



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1203 OF 2001

JOHN KARONGO MUHU PLAINTIFF

VERSUS

HOUSING FINANCE CO. LTD &

ANOTHER DEFENDANT

R U L I N G

The application dated 1st August 2001 is seeking mainly one Order and that is an order for temporary injunction against the Defendants, their servant or agent from disposing off or alienating all that parcel of land known as DAGORETTI/THOGOTO IT.518 registered in the name of the Plaintiff by Public auction which was then scheduled on 2nd August 2001. The main ground for the application is that the Defendant never gave the Applicant the required 90 days notification of sale and that the sale is malafide and only calculated to put a clog on the equity of redemption. There is a Supplementary Affidavit in support of the Application sworn by the Plaintiff. The Respondent opposes this application and has filed Grounds of Opposition as well as Replying Affidavit sworn by Jacinta Mutio Wambua, the 1st Respondents Manager (legal). There is one annexure to the Applicant's Affidavit and several annexures to the Respondents Affidavit.

The main grounds for the application are that the statutory notice was not served upon the Applicant. If it was ever served then the Applicant maintains that it is not a valid notice. The second ground is that the Applicant stands to suffer irreparable damage as the suit property comprises of a dwelling house where the Applicant's family and the Applicant reside.

The Respondent maintains that the Plaintiff is guilty of concealing material facts namely receipt of the statutory notice and so has come to court with unclean hands and that the Plaintiff is also guilty of laches having brought this application to court at the last hour and that the Applicant will suffer no irreparable loss as the suit property can be quantified and the damage if any can be paid by the Respondent.

I will start with the service or non-service of the statutory notice. The alleged statutory notice was dated 14th May 1996. It is clearly indicated on it that it was forwarded to the Applicant by Registered Post. Certificate of registration shows that 5 letters listed were sent. These were apparently registered articles numbers ranging from 2033861 to 3965. I note that that would be more articles than 5 but it appears that there could have been a mistake probably an error in recording for the same letters were listed and it appears that the range was from 2033861 to 2033865 and not 2033965 as appears in the certificate of posting. The list which is duly stamped by Post Office shows that on 16.5.2001 five articles were posted and the article registration number 2033862 was an article posted to J.K. Muhu of P.O. Box 23412 Nairobi. These two Exhibits namely certificate of posting a registered postal article coupled with list of registered postal articles, persuade me into accepting and I do accept that the alleged statutory

notice was forwarded to the Applicant.

The next matter I need to consider is whether the same statutory notice was indeed valid in law. The same statutory notice, a copy of which was availed to court by the Respondent and marked as JMW2 states inter alia as follows:

“We the advocates for Housing Finance Co. of Kenya Limited the chargee in the charge dated the 30th November '94 relating to the above title hereby give you notice that by reason of your having failed to pay the company the sum/loan amount and interest due by the 6th May 1996 the whole balance of that loan amount and interest amounting to K.shs 873,012,95/- interest thereon accruing at the rate of 26% per annum as from the 7th May 1996 until payment in full is due and owing from you and unless you arrange to settle the same within three months (3) from the date hereof, the chargee will exercise its statutory rights under Section 74 of the Registered Land Act (Cap 300) of the Laws of Kenya”. (underlining supplied)

That notice gave the Applicant three months from the date of the notice. That was wrong. Three months must in law start running from the date of the service of the notice and whatever else the notice says, it must make that clear. The very Registered Land Act (Cap.300) the Applicants counsel was referring to in that letter states as follows at paragraphs 74(1) and 74(2).

“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 sub-section (1), the chargee may

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

(b) sell the charged property.”

This clearly means that the notice must specifically state that the sale will take place if the chargor or mortgagor does not comply within three months of the date of service and not of the date of notice.

The learned counsel for the Respondent submitted that if the notice is sent by registered post it takes effect from the date of registration so that the date of notice and the date of service are the same. First that is not correct in law and secondly even if it were so, this case clearly demonstrates the difference as the letter was dated 14th May 1996 and was posted on 16th May 1996. Clearly the Applicant was expected to receive it minimum four days later. That makes a whole difference of six days but even if one were to take date of posting here which was 16th May 1996 as the date of service still there are two days difference within which Applicant could have, negotiated funds with a third party for repayment. Whichever way one looks at it, this statutory notice was not valid. The Court of Appeal in the case of Trust Bank Ltd vs Eros Chemists Ltd and another had this to say on an almost similar situation.

“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 Russel case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid”.

This is the law. I am not hearing this case, but from what I have stated above, I do find as I must do that the Applicant has shown a prima facie case with a probability of success. In view of the same, I do not think I need to say anything about the loss that the Applicant says he will suffer as the suit property comprises a house in which his entire family and himself live. I must however say that that alone is no

ground for not facing his responsibilities which includes paying his debtors. However, I will say no more on that.

The application for injunction succeeds and this application is granted in terms of prayer 3. The Applicant will have the costs of the application.

Orders accordingly.

Dated at Nairobi this 18th day of September 2001.

ONYANGO OTIENO

JUDGE