



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 178 OF 2002**

**MICHAEL MAINA KIHICO GICHUNGU ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD. .... DEFENDANT**

**RULING**

In the application by way of Chamber Summons dated 29th April 2002 and filed into the court on the same day, brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, the Applicant Michael Maina Kihiko Gichungu is seeking that the Defendant Kenya Commercial Bank Ltd., be restrained by a temporary injunction from selling by public auction or otherwise the Plaintiff's properties THIKA MUNICIPALITY/BLOCK 24/113, THIKA MUNICIPALITY/ BLOCK 24/900, THIKA MUNICIPALITY/BLOCK 24/1767 and THIKA MUNICIPALITY 24/2757 pending hearing and determination of this suit. It is also seeking that costs of this application be provided for. The grounds for the same application are that Defendant has unlawfully instructed auctioneers to sell the Plaintiff's above mentioned properties by public auction; that the Defendant did not serve the Plaintiff with a statutory notice as provided or at all in blatant disregard to the clear provisions of the Registered Land Act (Cap 300 Laws of Kenya), that notification of sale dated 15th April 2002 was defective as sale was advertised and scheduled to take place before the expiry of the required 45 days; that interest being charged by the Defendant is unlawful not contractual, arbitrary, highly exaggerated and unconscionable, and that the Plaintiff has made payments as required and the amount due has been considerably reduced. There is an affidavit in support of the application together with several annexures to the same affidavit.

In the Replying affidavit sworn by Mr. Martin Maseno the Officer-in-charge of advances Department, at the Defendant Town Centre Branch, the Respondent opposed the application maintaining that the Plaintiff's account was in arrears and a letter of demand had been issued to the Plaintiff who responded by making proposals to clear the amount outstanding which was as at 31st March 2001 KSh.1,805,746/70. The Applicant/Plaintiff failed to honour the same proposals and requisite statutory notices dated 5th June 2001 were issued to both the Plaintiff/Applicant and the borrower demanding KSh.1,835,844/65, and the notices were proper; that on 12th November 2001 the auctioneers also gave the requisite 45 days notification of sale to the Applicant. The Applicant made some effort and paid some money and made further proposals to make some further payment but again failed to honour the same proposals and so the respondent instructed the auctioneers to proceed with the sale and in a notification dated 15th April 2002, the auctioneer advertised the sale for 3rd May 2002; that as mandatory 45 days notice had been given by auctioneer vide a letter dated 12th November 2001 addressed to the Applicant by the Auctioneer, the notification of sale dated 15th April 2002 was superfluous; that the applicant executed the charge and understood its contents and thus cannot complain about rate of interest which is not unconscionable; that the Respondent has obtained valuation report to ensure that the properties would be sold at values commensurate with the market values which in aggregate is KSh.1.2 million and not K. 7 million as claimed by the Applicant, that the properties are vacant and are not occupied and lastly that the Plaintiff does not deserve equitable remedy sought by him.

The property was advertised for sale on 3rd May 2002. That sale however did not materialise as on 2nd May 2002 interim temporary injunction orders were issued which stopped the hitherto intended sale. I do agree that the sale would not have been valid in view of the fact the Notification of sale for that sale was

dated 15th April 2002 and the sale was to proceed on 3rd May 2002 well before the expiry of 45 days in that Notification of sale. The Respondent's allegation that they relied on the Notification of sale issued on 12th November 2001 and not the one of 15th April 2002 cannot hold water as that Notification of sale issued on 15th April 2002 clearly stated that the sale would take place after 45 days. The Applicant was entitled to treat that Notification of sale as having superceded the one issued on 12th November 2001 in the absence of anything to the contrary from the Respondent. In any case, if the Respondent maintains as it does that it was superfluous then it did create sufficient confusion in the matter as the Respondent did not tell the applicant so. One may nonetheless ask one question. If it was superfluous then why was it issued and what was its effect? However having held that the sale which was earlier on scheduled for 3rd May 2002 would not have been valid, I must state that the above would have affected only the sale on 3rd May 2002. It would not have stopped the Respondent from arranging sale any other time after that date provided the Respondent and the Auctioneer followed the right procedure.

In short the question as to whether the Respondent's statutory power of sale has arisen is still to be gone into. That brings me to the next point and that is whether the mandatory statutory notices or notice have/has been issued to the Applicant. Respondent's statutory power of sale can only crystallise after proper mandatory statutory notices have been served upon the Applicant. The Applicant herein says the Defendant did not serve him with statutory notice as provided or at all. The Respondent says statutory notices were properly served, and it annexed copies of the same. I must say that in the Applicant failing to exhibit whatever notices he received, and vaguely saying in the application that statutory notices were not served as provided or at all and in saying in paragraph 8 of his affidavit that he had never ever been served with statutory notice, the applicant was not being candid with the court. He could have annexed whatever he received whether he considered them improper or not and whether he thought they did not amount to statutory notices as the law requires or not. They were vital communication between him and the Respondent on the issue he brought before the court and the court has a duty to see them.

I have seen the alleged statutory notices. Copies of them are annexed by the Respondent and are MM8, MM9, and MM10. Letter dated 25.5.2001 exh. MM8 is not relevant. It is a letter to Respondent's advocates by the Respondents advising the Advocate to issue necessary statutory notices to both the debtor and guarantor. The next letter is dated 5th June 2001. It is MM10. It is addressed to the Applicant by the advocates for the Respondent and it states at paragraph 3 as follows: "We have therefore been further instructed by our client to demand on its behalf, as we hereby do, the immediate payment of the said sum of KSh.1,834,844/65 together with all interest accrued thereon to the date of payment in full and warn you that unless that sum together with interest (and legal fees etc amounting to KSh.41,000/-) is paid in full to its Town Center Branch within THREE (3) months of the date hereof, our client will institute court proceedings against you for its recovery and/or exercise its statutory power of sale under its charge by the sale of the chargor's property by public auction without any further notice or demand."

This is the letter the Respondent calls proper statutory Notice. Applicant says he did not receive it or that it is not a notice as provided by law. This notice starts to run from the date of the notice. That is not proper. The property in question was registered under the Registered Land Act Chapter 300. The relevant provisions of Section 74 of the Registered Land Act is the same as the provisions of section 69A(1) of the Transfer of Property Act as far as the date of the commencement of the mandatory statutory notice is concerned. They both state that the three months notice starts to run after the service of the notice and not from the date of the letter. If statutory notice therefore starts running or is made to start running three months from the date of the letter then it gives the mortgagor less than three months notice unless it is served on the same day. Any statutory notice that is made to run three months from the date of the letter cannot therefore be valid. In the case of Trust Bank Limited vs. George Ongaya Okoth, Kenya Court of Appeal Civil Appeal No.177 of 1998, the Court of Appeal stated as follows: "Section 69A(1)(a) of the Transfer of Property Act fixes a commencement dated of the notice. A mortgagee has no right to pick on any other date as the date of commencement. The period runs from the date of service of the notice on the Mortgagor. For purposes of the aforementioned section, the date of the notice is immaterial."

They then went on to comment on Russel's case and then stated again: "The relevant sub-section clearly stipulates "notice requiring payment of the Mortgage money has been served ..... and default has been made in payment. .... for three months after such service. So time starts running from the

date of service and terminates three months thereafter.” That decision was made on 14th January 2000. At that time, the case of Russel was still a stumbling block on that question of notice and they tried to distinguish it but they did not altogether declare the propositions in Russel bad law. That stage however came when the Court of appeal had to convene a five judge bench to hear the case of Trust Bank vs. Eros Chemist Limited and Another CA No. 133 and 1999 decided on 30th June 2000. That court declared Russel’s case a bad law and overturned its earlier decision on the question of the period of the statutory Notice. In doing so that court was faced with the decision in the case of Russel Company Ltd. Vs. Commercial Bank of Africa Ltd. & Another Civil Appeal No.80 of 1991 (unreported) and the opposing decision in the case of Trust Bank Ltd. vs. George Ongaya Okoth, I have cited hereinabove.

The five bench court came to the conclusion that the decision in Ongaya’s case was good law and it said in Eros case as follows: “In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under Section 69A(1) of the Transfer of Property Act.” And after discussing Russel’s case and Ongaya’s case they said: “The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to 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 rights of sale is exercised the mortgagors equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to rede em and warn of an intended right of sale. For that right to accrue the Statute provided for a 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 tak e place after three months period. To omit to say so or to state a period of less than three months for sale (as in the Russel case) is to deny the mortgagor a right confined upon him by Statute. That clearly must render the notice invalid.”

As I have stated the relevant provision in Transfer of Property Act is the same as the provisions of Section 74(3) of the Registered Land Act. The statutory notice that was issued in this case, which was stated to take effect three months from the date of the letter was not valid. That in effect means that the Mortgagee’s Statutory power of sale never crystallised and that being the case the Plaintiff has demonstrated a prima facie case with a probability of success. Mr. Omondi, the Respondent’s learned counsel invited me to consider the Applicant’s conduct. The applicant on a number of occasions did make proposals which he never honoured and there is no doubt that the debt is due. I do agree with him entirely. However those are the reasons why Section 74 of the Registered Lands Act was enacted to enable the Mortgagee to sell the Mortgaged land without resorting to court action. All the Mortgagor needs to do in such a case is to serve proper notice and ensure the auctioneers rules are complied with and the charged property will be sold without much ado. The sum total of all the above is that this application succeeds. It is granted in terms of prayer 3 of the application. From what I have said above I will not order any costs to the Applicant. Each party to bear its own costs.

**Dated and delivered at Mombasa this 19th Day of December, 2002.**

**J.W. ONYANGO OTIENO**

**JUDGE**