

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 5 OF 2001.

STEPHEN ODABIAH KARIUKI NJOROGE PLAINTIFF

VERSUS

EURO BANK LTD. 1ST DEFENDANT

REGISTRAR OF LANDS 2ND DEFENDANT

PETER MUSANGO 3RD DEFENDANT

CHRISTINE W. MOHORO 4TH DEFENDANT

RULING

This is an application for an injunction under O. 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules. The injunction sought in the application is to restrain the defendants from transferring, selling, taking possession of or in any way dealing with that parcel of land known as L. R. No Nairobi Block 82/3/3 until this suit is heard and determined. The only ground upon which the application is based is that the statutory notice required to be given under section 74 of the Registered Land Act was not given prior to the sale. That claim is repeated in paragraph 6 of the applicant's affidavit sworn in support of the application.

Service of a statutory notice of sale is a prerequisite for the lawful exercise of the mortgager statutory power of sale. It is trite law that where the mortgager denies receipt of the notice, service of the notice must be proved {see Nyangilo Ochieng & Another V. Fanuel B. Ochieng (Court of Appeal, Civil Appeal No. 148 of 1995)}. In the absence of proof of posting, the court is constrained to infer that the sale by auction is void. Obviously a sale which is void does not entitle the purchaser of the land in question to any title.

Given the foregoing, the defendants have to prove service of the requisite notice under S. 74 of the Registered Land Act if they are to successfully resist the application lodged by the plaintiff in this suit. The question that I have to decide is whether they have discharged that burden.

In the replying affidavit sworn by Japheth Ndambuki the 1st defendant's Credit Manager, it is deposed that the necessary notices were issued to the plaintiff. To substantiate that statement, Mr. Ndambuki annexes to his affidavit a notice (Exh. JK3) addressed to the plaintiff which, on the face of it, appears to be in compliance with the requirements of S. 74 of the Registered Land Act. Also annexed to Mr. Ndambuki's affidavit are two certificates of posting (JK4 and JK5) addressed to the borrower and to the plaintiff as the chargor at the address appearing on the charge document.

The evidence contained in Mr. Ndambuki's affidavit shows that the notice required to be served upon the plaintiff was posted to him at the address given in the charge document. In my view that constitutes satisfactory evidence of good service in terms of section 3(5) of the Interpretation and General Provisions Act and consequently the complaint by the plaintiff that the notice required to be served under S. 74 of the Registered Land Act was not so served lacks substance.

For the above reasons, I am not satisfied that the applicant has established a prima facie case with a probability of success within the meaning of the decision in Giella V. Cassman Brown & Co. Limited

((1973) E.A. 358) to warrant the issuance of a temporary injunction in the terms sought in this application.

For those reasons, the application is dismissed with costs.

Dated at Nairobi this 29th day of January, 2001.

T. MBALUTO

JUDGE