



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 341 OF 2008

LUCIANA WAKIO NYAMBU.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff instituted this matter by the Plaint dated 5th December, 2008 and filed in court on the even date. In the Plaint, the Plaintiff prayed for judgment against the Defendant for inter alia:-

- a) A permanent injunction restraining the Defendant by itself, its agents, servants or employees from selling, alienating, disposing off, transferring or dealing with the Plaintiff's property known as KWALE/DIANI COMPLEX/1179.
- b) A declaration that any purported sale of the subject property by the Defendant is illegal, null and void for want of statutory notice and for being aimed at defeating the Plaintiff's right to redeem the said property.
- c) Costs of the suit
- d) Interest on (c) above at court rates
- e) Further or other relief that this honourable Court may deem fit to grant.

2. In response to the to the Plaintiff's Claim, the Defendant filed a statement of Defense dated 21st April, 2009. The matter proceeded to hearing during which the plaintiff gave evidence and then called one other witness as PW2. At the close of the Plaintiff's case on 15th July, 2019, the Defendant's counsel announced that he did not wish to call any evidence hence the defendant's case was closed without any evidence being tendered.

The Plaintiff's Case

3. In his Plaint the Plaintiff pleaded that sometime in December 2007 she charged her property Known as *KWALE/DIANI COMPLEX/1179* (*hereinafter "the suit property"*) to the Defendant as guarantee to secure loan facility of Kshs. 500,000/= granted to **Moses Kaberi Kariuki**. She later visited the Defendant on 27th November, 2008 in its Ukunda Branch with view of paying off the amount outstanding against the charge on the suit property but the Defendant's manager refused to accept the bankers cheque for Kshs. 500,000/= offered by the Plaintiff arguing that the Defendant has sold the suit property by Public auction.

4. According to her the Defendant had neither notified her of any intended sale of the suit property nor had the Defendant issued statutory notice of sale to her and consequently any purported sale would be premature for want of the notices hence illegal.

5. In support of her case the Plaintiff gave personal testimony the called one other witness. She testified on 15/7/2019 as PW1. In her testimony, she told the court that she relied on her witness statement as her evidence in chief. Her statement reiterates the contents of the Plaint. However, she adds that the Loan was to be repaid directly from the saving account of one Moses Kariuki in 30 months equal instalment of Kshs.20,090/= starting from February, 2008. She faults the Defendant for not serving her with the requisite 3 months' statutory notice or any notification as provide by the law and any sale by public auction would be null and void.

6. It was her further testimony that she conducted search at the lands office in 2008 and discovered that the property was still registered in her name. A recent search conducted on 12/7/2018 further revealed that the suit property was registered in her name. The two search reports

were produced as P Exh. 2 and P Exh. 4 respectively.

7. The Plaintiff told the court that she only came to know of the purported sale when an auctioneer came to her with information that the property was being sold. She refused to sign a document which the auctioneer asked her to sign. Be it as it may, the Plaintiff testified that she has always been willing to pay the debt but the Defendant has refused to accept her cheque.

8. When cross-examined by the Defendant's counsel, the Plaintiff conceded that she had acknowledged the Defendant's right to exercise its statutory power of sale by executing the charge document. She however accepted having received a notice by the auctioneer but could not recall the date when the auctioneer purportedly served the notice which she had refused to accept

9. **PW2** was **Moses Kaberi Kariuki** who relied on his witness statement dated 11/9/2015 as his evidence in chief. In the said statement he confirmed that the Defendant bank offered to grant him loan facility of Kshs. 500,000/= vide a letter of offer dated 15th November, 2007. He accepted the offer and the Plaintiff charged her property (the suit property) in favour of the Defendant as security for the loan. He averred that at the time he was running a bar and restaurant and had to repay the loan from his savings account by monthly installments of Kshs. 20,090/=.

10. He proceeded and added that due to the unfortunate events of December, 2007 there was post-election violence when goons broke into his business and stole everything that was inside. He was then unable to service he loan as agreed due to the loss caused. He then conducted the Respondent's Bank manager who advised him to be banking Kshs. 1,000/= every day as a way of servicing the loan.

11. On cross-examination PW2 Conceded that he was in default of payment and the arrears were accruing interest. Like PW1 he faulted the bank for failure to issue notices in exercising its power of sale. That marked the end of all the evidence availed to court in the matter because the defendant opted to lead no evidence

12. The Plaintiff filed submissions on 16/08/2019 in which she identified four (4) issues for determination as follows;

- a) **Whether the Defendant's purported exercise of its statutory power of sale was legally done?**
- b) **Whether the Plaintiff has proved her case as against the Defendant on a balance of probability?**
- c) **Whether the Plaintiff is entitled to the prayers sought in the Plaintiff.**
- d) **Who should bear the costs of this suit?**

13. On the first issue, the Plaintiff submitted that she became aware of the intended sale when an auctioneer came to her place of business sometimes in November, 2008 with view of serving a notification of sale. The Defendant therefore breached the terms of Clause 9 of the charge agreement by not serving the Plaintiff with notice when the borrower defaulted in payment. The Plaintiff claims that she was not served with a 3 months' statutory notice as provided under Section 65(2) of the Repealed Registered Land Act and in the form prescribed under Section 74 of the said Act which is a replica of Section 90 of the current Land Act 2012.

14. It is the Plaintiff submissions that burden was all times upon the Defendant to prove notices were served and in any event failure to serve the requisite notice amounts to clogging the Plaintiff's right of redemption. Reliance was placed on the case of **Nyangilo Ochieng & Another –vs-Fanuel B. Ochieng & 2 others (1996) eKLR** for the proposition of the law that it is the duty of a chargee to prove service of the requisite.

15. On the second and third issues, the Plaintiff submits that she has proved her case on a balance of probabilities since the Defendant has not shown that it has served any notices for sale.

The Defendant's Case

16. Even though a defense was filed asserting default and issuance of requisite notices and resultant sale, no evidence was led to support that defense with the consequence that the same remained as mere allegation incapable of assisting the court to find for the defendant. That failure to lead evidence equally leave the evidence by the plaintiff unchallenged.

17. In its submissions filed on 5/11/2019 the Defendant argued that the borrower doesn't deny defaulting in repayment of the loan even repaying the first installment even after the bank had agreed to restructure the terms of the loan to accommodate the borrower's financial constraints by directing him to repay by making daily installments of Kshs. 1,000/=.

18. It is further submitted that the Plaintiff and the borrower were aware of the default and the consequences thereof but never made any effort to make the repayment and as such the Plaintiff has approached this court with unclean hands. It's argued that he who seeks equity must do equity and he who comes to equity must come to court with clean hands. According to the Defendant, the Plaintiff is therefore not doing equity by trying to restrain the bank from recovering its money. It is further sought that the court does find the auction sale done within the confines of the law. In support of its arguments the Defendant relies on the case of **Francis J.K Ichatha-vs-Housing Finance Company of Kenya, Civil application No. 108 of 2005**. These were indeed forceful submissions especially on the point that there was default to pay the debt. However, the right to sell does not accrue and crystallise upon default. There is a statutory and mandatory obligation upon the chargee to issue and serve notices on the chargor and the duty rests upon the charge to prove such service.

Analysis and Determination

19. After a scrupulous perusal of the parties' respective positions and having taken into account submissions by both the parties and the authorities cited therein, I am of the considered view that there exists only one substantive issue for determination by the court. I consider that single issue to be Whether the defendant did issue and serve the mandatory notices so as to have crystallised the statutory power of sale. There is of course the in consequent question of costs which will abide the outcome.

Were the statutory notices Properly issued and Served?

20. In our case there is no dispute that there was a valid charge over the Suit property executed in favour of the Defendant. There is no doubt therefore that the defendant was *ipso facto* vested with the chargee's statutory power of sale. However, as a precondition to exercise of the statutory power of sale legally, there must be established a default in the fulfillment of the obligations under the charge followed with strict compliance with the requirement that the chargee issues the various notices under the law. For this case the charge having been executed and the resort to exercise of power of sale sought during the tenure of Registered Land Act, the Defendant was bound to have issued and serve notices under Section 65 and 74 of the said Act. I consider the Repealed Registered Land Act because it was the law applicable at that particular time before the enactment of the Current Land Act No. 6 of 2012. Section 65 (2) of the Registered Land Act, states as follows:-

“65 (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.”

21. My reading and interpretation of this Section is persuaded by the decision by Judge Munyao Sila in *Susan K. Baur & another v Shashikant Shamji Shah & 2 others [2017] eKLR* where held that:-

“..This section 65(2) needs to be properly understood and it invokes two scenarios. In the first scenario, there is a debt but the date of repayment is not specified. Let us assume that Tom gives Jerry a loan of Kshs. 1 Million, which is secured by a charge over Jerry's property, but in their transaction, it is not mentioned when Jerry needs pay the debt to Tom. In other words, the date of repayment is not specified. In such a case, before Tom can move to sell, he must first call the debt by giving Jerry a notice of 3 months. It is on expiry of this 3 month notice that the debt can now be said to be payable. The second scenario is where there is a date specified for repayment of the debt. Let us say, that Tom agrees with Jerry that the debt is payable on 31 December of the given year. Here there is a specific date of repayment. In such a case, Tom in the event that he has not been paid by the due date, needs to demand the debt on the date specified. If he does not demand the debt on the date specified, and that day passes, then Tom needs to give Jerry a 3 month notice calling for the debt. I think the law envisages that if the call is not made on the date specified, then this is treated as a waiver, which means that a notice of 3 months calling for the debt, now requires to be made. That to me is the interpretation of what I would give to Section 65 (2) of the Registered Land Act.

22. In the case of *Kipsang Sawe Sisei V Kenya Commercial Bank Limited [2005] eKLR*, the court had this to say;

“However, the notice cannot be given until the principal sum has become due which in this case is three months after a demand has been made under Section 65(2).”

23. On the foregoing it cannot pass without observing that it was incumbent upon the Defendant bank to issue a three months' notice under Section 65(2) of the Repealed Registered Land Act. On the facts of the instant case emerging from clause 1 of the charge instrument dated the 21st January, 2008 was the reserved legal redemption date wherein the Borrower would make payment of the loan facility. There is no evidence adduced by the Defendant Bank to show that it did demand the repayment of the loan on 21/01/2008 and as such a 3 months' notice calling for the debt ought to have been issue as prescribed under section 65(2).

24. On expiry of the notice under Section 65(2) is when a statutory notice under Section 74 would kick in. Section 74 is drawn as follows :-

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:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

25. The notice under Section 74 invokes the Chargee's Statutory right of sale. Under Section 74, the chargee is supposed to issue a three-month notice which notice takes effect on the date of service of the same as mentioned in subsection 2. It is therefore essential that this notice be served as required by law. The law on service is under Section 153 of the Registered Land Act, which is drawn as follows:-

153. A notice under this Act shall be deemed to have been served on or given to any person -

(a) if served on him personally;

(b) if left for him at his last known place of residence or business in Kenya;

(c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;

(d) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;

(e) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.

26. The best service is of course personal but other forms of service are equally acceptable. Thus a notice is deemed served if left at the person's last known residence or place of business; or if sent by registered post to his last known postal address; or if served upon his duly appointed attorney in law. Where service cannot be effected by any of the above means, service may be effected by displaying it at a prominent place on the suit property. In our case, the Defendant did not adduce any evidence on when the notice was issued, however the Plaintiff testified that she first became aware of the intended sell when an auctioneer purported to serve her a notice at her place of business sometimes in November, 2008. That notwithstanding there was no effort made to avail to court even a copy of the notice to enable one understand the nature of the notice and when it was issued and served. That was always the duty of the defendant to prove service once the plaintiff alleged lack of service.

27. In **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR** the Court of Appeal while addressing the duty to serve and prove service of notice stated as follows :-

“It is for the chargee to make sure that there is compliance with the requirements of s.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 that such notice was in fact sent”.

28. It is important to note that in Nyagilo's case there was indeed a notice exhibited but the court faulted the bank for failure to lead evidence of service. As a consequence of that failure, and even though a transfer had been effected and other transactions registered against the said property the sale was all the same set aside and the proprietorship of the chargor restored.

29. In this matter without an iota of evidence that any notice was ever issued and served, there is absolutely no basis upon which one can infer there having been service. The argument by the defendant in the filled submission that the notices were properly served cannot hold any probative value since there is no material evidence to support the same. I am afraid to find that I have no evidence to find in favour of the Defendant. I do therefore find that the defendant failed on its legal duty to prove service and therefore I conclude that none was issued nor served.

30. The effect of the fact that no demand notice under Section 65 was sent, and no proper statutory notice was served upon the plaintiffs, would have meant that the auction sale which is alleged to have been conducted on 23rd October, 2008 was unlawful and illegal for being contra statute. Without compliance with the law on notices, the chargee had no lawful power to sell the charged property for default in payment of charge debt. I therefore find that the Defendant's right to sale had not crystallized to justify any lawful sale.

31. There was uncontested evidence that the Suit property remains registered in the plaintiff's name as against the Defendant's unsupported allegation that the suit property was sold and passed to an alleged third party. Clearly, if there has no accrued the right to sell and a lawful sale, no valid passage of title and transfer could take place.

32. Since the suit property is to date registered in the names of the Plaintiff and further since the Defendant faulted in exercising its statutory power as provided by the law, I find that it is only just to order an injunction to restrain the defendant from disposing the suit property until the defendant shall have issued and served all the requisite notices in full compliance with the law.

33. I must however point out that the requirement of the service of statutory notice was not meant to enable borrowers and their guarantors escape from their contractual obligations but was meant to enable such chargors as the borrower or guarantor retain the equity of redemption over the charged properties it being remembered always that a **CHARGE IS NEVER A TRANSFER.**

34. In conclusion, I now enter judgment for the plaintiff against the

defendant and make the following final Orders: -

a) An injunction restraining the Defendant by itself, its agents, servants or employees from selling, alienating, disposing off, transferring or dealing with the Plaintiff's property known as KWALE/DIANI COMPLEX/1179 unless and until the defendant shall have issued and served the requisite Notices in full compliance with the law.

b) A declaration that the purported sale of the suit property by the Defendant on 22nd October, 2008 was illegal, unlawful and therefore null and void

c) The Plaintiff will have costs of this suit.

35. It is so ordered.

Dated, Delivered and Signed at Mombasa this 15th day of May, 2020.

P. J. O. OTIENO

JUDGE