



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL SUIT 106 OF 2004

KENYA FARMERS ASSOCIATION.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

I have before me a Chamber Summons dated 6th April, 2004. It is by the Plaintiff/Applicant and seeks an order of injunction to restrain the Defendant from selling by Public Auction or otherwise, the Plaintiff's properties namely:- Nakuru Municipality Block 9/63, Nakuru Municipality Block 9/64, Nakuru Municipality Block 4/35, Nakuru Municipality Block 11/22, Nakuru Municipality Block 12/146 and Nakuru Municipality Block 11/47 pending the hearing and determination of the suit filed by the Plaintiff against the Defendant.

The application was made on the grounds that the respondent had advertised the Plaintiff's properties for sale by public auction on 7th April, 2004 whereas the applicant had not been served with a statutory notice as by law required. The application was supported by an affidavit sworn by the Managing Director of the Plaintiff, Mr. Medan N. Githaiga. He deponed that sometimes in June and July 1996, the Defendant offered to the applicant loan and overdraft facilities totaling to Kshs.100 million as well as Guarantees and Letters of Credit facilities totaling to Kshs.200 million at the Defendant's Nakuru branch. To secure the said facilities, the applicant executed an all assets debenture for Kshs.500 million and a legal charge on some 84 specific properties with an open market value of Kshs.494 million as at 1995. The deponent admitted that at the time of applying for the said facilities and since then, the applicant's business had been performing poorly and as a result the Plaintiff's indebtedness to the defendant had grown to over Kshs.450 million as per the last statements from the Defendant and that was due to unserviced accrued interest and bank charges.

Mr. Githaiga further deponed that the Government of the Republic of Kenya had pledged to restructure and revive the applicant and had already facilitated the appointment of a new board and management team to oversee the restructuring of the applicant. He said that the new board and management team had agreed with the respondent that the bank was not going to dispose of the assets of the applicant but the applicant was going to sell by private treaty its none core assets and apply the proceeds towards off setting the outstanding debt.

However, on 16th July, 2003 the applicant was served with a 45 days redemption notice by M/S Legacy Auctioneering Services on behalf of the respondent seeking to recover Kshs.471,624,534.70. Thereafter, the applicant was given upto 31st December, 2003 to contact the relevant Government ministries to find a way forward. The Plaintiff's application for indulgence upto 31st March, 2004 was rejected by the

respondent. Mr. Githaiga deponed that the applicant had not been served with any Statutory Notice. He further deponed that the actual debt was barely Kshs.41,800,000/- and the bulk of the Defendant's claim was made up of bank charges and interest which were neither explained nor agreed upon. The applicant stated that it would suffer irreparable loss if its aforesaid properties were sold.

Mr. Otieno Olola for the applicant conceded that there was a statutory notice which was served upon the applicant by the respondent's former advocates, M/S Rachuonyo & Rachuonyo dated 19th December, 2001 when the applicant's debt to the respondent was alleged to be Kshs.329,950,391/-. However, he disputed the validity of the said notice, saying that subsequent to the service of the said notice the parties met severally and agreed to disregard the said notice. He said that the applicant had even made some payments towards reduction of its debt and the conduct of the respondent over the last three years showed that it had waived the said statutory notice.

He cited the case of **SIMIYU VS HOUSING FINANCE COMPANY OF KENYA E.A.L.R. [2001] 2 EA 540** where the court held that a statutory notice was defective as it gave the Plaintiff a period of three months from the date of the notice and not from the date of service of the notice.

Mr. Kiburi, the respondent's learned counsel opposed the application and argued that there had been previous suits between the parties on the same issue, the same being HCCC No. 1005 of 1999 at Nairobi. He therefore submitted that the applicant was not sincere in stating in its verifying affidavit to its plaint that there had been no other suits between the parties.

Regarding the statutory notice, he said that the aforesaid one dated 19/12/2001 was valid and there was no need for the respondent to have issued a fresh one. He submitted that the applicant was truly indebted to the respondent and all the interest and bank charges were payable by the applicant. He further stated that the respondent gave the applicant time to take up the issue of its indebtedness to the respondent with the government of the Republic of Kenya failing which the respondent made it clear that it would proceed with the intended auction of the applicant's properties. He submitted that the applicant had not shown that he had a prima facie case with a likelihood of success and urged the court to dismiss the said application. He relied on the Court of Appeal decision in **J. L. LAVUNA & OTHERS VS CIVIL SERVANTS HOUSING COMPANY LTD & ANOTHER , Civil Appeal No. 14 of 1995 and also the CIVIL APPEAL NO. 227 OF 1998, ABERDARE INVESTMENT LTD VS HOUSING FINANCE COMPANY OF KENYA LTD & ANOTHER.**

It is not in dispute that the applicant executed a Debenture to secure Kshs.500 million borrowed or to be borrowed from the respondent in terms of a Debenture dated 5th June, 1996. The aforesaid sum was exclusive of interest and the applicant covenanted with the respondent to pay the same upon demand together with costs, charges and expenses which may from time to time be due together with interest thereon. It is also not in dispute that the applicant did not service its liabilities to the bank as was required.

At this juncture, the court has not been called upon to determine the right amount payable by the applicant to the respondent. The main issue for determination is whether the respondent served upon the applicant a valid statutory notice of sale and if so, whether the respondent can rightly proceed to sell by public auction the applicant's properties as herein above set out.

The applicant contended that it was not served with any statutory notice of sale in terms of Section 74(2) of the Registered Land Act Cap 300 Laws of Kenya. However, it admitted that it was given the 45 days' notice by M/S Legacy Auctioneering Services.

It was submitted for the applicant that the appropriate notice was not served as required under Section 74 of the Registered Land Act Chapter 300 and alternatively, if any statutory notice had been served, the same was treated as having been waived by the respondent in view of some tripartite negotiations involving the applicant, the respondent and the Government of the Republic of Kenya through some Senior officials for example, the Permanent Secretary, Ministry of Finance & Planning, the Permanent Secretary, Ministry of Agriculture and Rural Development (as it was known then) and the Permanent Secretary, Ministry of Co-operative Development and Marketing among others.

I wish to consider the issue of the validity of the statutory notice that was served upon the applicant. The same read as hereunder:-

“We act for National Bank of Kenya Limited, Nakuru Branch. We are instructed to write to you as under:-

1. That our client agreed at your request to lend and advance to you a principal sum of Kshs.500 million upon the security amongst others, of a legal charge for Kshs.500 million over your several properties listed above, (with other lands).
2. That by a charge dated 5th June, 1996 made between yourselves of the one part and our client of the other part, you charged the said properties to our client by way of first legal charge to secure repayment of the said sum of Kshs.500 million together with interest thereon and other moneys as described therein.
3. By the said charge, you covenanted and agreed to repay to our client the said sum and interest and all other moneys aforesaid on the date specified for repayment, now past, or on demand.
4. The balance of the principal sum together with interest and other moneys now outstanding from you is Kshs.329,950,391/- as at 1st December, 2001 with further interest at 29% p.a. 5. We hereby require you to pay to our client forthwith, the said sum of Kshs.329,950,391/- with further interest at 29% p.a. as from 1st December, 2001 until payment in full.
6. We hereby give you notice that if such principal sum and further interest are not paid before expiration of THREE (3) MONTHS from the date of service of this notice upon you, then our client shall sell the properties comprised in the said legal charge.
7. A separate statutory notice has been sent to you in respect of the other charges created by you simultaneously with the above charge.

FOR: RACHUONYO & RACHUONYO ADVOCATES

SIGNED)

C. O. RACHUONYO”

The properties involved in this application were registered under the Registered Land Act. The properties listed in the schedule of the said Debenture as having been charged to the respondent included 45 Registered Land Act Titles, 30 Registration of Titles Act Titles and 5 Government Lands Act Titles.

Section 74(1) and 74(2) of the Registered Land Act states as follows:-

“74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any 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 notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

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

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property. Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, without a further notice served on him under that subsection.”

A logical interpretation of subsection (2) above shows that the notice takes effect three months after

service of the same and not within three months after the service. The Court of Appeal, in a five judge decision in TRUST BANK LTD VS EROS CHEMISTS LIMITED & WHITESTONE AUCTIONEERS (K) LIMITED, CIVIL APPEAL NO. 133 OF 1999 authoritatively resolved this issue. I can do no better than quote the relevant portion of their Lordships decision as follows:- “The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for three months’ period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months’ period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid.

In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months’ notice is given. 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 in failing to have the notice to say so, the bank failed to give a valid notice, with the result that the right of sale did not accrue under such a notice.”

The said decision stressed that the notice must expressly state that the sale shall take place after the three months’ period and failure to state so renders the notice invalid. The notice given by the bank in the present case stated that if the principal sum and interest were not paid before expiry of three months from the date of the service of the notice, the bank would sell the properties comprised in the legal charge. The dividing line may appear very thin but as the Court of Appeal in the above quoted full Bench decision stated, the objective of the statutory notice must be jealously guarded.

I therefore conclude that the statutory notice which was served upon the applicant is invalid and the respondent cannot sell the applicant’s aforesaid properties on the strength thereof.

The above conclusion would have been sufficient to dispose of this matter but there are other minor issues that were raised by the applicant which I should comment on. It was argued that out of the actual amount of money advanced to the applicant, only Kshs.41,800,000/- remained unpaid, the rest of the claim was on account of interest and bank charges which were not agreed upon. It must be understood that banks do not lend money for free, they have to benefit by levying bank charges and interest on the amounts advanced and the repayment of those charges and interest is just as obligatory as the principal sum. The Court of Appeal in **ABERDARE INVESTMENT LIMITED VS HOUSING FINANCE COMPANY OF KENYA LTD & ANOTHER, CIVIL APPEAL NO. 227 OF 1998** stated that a court would not ordinarily grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The applicant must therefore pay the balance of the principal sum plus all the bank charges and interest which shall be found to have been lawfully charged.

Regarding the entry of the Government of the Republic of Kenya into the negotiations between the applicant and the respondent, I have carefully studied the Debenture that was executed by the applicant. It is between the applicant, Kenya Farmers’ Association Limited, a body corporate, being a society duly registered in accordance with the provisions of the Co-operative Societies Act and the respondent, National Bank of Kenya Limited. The Government of the Republic of Kenya is not a party at all.

The Permanent Secretary in the Ministry of Agriculture and Rural Development, in his letter dated 4th June, 2002 to the Permanent Secretary, Ministry of Finance and Planning clearly stated that the applicant had requested the Government to intervene on the issue of the intended sale of the applicant’s assets by the bank and the only reason why the Government was trying to put in a kind word for the applicant was that the latter was a strategic co-operative that was said to be playing a very important role in agricultural production and marketing in the country. The Government had no legal obligation whatsoever to settle

the applicant's liabilities to the respondent or any part thereof.

If the statutory notice had been valid, the pendency of any negotiations between the applicant, the respondent and the Government would not have been a bar to the respondent's right to sell the applicant's properties upon default in payment on the part of the applicant, because as earlier stated, the Debenture was entered into between the first two parties only.

I am satisfied that the applicant has shown that it has a prima facie case with a likelihood of success as against the respondent and stands to suffer irreparable loss if the orders sought are not granted. I therefore grant an order of injunction to restrain the respondent from selling by public auction or otherwise, the Plaintiff's properties as stated in the Plaintiff's application date 6th April, 2004.

The costs of this application shall be in the cause.

DATED, SIGNED & DELIVERED at Nakuru this 17th day of May, 2004.

DANIEL MUSINGA

AG. JUDGE

17/5/2004

Ruling delivered in the presence of Mr. Olola for the Plaintiff and Mr. Kiburi for the Defendant.

DANIEL MUSINGA

AG. JUDGE

17/5/04