



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 177 OF 1998

TRUST BANK LIMITED..... APPELLANT

AND

GEORGE ONGAYA OKOTH..... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Hayanga, J.) dated 4th May, 1998

in

H.C.C.C. NO. 1135 OF 1997)

JUDGMENT OF GICHERU. J.A.

The mortgagee's statutory power of sale under section 69(1) of the *Transfer of Property Act, 1882, of India*, hereinafter called the Act, as applied to Kenya arises where the mortgage-money has become due:

"whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable."

But that power in terms of section 69(A). (1)(a) of the Act cannot be exercised unless and until:

"notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service."

The object of the notice as pointed out in the Tenth Edition of *Fisher and Lightwood's Law of Mortgage* at page 384 is to guard the rights of the mortgagor and under the statutory power of sale, that notice:

"may be in the form of demand for immediate payment, with an intimation that if the money is not paid before the expiration of three months from the date of service, the mortgagee will proceed to sell, but it is equally effective if it is a notice to pay at the end of that period."

By a plaint dated 12th May, 1997 and filed in the superior court on 13th May, 1997, the respondent herein sought *inter alia* an injunction restraining the appellant herein from selling or otherwise alienating, mortgaging or otherwise dealing in or disposing of the respondent's properties *Land Reference Numbers 1160/471 and 1160/472* situated in Karen, Nairobi, along Masai Lane opposite a homestead referred to as Murang'a House, hereinafter called the suit properties. The suit properties together with the respondent's

other three properties *Land Reference Numbers 1160/473, 1160/474 and 1160/475* which latter properties were all situated in the same place with the suit properties were the subject-matter of legal charges dated 5th March and 28th October, 1991 made between the respondent as the Chargor/Mortgagor and the appellant as the Chargee/Mortgagee and duly registered to secure the repayment of an aggregate sum not exceeding K.Shs.20,50 0,000/- or a lower limit of advance or banking facilities agreed or fixed from time to time by the appellant as the lender that might be advanced to the respondent after the legal date of redemption upon a written demand for payment of such sum as may then be due and owing for the charge debt and interest thereon at a rate not exceeding that allowed by law. The suit properties in respect of which the injunction was sought had been advertised on 21st April and 12th May, 1997 for sale on 16th May, 1997 to realise the securities for the amounts of money due and owing to the appellant which amounts of money had been advanced or were in respect of banking facilities accorded to the respondent by the appellant. This advertisement triggered the respondent's suit in the superior court wherein he alleged fraud and recklessness on the part of the appellant as particularised in paragraph twelve of his plaint.

Simultaneous with the filing of his plaint in the superior court, the respondent took out a Chamber Summons under Order XXXIX rules 1 and/or 2 of the civil Procedure Rules, section 3A of the Civil Procedure Act, inherent jurisdiction and all other powers and *enabling provisions* in which he sought orders that the appellant whether by itself or its servants, agents, advocates, auctioneers or any of them or otherwise howsoever be restrained by an injunction from advertising for sale, selling by public auction as advertised for 16th May, 1997 or by private treaty or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or otherwise howsoever of the suit properties pending the hearing and final determination of the suit against the appellant or until further orders of the superior court. The respondent also sought that all further registration or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession or in any kind of right, title or interest in the suit properties with any Land Registry, Government Department, and all other registering authorities be prohibited until further orders of the superior court. He also asked for costs of his application in the Chamber Summons.

Besides his averment of fraud on the part of the appellant and his contention that he had paid all the monies advanced to him on the strength of the charge instruments referred to above, the respondent averred that the purported statutory notice requiring him to pay the mortgage-money was invalid as the same was not served as required under *section 69(A).(1)(a)* of the Act before it crystallized. That notice which was dated 26th August, 1996 and addressed to the respondent was couched in the following terms:

"Dear Sir,

OUTSTANDING BALANCE OF KSHS.75,408,911.75 DUE BY YOU TO TRUST BANK LIMITED.

We are instructed by our above named client to apply to you for the immediate payment of KShs. 75,408,911.75 being the amount due by you to our client in respect of a loan/overdraft facilities granted to you at your request full particulars of which are known to you. Our instructions are that the said sum carries interest at 34% per annum plus penalty until payment in full. Such rate of interest is subject to be varied and increased at our client's sole discretion without notice to you.

Unless we receive your remittance for the said sum together with interest thereon within *FOURTEEN DAYS* (14) days from the date hereof, our instructions are to sell by public auction the immovable properties charged to our client by way of security.

Would you please note that no further notices will be sent to you and that any proposals made if acceptable and any instalments paid by you subsequent to the date of this Notice will be accepted without prejudice to our client's rights.

Yours faithfully

NDUNG'U NJOROGE & KWACH".

The submission of counsel for the respondent in the superior court in regard to the notice set out above was that since it did not comply with *section 69(A)(1)(a)* of the Act, the appellant could not exercise its statutory power of sale over the suit properties.

The appellant's reaction to the respondent's averment and submission in the superior court in regard to the statutory notice under *section 69A.(1) (a)* of the Act was that the said notice was given and served on the respondent and was valid in law so that it entitled the appellant to realise the charged securities as the respondent had defaulted in the repayment of the amounts of money due and owing to it by the respondent.

In his ruling dated and delivered on 4th May, 1998, Hayanga, J. observed that there are statutory conditions precedents under *section 69A. (1)* of the Act which where applicable to each particular case a mortgagee whose power of sale has arisen must fulfil before exercising such power and where such conditions are not fulfilled, then an injunction restraining sale should issue. There can be no gainsaying that this must be so since in a matter such as was before the learned judge, in law the exercise of the statutory power of sale is predicated on the fulfilment of the relevant statutory conditions precedent as are set out under *section 69A.(1)* of the Act. According to the learned judge, the contents of the statutory notice under *section 69A. (1)(a)* of the Act must contain what is in the Act and the notice set out in this judgment does not comply with the aforesaid subsection. That notice has, according to him, the effect of reducing the redemption period to fourteen days from the statutory period of three months and on account of this, the respondent had a *prima facie* case with a probability of success in the superior court. Holding that damages could not be adequate compensation to the injury that the respondent would suffer if the suit properties were to be sold and that the balance of convenience favoured the granting of an injunction, the learned judge proceeded to grant with costs the respondent's application in the Chamber Summons. It is against the order granting the respondent's Chamber application that the appellant now appeals to this Court and has put forward ten grounds of appeal which in the main gravitates on the issue of the validity of the statutory notice under *section 69A.(1) (a)* of the Act.

At the hearing of this appeal on 9th December, 1999, counsel for the appellant, Mr. Munyonge, submitted that the statutory notice given by the appellant to and served on the respondent was in accordance with the relevant law for notwithstanding the reference in that notice to the fourteen days period within which the respondent was required to pay the mortgage-money, it was not until 21st April, 1997 (nearly eight months from the date of the notice) that the appellant initiated steps towards exercising its statutory power of sale. This was after a period far in excess of the three months stipulated in *section 69A. (1)(a)* of the Act. According to Mr. Munyonge therefore, the learned superior court judge was wrong in holding that the statutory notice set out above did not comply with the aforementioned subsection since it did not make reference to all what is contained in the said subsection. Indeed, the respondent was not entitled to the orders sought in his Chamber summons in view of his non-denial of his default in the repayment of the mortgage-money, counsel concluded.

Mr. K'Owade for the respondent in response to the submission of counsel for the appellant contended that apart from the statutory notice set out in this judgment conveying the message that the respondent was required to repay the mortgage-money within a period of fourteen days, the said notice did not take into account that it would become effective only upon service to the respondent. Besides, the allegations of fraud against the appellant as particularised in paragraph twelve of the respondent's plaint in the superior court were such that they required investigation on a trial in the superior court. Mr. K'Owade therefore was of the view that the appellant's appeal was unmeritorious and should be dismissed with costs.

Doubtlessly, the allegations of fraud as set out in paragraph twelve of the respondent's plaint cannot be taken lightly and would require investigation in a trial by the superior court. However,

in the absence of express statutory provision, the right conferred on a mortgagee to bring the mortgaged property to sale out of court cannot be said to be taken away by allegations of fraud. In any event, in the circumstances of the matter before the superior court, the allegations of fraud could have been an issue if the appellant was able to exercise its statutory power of sale as provided by *section 69A.(1)* of the Act.

As indicated at the beginning of this judgment, the object of a statutory notice under section 69A.(1)(a) of the Act is to protect the rights of the mortgagor and that notice may be in the form of demand for immediate payment, with an intimation that if the mortgage-money is not paid before the expiration of three months from the date of service, the mortgagee will proceed to sell the mortgage-property. Such notice would equally be effective if it required the mortgagor to pay the mortgage-money at the end of a period of three months. Short of the foregoing, such notice would be ineffective as it would not be in conformity with the aforementioned subsection, the result whereof being that the exercise of the mortgagee's statutory power of sale would not have accrued. That was the case in the instant appeal. Consequently, the learned superior court judge cannot be faulted in holding as he did and in granting the orders sought by the respondent in his Chamber Summons as are outlined in this judgment; for if the exercise of the appellant's statutory power of sale had not accrued, any sale of the suit properties by the appellant as a mortgagee would be illegal. In the upshot, I would dismiss the appellant's appeal with costs to the respondent. As Bosire and Owuor, JJ.A. agree, it is so ordered.

Dated and delivered at Nairobi this 14th day of January, 2000.

J.E. GICHERU

JUDGE OF APPEAL