

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1592 OF 1999

FRANCIS NGANGA MUNIDA.....PLAINTIFF

-VERSUS

EQUITY BUILDING SOCIETY.....DEFENDANT

RULING

In his application the applicant is asking for orders that the transfer of L.R. N. Nairobi Block 75/168 in Buru Buru be stopped and that the sale of this property of 3.11.99. The application is grounded on the reasons that No. 1-10 Statutory Notice was given and that the Auctioneer did not issue a Proclamation Notice. The Applicant contends that there were no arrears due and that the installments due had been paid by 5.11.99.

The application is opposed on the ground that there was default in payment and a Statutory Notice was sent to the applicant. He must have received the Statutory Notice and that is why the applicant had gone to plead with the Bank. The statement of accounts which is annexed to the application show that there were arrears due.

In the affidavit in support the applicant has deponed that he was not served with a Statutory Notice as required by Section 74 (1) of the Registered Land Act. In reply the respondent says that the Statutory Notice was issued through the Firm of Kamau Njuguna and Company Advocates. A copy of the Notice is annexed to the affidavit. The Respondent does not explain how the notice was served upon the applicant. There is no return of service except the one for notification of sale from the auctioneers which is annexed to the Replying Affidavit. In paragraph 6 of the Replying Affidavit Mr. Ngari explains how after the Statutory Notice was not heeded they instructed the Firm of Lilian Njuguna and Co. Advocates to instruct the auctioneers to advertise the property for sale.

Then in paragraph 7 he says the applicant called on them after receiving the notice. This presumably refers to the notification of Sale which was allegedly served on the applicant by the auctioneers. If the applicant went to plead it was as a result of this notice but not because he had received the Statutory Notice.

No where in the replying affidavit and in the further affidavit does Mr. Ngari explain how the Statutory Notice was served on the applicant. Section 74 (1) of the Registered Land Act (Cap.300 Laws of Kenya) requires Chargee to serve by registered post the Statutory Notice. The right of Sale arises 3 months after the Service of the Notice and thereafter the Chargee can advertise the property for sale. It is for the Chargee to prove service. If it is by post the Chargee must show that he did register the notice and that he posted it. There is no evidence of having registered and posted the notice. In the absence of such evidence the inevitable conclusion will be that the Statutory Notice was not served and consequently the sale by auction was void. See Civil Appeal No. 148 of 1995 Nyangilo Ochieng & Another AND Fanuel B. Ochieng and Another. The effect of the sale being void is that the purchaser of sale does not obtain proprietorship or title to the land. The remedy for the purchaser is to go back to the defendant for redress.

The application is therefore allowed as prayed for in prayer 1 of the Chamber Summons. The sale by auction is declared null and void. The applicant shall have the cost of his application.

Delivered and dated this 28th day of January, 2000.

KASANGA MULWA

JUDGE