



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. E034 OF 2021**

CONSOLIDATED MEDIA LTD.....1<sup>ST</sup> PLAINTIFF

FRANCIS OOKO JOHN RAUDO.....2<sup>ND</sup> PLAINTIFF

JOAN CAROLYNE RAUDO.....3<sup>RD</sup> PLAINTIFF

ANDREW KEVIN RAUDO.....4<sup>TH</sup> PLAINTIFF

VERSUS

SPIRE BANK LIMITED.....1<sup>ST</sup> DEFENDANT

VIEWLINE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT

**RULING**

1. This ruling is in respect of the plaintiff's Motion dated 14/1/2021. The same was brought under **Order 40 Rules 1(b), 2, 3 and 4 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act**. In the Motion, the plaintiff sought an injunction to restrain the defendants from alienating the property known as **LR. No. 330/234 (Original Number 330/75/1)** ("the suit property").

2. The grounds for the Motion were set out in the body of the Motion and in the supporting and supplementary affidavits of **Francis John Ooko Raudo** sworn on 14/1/2021 and 2/2/2021, respectively. These were that; the 1<sup>st</sup> plaintiff took some securities from the 1<sup>st</sup> defendant in or about September, 2017 on the security of the suit property belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff; due to the effects of Covid – 19, the 1<sup>st</sup> plaintiff had been unable to service the said facility as required.

3. That on 12/11/2020, the 2<sup>nd</sup> defendant issued a 45 days Notification of sale notice. That the sum claimed was Kshs.8,859,508/02 yet the suit property was valued at Kshs.65,000,000/-.

4. The application was strenuously opposed by the 1<sup>st</sup> defendant vide the replying affidavit of **John Wageche** sworn on 27/1/2021. It was contended that in or about September, 2017, the 1<sup>st</sup> defendant extended facilities to the 1<sup>st</sup> plaintiff totalling Kshs.10,100,000/- repayable in 48 monthly instalments. The security was the suit property and personal guarantees of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiff.

5. That despite the 1<sup>st</sup> defendant and the borrower agreeing on the restructuring of the facility, the latter failed to comply with the terms thereof whereby the 90 day Statutory Notice was issued on 22/6/2020. The 40 day statutory notice under **section 96(2) of the Land Act, 2012**, was issued on 22/9/2020. It is upon failure to comply therewith that the auctioneer issued the 45 day Notice on 12/11/2020. That the said Notice expired without any compliance, whereby the auctioneer advertised the suit property on 25/2/2020 for sale on 9/2/2021.

6. It was contended that the defendants had complied with the law and acted in good faith. That the debt was not denied and that the plaintiffs had received all the necessary Statutory Notices. That the 1<sup>st</sup> defendant had indulged the plaintiffs in order for them to regularise their loan account but they had failed. That the arrears stood at KShs. 8,969,006/21.

7. The application was orally argued. **Mr. Jaoko**, Learned Counsel for the plaintiffs submitted that no statutory notices under **sections 90 and 96(e) of the Land Act** (hereinafter "the Act") were served upon the plaintiffs. That there was no certificates of postage to evidence service of the notices produced by the 1<sup>st</sup> defendant. That there was no certificate of service under **section 15 (c) of the Auctioneers Act** to

show compliance with the law. The case of **Moses Kibiego Yator v. Eco Bank Kenya Ltd [2014], eKlr**, was cited in support of those submissions.

8. On the other hand, **Mr. Mbogo**, Learned Counsel for the defendants submitted that the debt and default were undisputed. That the plaintiffs were seeking the re-writing of the contract with the 1<sup>st</sup> defendant. That the only issue raised was non-service of the statutory notices for which however, the defendants had produced certificates of posting.

9. Counsel relied on the cases of **Karige Kihoro v. Equity Bank Limited & Another [2016] Eklr**, **Nyangilo Ochieng & Another v. Faniel B. Ochieng & 2 Others [1996] Eklr** and **Nellie Benignus Wamalwa v Rafiki Deposit Taking Micro Finance Ltd [2018] Eklr** in support of those submissions.

10. It was further submitted that the suit property having been offered as a commercial chattel, there would be no irreparable loss to be suffered. That in any event the balance of convenience was in favour of declining the order sought.

11. This is an injunction application. The principles applicable were well enunciated in the celebrated case of **Giella V. Cassman Brown Co. Ltd [1973] EA 358** wherein it was held that: -

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience”.***

12. In the present case, the loan is not disputed. The default is also not denied. All that is in contention is whether all the required statutory notices were served. There are various steps by way of notices that must be undertaken by a Chargee before realizing its security. The first Notice is to be found under **section 90(3) of the Land Act, 2012 (“the Act”)**. That Notice is for three months after the date of service. This notice succeeds a 1 month default notice.

13. The second notice is to be found in **section 96(2) of the Act**. That notice is supposed to be for 40 days and should be served amongst others, **“the spouse of the chargor who gave spousal consent”**.

14. The third notice is to be given under **Rule 15(d) of the Auctioneers Rules**, the same being 45 days’ notice. It is after the expiry of the last notice that the auctioneer is entitled to sell the property not earlier than 14 days after the first advertisement.

15. The plaintiffs complained that no statutory notices were served upon them. That in particular, there was no service of the 40 days’ notice upon the spouse and that there was no service of notice under **Rule 15 of the Auctioneers Rules**.

16. I have seen the statutory notices served by the defendant. The first notice was dated 22/6/2020. It stated as follows: -

***“By a copy hereof, we notify the Guarantors of your default and demand from the Guarantors that they honour their guarantees by paying the outstanding amount together with the further interest that will accrue as aforesaid.***

***For purposes of the foregoing paragraph, the date of service shall be Ten (10) days from the date of posting as evidenced by the Certificate of Posting a Registered Postal Article issued to us at the time of posting”.***

17. The 22/6/2020 was a Saturday. The payment receipts for the postage shows that the said Notice was posted on the same day, 22/6/2020. Service thereof was therefore effected ten days thereafter, being 2/7/2020. Under **section 90(3) of the Act**, the notice period would be 90 days after service. Accordingly, that Notice terminated on 29/9/2020. The notice period run until 21/9/2020 before the second notice of 40 days was given. The statutory notice given was therefore 81 days contrary to the law.

18. The second 40 days’ notice was issued on 22/9/2020. From the receipts produced by the defendant, it was posted on 1/10/2020 to the plaintiffs. It stated that it would be deemed served 10 days after the date of service. It was therefore served on 10/11/2020. What followed was the 45 days redemption notice on 12/11/2020.

19. From the foregoing, it is clear that the initial Notice that commenced the realization of the security was illegal in so far as it failed to give the requisite 90 days’ notice. It fell by 9 days and it cannot be allowed to sanction the proposed sale.

20. Accordingly, I find the proposed public auction to be irregular and illegal. It cannot be allowed to stand. I therefore allow the application in terms of prayer nos. 2 and 3 of the Motion. For the avoidance of doubt, the 1<sup>st</sup> defendant can proceed to realize its security after issuing compliant notices.

It is so ordered.

**DATED and DELIVERED at Nairobi this 8<sup>th</sup> day of February, 2021.**

**A. MABEYA, FCIArb**

**JUDGE**