plaint, it was never challenged. From that perspective, it seems that the plaintiff was perfectly at home with the validity of that notice at that time. Now he seeks to challenge it. It appears to be too late in the day for him to do so.

s. 7 of the Civil Procedure Act states-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." Explanation (4) to this section reads-

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." The invalidity of the statutory notice clearly might and ought to have been made a ground of attack in the former application at Nakuru. It is therefore deemed to have been a matter directly and substantially in issue in that application and therefore it is res judicata. In MBURU KINYUA V. GACHINI TUTI [1978] KLR. 69, at page 73, Madan J.A. said-

"... the liberty to present more than one application is always subject to the court's power to prevent abuse of its process... It is also of course subject to the rule of res judicata including what is laid down in explanation (4) to section 7, unless a special circumstance is present in which event I would be content to follow the following dictum of Wigram V-C, in Henderson v. Henderson [1843] 67 E.R. 313, 319, which the Privy Council described as the locus classicus of this aspect of res judicata, in Yat Tung Investment Co. Ltd., v. Pao Hena Bank Ltd. [1975] A.C. 581, 590;

where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'. "The plaintiff's first opportunity to challenge the statutory notice presented itself in the Nakuru application. He ought to have taken it then. But he didn't. No reason is given as to why he didn't. I find that he might and ought to have brought it up then, and that therefore the matter is res judicata. With respect, Mr. Obura misses the point when he asks the court to decide whether res judicata can validate an invalid statutory notice. That is not the point. The point is that the issue of the validity or otherwise of the statutory notice ought to have been raised in the earlier application, and since it was not so raised, raising it in the present application falls foul of res judicata.

The above observations apply with equal force to the issue of the notification of sale. I agree with Mr. Mubea that an auctioneer need not issue a 45 day notification of sale every time an auction sale does not go through. NATHAKAL MONJI RAI V. STANDARD BANK (K) LIMITED & ANOR. Milimani Civil Case No. 830 of 1999 is adequate authority for that proposition. But in the instant case, the plaintiff says that sometime in November, 2003 he received a notification of sale from the post office giving him 45 days notice that this property would be sold. In her replying affidavit, Regina K. Anyika, a legal officer at the defendant bank, avers on information from the auctioneers, that besides the notification of sale which was sent to the plaintiff by registered post, there was also a personal service of the same upon him. This statement finds corroboration on page 19 of the defendant's bundle of documents, which is a 45 day notice and which seems to have been signed by the plaintiff on or about 15th November, 2003. On the face of the record, the notice appears to be regular and to have been properly served. But quite apart from the fact that

this notice need not have been served in the first instance as the plaintiff had been served earlier on 11th April, 2001, that is beside the point.

The point is that in his ruling dated 23rd May, 2002 in the Nakuru application justice Visram expressly stated that one of the issues raised by the plaintiff was that he was not served with notification of sale of the suit land as required by law. The court found that the plaintiff was actually served with the notice on 11th April, 2001 when he personally, signed on the notice documents signifying its receipt by him. One of the grounds in the application before this court is that the intended sale is illegal for want of proper notification of sale. As stated earlier, even though there was no obligation on the part of the defendant to serve the plaintiff with second notice, he was served on 15th November, 2003. Besides that, an earlier notice was served on 11th April, 2001. That issue was determined in the Nakuru application. The matter is therefore resjudicata.

The upshot of the above is that the preliminary objection is upheld and the chamber summons application dated 24th December, 2003 is dismissed with costs to the defendant/respondent. The interim orders granted on 9th January, 2004 are hereby vacated.

Dated and delivered at Nairobi this 25th day of March 2004

L. NJAGI

JUDGE