



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1558 OF 2001

STEPHEN MUGERA GAKENGE PLAINTIFF

VERSUS

**KENYA COMMERCIAL BANK LTD & ANOTHER
DEFENDANTS**

RULING

This is an application seeking temporary injunction. It is supported by an Affidavit sworn by the Plaintiff and several annexures to the same affidavit. The Respondent opposed the application and filed Grounds of opposition and a Replying Affidavit sworn by Naftaly Kiroto Njoka.

The main issues in this application to be considered are whether or not valid mandatory statutory notice was issued and served upon the Applicant and whether Notification of Sale under Rule 15 (d) and (e) of the Auctioneers Act was proper or not. The Plaintiff in its Pleint agrees that he charged his properties Plot No. 23 Maragua Trading Centre and L.R. No. LOC 7/GAKOIGO/1358 to the first Defendant to secure overdraft loan facilities extended to Gakenge Maize Millers Co Ltd. He also agrees that this loan is outstanding. All it contends is that the first and 2nd Defendants have acted illegally in realising his property in that no valid statutory notice pursuant to Section 74 of the Registered Land Act had been personally served on the Plaintiff. He also contends that the Notification of Sale served upon him by the Second Defendant is defective and improper and is illegal under the provisions of the Auctioneers Rules 15(d) and 9(c).

The Respondent maintains that valid notices were issued to the Plaintiff/Applicant, and that the Notification of Sale issued was proper and in conformity with the Auctioneers Rules, that the Applicant has not satisfied the requirements for grant of an injunction and is not entitled to an equitable relief.

Two different statutory notices were exhibited. One was exhibited by the Applicant and the other was exhibited by the Respondent. I have perused both statutory notices. The one exhibited by the Applicant is addressed to Gakenge Maize Millers. That notice is clearly not valid as Gakenge Maize Millers is the Principal Debtor but is not the chargor. Secondly that notice offended the requirements of section 74(2) of the Registered Land Act in that it gives the chargee a notice of three months from the date of the notice and not from the date of service as is required by the law. That provision in section 74(2) is the same as the provision in Section 69A(1) and in the case of Trust Bank Ltd -vs- Eros Chemists Ltd CA No. 133 of 1999 Court of Appeal is clear on the legal position. There is also the case of Trust Bank Ltd -vs- Okoth Civil Appeal No. 177 of 1998. In Trust Bank -vs- Eros Chemists Ltd & Another the Court of Appeal stated in part as follows:

“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 this right to redeem 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 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 the statute. That clearly must render the notice invalid”.

The notice that the Applicant says was served upon him which I have referred to hereinabove was invalid.

However, as I have stated the Respondent states that it served another Notice and it relies on the notice it allegedly served upon the Applicant. It is also dated the same date as the notice I have discussed hereinabove. It is dated 26.2.2001. Unfortunately that notice annexed as Exh. JMN3 is for the very same second reason I have given above also invalid in law. It also gives the Applicant, notice stating that the “chargee shall after expiry of three (3) months from the date of hereof sell the charged property”. That notice should have clearly spelt out that the property would be sold after expiry of three months from the date of service of the notice.

Further it is stated in that notice that it was sent by registered post yet there is no evidence of the letter having been sent by registered post i.e. no copy of Certificate of Registration was annexed to prove that it was indeed sent see case of Nyagilo Ochieng & Another –vs- Fanuel Ochieng & Others CA No. 148 of 1995 where it was stated by the Court of Appeal on a similar situation:

“It is for the chargee to make sure that there is compliance with the requirements of Section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove such notice was in fact sent”.

I am satisfied from the above that a prima facie case with a probability of success has been shown to the court as far as there is so far evidence tendered to show that no valid mandatory statutory notice has been served upon the Applicant. In fact even if the notice annexed by Respondent was properly worded, it would still not have been acceptable as it is clear from the Variation of Charge document and the charge itself that the address of the Applicant is Box 17, Maragua whereas the two purported statutory notices were sent to him through Box 117, Maragua which is not his address.

I do not think I need to consider the question of the Validity of Notification of Sale notices as the same draw their validity from the validity of the Mandatory statutory notice the issue of which crystallises the Mortgagee’s power of sale and if the same mandatory statutory notices are not valid then it goes without saying any more that Notification notices also cannot stand.

This application succeeds. It is granted with costs to the Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of October 2001.

ONYANGO OTIENO

JUDGE