REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 52 OF 2004

JOSEPH OKOTH WAUDI ……. PLAINTIFF

-Versus

NATIONAL BANK OF KENYA LTD. ……. DEFENDANT

R U L I N G

This is an application for injunction to restrain the defendant bank from selling the plaintiff's property situate in Mombasa and known as plot No. Mombasa/Block XXI/226 M.I. The application is supported by the plaintiff's affidavit in which he states that by a charge dated the 16th December 1996 and a further charge dated the 11th June 1997 he borrowed from the defendant a total sum of Sh. 5,150,000/=. He further states that on the 24th March 2000 the defendant purported to prepare a second further charge for Sh. 4,000,000/= which was also registered against the title but he was not given that money. He has challenged the further charge as being incompetent and of no use at all as it was prepared by an unqualified advocate. He further avers that he has neither been served with a statutory notice of sale as required by law nor the notification of sale by the auctioneers - as required by the Auctioneers Act. Even the property has not been valued in the last 12 months to determine a proper reserve price.

The application is strenuously opposed by the defendant. In the replying and further affidavits sworn by Delilah K. Ngala, the defendant's Mombasa Branch Manager she described this application as being of academic value, a similar application having been dismissed by this court in HCCC No. 604 of 2001. She stated that the second further charge for Sh. 4,000,000/= was created in accordance with the defendant's internal regulations when the plaintiff requested for a rescheduling of his account and that no further funds were advanced to the plaintiff on the strength of that second further charge. She further averred that the plaintiff was clearly in default and as at the time of swearing the affidavit on 27th February 2004 the plaintiff owed the defendant Sh. 27,023,652/65. She exhibited to her replying affidavit a letter dated the 21st August 1998 from the defendants then advocates to the plaintiff giving him the three months statutory notice of sale.

When the application came before me for hearing on the 2nd March 2004 counsel for the defendant raised a preliminary objection arguing that the matter was res judicata. He submitted that this application is the same as the one Justice Onyancha dismissed in HCCC No. 604 of 2001. The plaintiff's appeal to the Court of Appeal was struck out on a technicality although he is trying to reinstate it. Counsel for the plaintiff on his part argued that in HCCC No. 604 of 2001 the claim relates to illegal interest charged on the sums advanced. In this case the claim is based on the threat to sell the plaintiff's property without serving him with the requisite statutory notice and that the purported second further charge is a nullity and yet the defendant is attempting to sell the plaintiff's property to recover the amount in the second further charge. After hearing counsel for both parties on the preliminary objection. I overruled it and said I will give my reasons in this ruling.

Looking at the plaint in HCCC No. 604 of 2001 the plaintiff's complaint is that the interest rate

applied to the amount due from him is illegal. In this case the main issues raised are the threatened sale of the plaintiff's property without serving him with a statutory notice of sale or a notification under the Auctioneers Rules as well as the second further charge registered against his property which he says is a nullity. Justice Onyancha's ruling dismissing the plaintiff's earlier application for injunction did not touch on these issues as they were not raised. Further more the plaintiff is endeavuoring to have his appeal against Justice Onyancha's ruling reinstated. So the matter cannot be said to be finally decided even if the issues were or ought to have been the same in both cases. I therefore overrule the preliminary objection that the matter is res judicata.

Going back to the main application, the plaintiff has complained that he has not been served with the statutory notice of sale. He has also not been served with a notification of sale by the Auctioneers and that his property has not been valued in the last twelve months. Of these issues the defendant chose to respond to the first one only by stating that its advocates gave the plaintiff the statutory notice of sale vide their letter of 21st August 1998. I will deal with that notice later in this ruling.

The plaintiff states that he was surprised to read in the Daily Nation Newspaper that his property is scheduled for sale on 5th March 2004. He annexed an extract of that notice to his affidavit. Prior to that the Auctioneers had not served him with any notification of sale. Rule 15(e) of the Auctioneers Rules 1997 provides that:- "15. 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;

(e) …….

The defendant did not say if any such notice has been given to the plaintiff.

As regards the valuation of the property prior to sale Rule 11 of the Auctioneers Rules 1997 provides that:-

"11(1) A court warrant or letter of instruction [to the auctioneer] shall include, in the case of:-

(a) …….

(b) Immoveable property:-

(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale". The defendant has not provided any evidence of the property having been valued in the last twelve months or the reserve price they advised the Auctioneers of.

As regards the statutory notice of sale the defendant states that it was given by its then Advocates in their letter dated the 21st August 1998. I do not wish to reproduce the whole letter in this ruling as it is long. I will however reproduce the relevant part. After stating that the charge and further charge registered against the defendant's said property was for an aggregate sum of Sh. 5,150,000/= and that that amount is repayable to the defendant on demand the letter continued to state:-

"You have failed or neglected to pay the total sum due by you to "NBK" inspite of several demands particulars where of are well within your knowledge.

We have now to demand from you the total liability due by you to "NBK" together with all interest costs charges and expenses due to "NBK" forthwith.

The exact amount due to "NBK" will be informed to you on hearing from you in writing the date on which you intend to pay the liability as stated hereinbefore due by you to "NBK".

Is this notice valid? In my view it is not. It does not comply with the requirements of section 74 of the Registered Land Act Cap 300. That section states:-

"74(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or any other part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor a notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the charge may:-

(a) ……..

(b) sell the charged property".

As I have already stated the notice only stated the principal sum comprised in the charge and further charge. It did not demand of the defendant payment of "the money owing". That in my view is not a valid notice. The intention of Parliament in enacting section 74 of the Registered Land Act and I suppose that of the Rules Committee in making the Auctioneers Rules, is to protect the chargor's equity of redemption. Much as the courts should not fetter the chargees' exercise of their statutory rights of sale when they have arisen they should equally ensure that the chargor does not lose his equity of redemption by a notice that flouts the law and takes away a right conferred upon him by statute to be given a valid notice. In **Trust Bank Ltd. Vs Eros Chemists Ltd. [2000] 2 EA 550** a bench of five of the Court of Appeal dealing with the length of the statutory notice stated at page 554:-

"We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so it seems to us that failing to have the notice say so, the bank failed to give a valid notice with the result [that] the right of sale did not accrue under such notice".

In **Said Omar Athman A. Mohamed and Another Vs Kenya Commercial Bank Ltd. Mombasa HCCC No. 146 of 2001** Onyango Otieno J. (as he then was) declared invalid a notice given under Section 74 of the Registered Land Act which gave the chargor three months notice from the date of the letter instead of three months from date of service of the letter.

True those cases dealt with the length of the notice. But they are emphatic that a notice which does not comply with the provisions of the Act is not valid. In my view they equally apply to a notice which does not state the amount owing from the chargor as at the date of the notice. That being my view I hold that the purported notice given by the defendant's Advocates letter of 21st August 1998 is invalid. Consequently the proposed sale based on it will be illegal and must be restrained.

There is something else I need to say about that notice. It was given on the 21st August 1998. Subsequently the plaintiff requested that his facility be rescheduled or restructured. The defendant agreed and caused the impugned second further charge to be drawn executed and registered. That in my view gave the plaintiff the impression that the defendant had waived its rights under that notice. The defendant should therefore have served the plaintiff with a fresh notice before attempting to realise the security.

As regards the second further charge, faced with Mr. Wameyo's submissions that it is a nullity the defendant in the replying and further affidavits and through its Advocate's submissions wants me to hold

that it was superfluous. Without expressing any views on it, suffice it to say that I find it strange that a bank in rescheduling a customer's account can go into the trouble and expense of creating a second further charge to cover the accrued interest which was in any case covered by the earlier charge and further charge. Be that as it may, I find the plaintiff's complaint that the sum of Sh. 4,000,000/= secured by the second further charge is part of the amount the defendant is trying to recover by the sale to be justified. That document having been prepared by an unqualified advocate is invalid. See **Wilson Ndolo Ayah Vs National Bank of Kenya Ltd. Nairobi HCCC No. 1723 of 1997**. I do not agree with Mr. Mburu that the charge in that case was declared invalid because of non compliance with section 69 of the Indian Transfer of Property Act. It was held invlid first and foremost because the Advocate who had prepared it had in contravention of Section 34(1) of the Advocates Act not taken out a practicing certificate and was therefore unqualified. In **Civil Appeal No. 146 of 2000** the Court of Appeal declared incompetent a memorandum of appeal signed by an unqualified advocate and struck out the appeal.

For these reasons I find that the plaintiff has made out a prima facie case with a probability of success. Accordingly I allow his application dated the 24th February 2004 and order that the defendant by itself, its servants and or agents (including the auctioneers who have advertised the plaintiff's property for sale) are hereby restrained from selling or in any manner disposing the plaintiff's property known as Mombasa/Block XXI/226 M.I. until the defendants have issued and served the plaintiff with a valid notice of sale in respect of the undisputed sum of Sh. 5,150,000/= secured by the charge and further charge plus interest and charges thereon. The costs of this application shall be in cause.

Dated this 4th day of March 2004.

D.K. Maraga

Ag. JUDGE