



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 56 OF 2018

1. KWALE CEMENT FACTORY LIMITED

2. RISING STAR COMMODITIES LTD.....PLAINTIFFS

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

R U L I N G

1. On the 31/8/2018 this court granted to the applicant an order of temporary injunction against the sale of the suit property known as KWALE SHIMONI Adj/349, 565 426 and 763 up to the time the defendant would have issued and effectively served notices under Section 96(2) of the Land Act. The orders were issued pursuant to *inter-parties* proceedings with due participation by the defendant.

2. The plaintiffs/Applicants now, in the notice of Motion dated 29.01.2019 contends that even though there was serviced of a 45 days' notice on the 11/12/2018 pursuant to the Auctioneers Act, there has not been served the 40 days' notice pursuant to Section 96(2) of the Land Act hence the subsequent auction scheduled for the 8/2/2019 was faulted for having been premature and contrary to the law because even there had been filed a counter-claim for the recovery of the outstanding debt hence the bank has a duty to choose whether to seek realization or recovery by the court case. It was then added that the conduct of the defendant in failing to serve a notice pursuant to Section 96(2) was a brazen failure to comply with court orders and must be discouraged by it being compelled to obey court orders. Those facts were reiterated in the supporting affidavit sworn by MR. ALI BADRUDIN PUNJANI which then exhibited the court ruling of 31/8/2018, the Notification of sale by Watts Auctioneers and the Newspaper advert scheduling the sale for the 8/2/2019. The plaintiff also filed a supplementary affidavit whose primary purpose must be seen to have been to show that a director and guarantor of the 1st plaintiff was dead prior to the date of the notice.

3. When served the defendant through its Senior Recoveries Manager, MR. BEN MWAURA, swore a Replying Affidavit which in the main contends and asserts that the current application in so far as it seeks an injunction is *res judicata*; that a valid notice pursuant to Section 96(2) Land Act was duly served on the 12/9/2018 as evidenced by its certificate of posting. Exhibited in the Replying Affidavit were not only the notices issued but also certificates of posting which coincidentally were similar for the notice dated 11/9/2018 by the defendant advocate and the notification of sale by the Auctioneer.

4. On the directions of the court, parties filed written submissions on the 27/2/2019 and 01/4/2019 then attended court by counsel to highlight the same.

Submissions by the plaintiff/applicant

5. The written submissions by the plaintiff as highlighted orally in court stressed the fact that there was no sufficient proof, on prima facie basis, that a notice pursuant to Section 96(2) had been served and that in any event a director of the 1st plaintiff who was also a guarantor of the facility had died in 2015 and therefore a notice alleged served upon him could not have been served when he was long dead. For those submissions the plaintiff cited to court he decisions in ***Edward Karanja Ragui vs Barclays Bank of Kenya Ltd [2002] eKLR*** and ***Stephen Boro Gitiba vs Nicholas Ruthiru Gatoto (2017)eKLR*** for the proposition that a notice alleged served on a deceased cannot be deemed duly served and that the onus to prove service of the Notice was upon the chargee.

6. On the propriety of seeking remedies of realisation and recovery proceedings at the same time, he counsel cited to court the decision in ***Clesoi Holdings Ltd vs Prime Bank Ltd (2016)eKLR*** for the proposition of law that a chargee must choose whether to pursue realization or a recovery suit but not to undertake the two simultaneously because that prejudices the chargor.

7. On the preliminary objection by the defendant that the application is *res judicata*, the plaintiff made submissions that the basis of the current application was the failure by the defendant to comply with the court orders of 31/8/2018 and not to rehear the same application for injunction afresh. It was added that alleged transgressions leading to and necessitating the current application did take place on 21/01/2019

and are not the same as those canvassed and determined in the decision of 31/8/2018.

Submissions by the Defendant

8. The defendant first Salvo aimed at the application was the objection that the matter of grant of injunction having been canvassed and determined in an earlier application and a ruling dated 31/8/2018 delivered, it was not open to the plaintiff to bring a fresh application seeking similar orders and that in doing so the plaintiff was abusing the court process and thus affronted the rule of *res judicata*. To the defendant such actions violated the rule on the finality of court orders as a matter of public policy that litigation must come to an end for the judicial authority to be maintained. Counsel cited to court the provisions of Section 7 Civil Procedure Act and its interpretation by the **Court of Appeal in *Uhuru Highway Developers Ltd vs Central Bank of Kenya [1996] eKLR*** for the proposition that the principle of *res judicata* apply to application with the same force they apply to suits. The decision in ***Invesco Assurance Co. Ltd vs Mercy Nduta Murigi [2017] eKLR*** was also cited for the proposition of law that public policy and the principle of finality dictate that parties to a litigation ought to bring forth the whole case in the dispute for determination and will not be permitted to re-open and re-litigate a matter which ought to have been due for litigation in an earlier suit but was not brought forth.

9. On the merit of the application and concerning compliance with the Orders of 3/8/2018 on services of notices pursuant to Section 96(2), counsel for the Defendant pointed out that the ruling by the court provided that upon effective service of the Notice under Section 96(2) the injunction thereby granted would lapse. It was then averred and asserted that a notice dated 12/9/2018 was issued and a certificate of posting dated same day exhibited to show that the notices were duly issued and served. The defendant then posed the question to court of how genuine the plaintiff could be when they deny receipt of the Notice under Section 96(2) but accept receipt of the Auctioneers notification yet the same were sent by same mode and to the same postal addresses.

10. On the fact of death of one of the directors and guarantor, the defendant to act the position and made submissions that under the guarantee parties covenanted that the term guarantor would include the guarantors personal representatives and therefore that there being evidence that Notice was sent to the deceased, it must be deemed that it was sent to his personal representatives.

11. The plaintiff was then faulted for material non-disclosure of the material fact of service of the notice and the court urged to set aside the *ex-parte* orders granted on the basis of the decision in ***Republic Experte John Ngugi vs Principal Registration of Government Lands [2014] eKLR*** for the proposition of law that a party who obtaining *ex-parte* orders without fullest disclosure cannot be allowed to obtain or retain any advantage by such non-disclosure or concealment of material facts.

12. On how to choose whether to proceed with realization or recovery suit, counsel made submissions that the choice was upon the chargee and the chargor cannot dictate to the chargee on the choices to be made. Reliance was then made on the decision in ***Patrick Mwangi Muyara vs Consolidated Bank of Kenya Ltd [2009] eKLR*** and ***Hyundai Motors Kenya Ltd vs East African Development Bank Ltd [2007]*** for the proposition of law that the bank had the right to opt for a remedy since the money advance was not for free but due for repayment.

13. On whether or not the orders could be granted, counsel for the defendant took the view that there was no *prima facie* case disclosed but that in any event no irreparable damage was anticipated because the property had known value which could be adequately be compensated even if the suit was to succeed and lastly that the balance of convenience then tilted in favour of the application being dismissed. Counsel then cited to court the decisions in ***Kitur vs Standard Chartered Bank [2002] eKLR*** and ***Thathy vs Middle East Bank (K) Ltd [2002] eKLR***. Lastly counsel cited to court the authority in ***Orion East Africa Ltd vs Ecobank Kenya Ltd [2015] eKLR*** in which the Court of Appeal observed that a party with unclean hands deserves no relief from the court whether interim is final. On those submissions the defendant prayed that the application lacks merits and should be dismissed.

14. Having read the record of the application together with the supplementary affidavit, the Replying Affidavit as well as the rival submissions, I do find that there is one pertinent issue for determination and it begs the question whether or not there was an effective service of a notice under Section 96(2) Land Act.

15. Before I delve into that issue, the Respondent has raised a point of law in the nature of a preliminary objection alleging that the application is *res judicata* on the face and basis of the court ruling of 31/8/2018. I must go over that preliminary point before I can seek to resolve the substantive issue on the merits of the application.

16. I do not doubt that the principle of *res judicata* as a public policy matter dictating that litigation comes to an end is a well settled and revered principle which seeks to preserve the legitimacy, respect and credibility of a judicial system. It serves that purpose by ensuring that a matter on which a judge has delivered himself on is not freely and callously re-opened because to do that would bring in contradictory verdicts with the undesirable effect of eroding the dignity and credibility of the justice system. Accordingly it cannot be in doubt that principle applies to application and rulings therefrom in equal force as it applies to suit and final judgments.

17. However, it must be noted that in this matter, the only reason the court granted an order of temporary injunction and for a limited time was because there was proved to court that no notice under Section 96(2) had been served.

18. That decision set the parties at a pedestal at which the defendant would have its right to exercise its power of sale accrue only after it complied with the law by effectively serving a notice under the statutory provision. To this court, the plaintiffs right to statutory protection was underscored and protected and the door was then left wide open for the court to have the chance to interrogate one agenda whether or not the defendant had use the window of opportunity given to it and properly husbanded the right to sell. The issue of service of fresh notices under Section 96(2) had not been live in the previous application and could not have been litigated or determined by the court prior to the Orders of 31/8/2018. To that extent the principle of *res judicata* cannot be properly invoked to invalidate the application grounded on that cause that could only accrue depending on the compliance of non-compliance with the court order. Accordingly that objection is wholly illogical and unmerited and can only be seen to have been impropriety taken with the hope that the court would be unable to discern what the effect of its orders of 31/8/2018 were.

Did the defendant comply with the orders of 31/8/2018?

19. The clear words of the court in the ruling were that the defendant was to issue and effectively serve notices pursuant to the law. It is not in dispute that the notice were indeed issued and posted under certificate of postage. I say I do not doubt postage because the same postal addresses used for the 40 days' and 45 days notices were the same and that the plaintiffs admit receipt of the 45 days' notice defeats the assertion that the 40 days' notice dispatched to the same addresses were not received. However, the point that I consider the defendant not to have fully addressed is whether a dead person could be served in his death through registered postal mail?

20. The obligation of the charged under Section 96 (2) & (3) is that a notice of 45 days must be served and must expire before a sale could be conducted and that a copy of such notice be served upon, in a scenario of freehold title like the suit property, the spouse of the chargee and any other person known to have right to enter the laid and use it or its resources.

21. Here the service of the notice on the borrowers is not in dispute as said before, what I do find is that there was not effective service upon the personal representatives of one of the guarantors of the loan, Mr **Gulbann Badrudin Punjani**, because the deceased having died was beyond reach of any postal mail and it must be clear that the letter even if registered could not have reached him. Equally there was no attempt to comply with the requirements of section 96 subsection 2(3) with the consequence that there was no effective service as the court order demanded. Without an effective service the court order was not complied with and the law affronted hence if any sale was to take place it would be contrary to statute and there is no harm that can be irreparable as failure or denial to a party of a statutory right.

22. For the foregoing reasons, I find that there is yet to be made full compliance with the orders of 31/8/2018 for which reason I grant an injunction once again limited to a period until full and strict compliance with the law shall have been followed by the defendant.

23. I award the costs of the application to the plaintiffs.

Dated and delivered at Mombasa this 2nd day of May 2019.

P.J.O. OTIENO

JUDGE