REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.187 OF 2001

IBRAHIM MUSA & SONS LTD. …… 1ST PLAINTIFF

IBRAHIM MUSA MOHAMED ….…….…. 2ND PLAINTIFF

VERSUS

FIRST NATIONAL FINANCE BANK …… 1ST DEFENDANT

G.A. DATOO & CO. LTD ……...… 2ND DEFENDANT

R U L I N G

The application dated 17th April 2001 is seeking mainly one order and that is an order that the First Defendant First National Finance Bank be restrained whether by itself, its current agent (2nd Defendant) or any other agents or servants from advertising for sale and/or selling, disposing of, alienating or in any other way interfering with the quiet possession and ownership of Plot No. Mombasa/Block XVIII/486 owned by the Plaintiff until the hearing and determination of the suit filed herein.

The application is brought on grounds that the First Defendant has not given the Plaintiffs the mandatory 90 days Notice as provided by Section 74(2) of the Registered Land Act and that the 2nd Defendant as auctioneers have not given the requisite Notice under the law. In the supporting Affidavit, the 2nd Applicant admits that since January 2000 they have not been able to service the loan regularly but he says in the same Affidavit that they have been seeking negotiations with the First Defendant on the rescheduling of the same loan but the First Defendant is not responding to their approaches. The Applicant's property was then advertised without any notice having been issued as required by law and the Applicants were surprised when they were informed by a friend that their property had been advertised for sale. They are not aware of the value that the First Defendant has put on the property as the first Defendant has withheld such information from them but they fear that the Defendants would seek to sell the property at an amount below the properties real value.

They also allege that the Principal Debtor (the loanee) has not been served with the necessary notice and they end that Affidavit by stating that the Defendant (First Defendant) has attached very high interest rate to the loan and that is uncontionable. There is what is purported to be a supplementary Affidavit sworn on 30th April, 2001 and filed into the court on 2nd May 2001. I will refer to these affidavits later both on validity of each of them and if need be on the contents of the same. However each of the affidavits had annextures. The Respondent opposed the application and filed an Affidavit in reply together with some annextures. The Affidavit was sworn by Bala Gopal Rao, the Senior Manager in Mombasa of the First Respondent. That Affidavit stated in brief that the First Applicant was indebted to the First Respondent and by 31st December 1999, the same loan stood at KShs.7,763,367/55. Second Plaintiff/Applicant was the guarantor and charged his property to enable the first Plaintiff/Applicant

secure the said loan. Regular statements have been sent to the Applicants and statutory notice was duly issued and served by registered Post through the last known address of the Applicants. He stated that the said letters had not been returned and were therefore duly received by the Applicants. However in another Affidavit, he accepted that the letters were returned to the Respondents.

He however maintained that the service was proper. He also explained the question of valuation of the property. That Affidavit also had several annextures to it. I have considered the application, the grounds for the same application, the affidavits and annextures filed by the parties and the able submissions by the parties. First the Application was purportedly brought under certificate of Urgency and was filed on 18th April 2001. It was then dealt with as a matter under Certificate of urgency and under that pretext, interim temporary injunction orders were obtained which were extended for sometime, but were later not extended. That alleged certificate of urgency filed on 18th April 2001 was null and void and of no legal effect at all. I say so because the file copy (which looks like the original) was never signed by anybody. Indeed there is no indication that anybody was to sign it at the bottom because there is no entry of the name and/or designation of the person whose signature was to appear where it should have been usually signed. It is indicated that it was Kabbie Kabuki who was saying the matter was urgent but he did not sign anywhere even where it is indicated that it was drawn by Kabuki & Company. In my mind, if the learned Commissioner who dealt with the first application had been made aware of the same the application would not have been accepted as urgent and no orders under certificate of urgency would have been issued.

Secondly, the Affidavit in support of this application is defective. It does not comply with the requirements of Section 5 of the Oaths and Statutory Declarations Act in that it is not stated in the jurat the place where it was sworn. That provision states as follows:

> ***"5. Every Commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."***

This is a provision in an act of Parliament. In my opinion it cannot be treated as an irregularity under Order 18 Rule 7 and therefore a breach of it is a breach of an act of Parliament and is not to be ignored if it was a mere irregularity. Further in my humble opinion the existence of the rubber stamp of the Commissioner for Oaths does not make matters any better as the name Mombasa in the Rubber stamp is merely an address of the Commissioner for oaths and it states the Postal address of the Commissioner for Oaths but that his postal address is in Mombasa does not necessarily mean that any oath or affidavit taken or made before him must have been made in Mombasa. That information is only conveyed if the place is either handwritten or typed or produced by any other means in the jurat. This was not done here and so the supporting Affidavit is of no help to this court.

Thirdly, when the orders of interim injunction was obtained, an incorrect statute was used and relied on, namely that the act that did control the transaction was Section 69(A)(1) of the Transfer of Property Act. That was not correct and on the date the application was heard, the learned counsel for the applicant made an application to amend the Chamber Summons particularly the ground of the application so as to delete Section 69(A) (1) of the Transfer of Property Act and insert Section 74(2) of the Registered Land Act. That amendment was made later after a wrong statute had been used to obtain and perpetuate interim temporary injunction orders for close to one year 5 months. In any event that amendment was of no consequence as it only ended up in an application contradicting the allegations in the plaint and at least one most important prayer in the Plaint where Paragraphs 11 and prayer (b) still talk of Section 69(A) (1) of the Transfer of Properties Act. The effect of the use of wrong provisions to obtain the court's orders cannot be over emphasized. The Applicant had an Advocate who should have known only too well which statute was applicable to the case. He misled the court and the Applicant cannot be said to have come to court with clean hands in view of all the these observations hereinabove.

What I have said would have been enough to dispose of this application. However even if I were to ignore what I have said (and I cannot ignore them), on consideration of the application in substance, five matters are raised. These are that the threatened sale by the Respondents would be illegal as the requisite

statutory notice of 90 days has not been issued and served. Secondly that the property is threatened with a sale at a value much lower than its true value or market value. The third point raised is that the auctioneers 45 days notice was not served. The next point raised was that the first Respondent did not send any copies of statements to the Applicants and lastly is that the 1st Plaintiff/applicant had not been given Notice prior to advertisement. I will make an attempt to answer these points but I need to make it clear here that only one point was actually raised by the Applicant's counsel in his address to me. The rest of the point were not canvassed and remain so uncanvassed. I only extracted them from the Affidavits in support of the application which I have already said was defective and of no effect whatsoever. I will start with Auctioneers Notice. The Applicant says the Notice was sent to them but was returned to the Respondents unclaimed. The address used was P.O. Box 90759 which they do admit is their address and was the address they themselves (at least First Applicant) printed on its letter heads as can be seen in a letter they wrote to the First Respondent dated 20-6-2000 in which they admitted receipt of First Respondent's letter dated 10th June 2000. That letter of 10th June 2000 from First Respondent was written to the said Applicant care of Ibrahim Musa & Sons, Box 90759.

It goes without saying that it was the correct address of the applicants for in their letter of 20.6.2000 they acknowledged receipt of the letter of 10th June 2000 written to them through that address. They have not stated why that registered letter was returned unclaimed and one cannot rule out deliberate effort on their side to derail the efforts of the Applicants to have them meet their obligations. They should have offered some reason why that address which was clearly operating well suddenly stopped serving their interest. Were they away for sometime so that they were not visiting their post office? Did they stop using the box? What happened that these letters registered could not be claimed by them? In any case, as to the auctioneer's letter, whether it was served or not is no longer important as the sale that was to take place on 25.4.2001 was stopped which means that even if the Respondent were to be allowed to proceed with the sale now, their auctioneer would have to go back to the drawing Board and issue fresh notices. The next matter I want to consider is the allegation that the first Plaintiff/applicant was not served with a notice before the sale was advertised. As I have stated above, this point though in the Affidavit in support of the application, was not canvassed before the court. However, I have considered the law and I have perused the affidavits and the annextures. I do agree that in law there is no requirement for a notice to be issued to the Principal Debtor before the securities are realised and no notice is required to be served upon the loanee or principal Debtor as a prerequisite to seeking the sale of the guarantor's property used as security.

What is required is a demand letter to the Principal Debtor. I have seen letter dated 20.7.2000 addressed to First Plaintiff/Applicant and it fulfils the purpose. Indeed it is a notice. I note that the Respondent stated in its Replying Affidavit that a demand letter was sent to First Applicant and annexed a copy of the letter. The Applicants, in their supplementary Affidavit never denied those allegations. There is no merit in that allegation. The third matter I will deal with is the allegation that statements were not availed to the Applicants. The answer to that is that if no statements were sent to them then where did they get annexture "IBM3" which was annexed to their Affidavit in support of the application? Those statements annexed as IBM3 cover a substantial part of their transaction and so the best the Applicants can say is that not all statements were sent to them but they must not end there. They must state the period in respect of which statements were not forwarded to them. Otherwise the allegation remains a blanket coverage which is heavily dented by the fact that they themselves have indicated that they have a substantial number of statements on the transaction which they could have only got from the Respondents and not otherwise legally.

Then the question of valuation of the property. This is another allegation which never saw the light of the day. It was never canvassed and indeed could not be canvassed because the applicants never made any effort to avail a current valuation of the property so as to be able to convince the court that the valuation by the Applicants was far below the market value or far below the forced sale value. If the property is to be sold at an auction then possibly the forced sale value will be required to be close to the reserve price. The sale was scheduled for 25th April 2001. The valuation by the Respondents was carried out on 1st February 2001. That meant the sale was to take place within one year of the valuation. That was proper in law. Without the Applicant's valuation Report by an independent valuer to challenge the Respondent's valuation, the allegation that the value of the property would be reduced cannot stand in law. In any event

now that one year has expired since the Respondent's valuation was done, they will have to carry out another valuation if they still want to sell the property. I cannot fault their valuation without any guidance which I would have only got from the valuation Report by the Appellants. That is why I stated herein above that this allegation cannot see the light of day.

The last point is that statutory notice was not sent as required by Section 74(2) of the Registered Land Act. The law is well settled that where the service is by registration the service is deemed to have been done if sent to the last known address of the Mortgagor. As I have stated above the last known address of the Applicant was P.O. Box 90759 Mombasa. That is not in dispute. That the Notice under Section 74(2) of the Registered Land Act was registered to the Applicants through that address is certain and is not in dispute. It is also not in dispute that it returned after sometime unclaimed. The Applicants have not offered any reasons as to why it was not claimed. The Respondents have shown that the Statutory notice was properly served as is required by law. They have annexed registration slip showing that the letter was registered. They have shown that they used the last known address of the Applicant's as is required. In my humble opinion they have discharged the burden which was on them to show proper service. The letter was later returned unclaimed and the Applicants say they did not receive it. They do not say that they had ceased at any one time to operate their postal address box number. I think under these circumstances when dealing with service in respect of property covered by Registered Land Act, I must accept that once the Mortgagee proves that he served the Mortgagor as is required by Section 153 of the Registered Land Act, the court must accept that he has discharged the burden on him in respect of service.

To accept otherwise would in my mind play into the hands of scrupulous debtors who may very well refuse to collect such registered letters on the knowledge or suspicion that such letters constitute important obstacle in their attempt to avoid facing responsibility over the loans they have with their financiers. It would provide the easiest way out and they would in that way avoid being pinned down to account for such loans. I will not lend hand in such machinations. I do find that service here was proper and that it would have only been found to have been improper if the Appellant had offered acceptable reason as to why he could not claim the same letter.

For what I have said above it will be clear that both on legal technicalities and on the substantive aspect, this application cannot stand. It is dismissed with costs to the Respondents. Orders accordingly.

Dated and delivered at Mombasa this 25th Day of September, 2002.

J.W. ONYANGO OTIENO

JUDGE