



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 63 OF 2019

SHEM MWAURA NJOROGHE.....PLAINTIFF

VERSUS

1. EQUITY BANK (KENYA) LIMITED

2. ANTIQUE AUCTIONS AGENCIES.....DEFENDANTS

R U L I N G

1. In the suit, the plaintiff filed a Notice of Motion simultaneously with the plaint and prayed for a temporary injunction directed at the defendant and restraining it from proceeding with the auction of a property described as LR No. Mainland North/Section 1/12257 (CR No. 36550), LR No. Mainland North/Section 1/1225 (Cr No. 36549, LR No. Mainland North/Section 1/4304 (C.R. No. 18652 and LR No. Mainland North /Section 1/4303(CR No. 18652 scheduled for the 31/7/2019 pending the having and determination of the suit.
2. The application and the suit are grounded on the allegations that then suit property were charged to the defendant to secure the borrowing of the one **PWANI FEED LTD** in the sum of Kshs.76,000,000 and a legal charge created over the same. On the basis of the legal charge the defendant is faulted for having initiated the process of sale prior to issuing and serving statutory power of sale pursuant to Section 96(2) & (3) of the Land Act. The defendants conduct is termed oppressive of the plaintiff for failure to serve statutory notices yet the plaintiff had made arrangements to sell the property by private treaty so as to offset the loan and duly notified the defendant.
3. The court was thus urged to stop the planned sale so that the sale by private treaty which had reached an advanced stage is not faulted. Those facts were repeated in the Affidavit in support which then exhibited the title to the parcels of land, the legal charges duly registered, correspondence showing request to and consent by the defendant to sell LR No. 4303 and 4304 at Kshs.18,000,000 and 20,000,000 respectively and pay the debt together with a Notice under Section 90, Land Act and notification of sale by the auctioneer.
4. When served, the defendant indicated its opposition to the application by Replying Affidavit sworn by COSMAS MBEVO, the Credit Manager of the defendant based at the lending branch. In that Affidavit the defendant asserts that the due statutory Notices were duly issued and served and exhibited the Notices dated 27/3/2018 to the directors of the borrower and copied to the plaintiff and one Faith Wanjiru Ng'ang'a together with a list of Registered postal mail registered and posted by the defendant which show that the notices were sent on the 29/3/2018.
5. There was yet another notice dated 17/8/2018 and giving to the plaintiff a notice of three months, this time round addressed to the plaintiff and copied to the directors of the borrower, one Faith Wanjiru Ng'ang'a and the County Commissioner, Mombasa. The same is also shown to have been dispatched by registered post on the 9/9/2018. To this court those notices were issued pursuant to Section 90(1) going by the length of the notice given.
6. The said notices having expired the defendant once again, on 5/3/2019, issued another set of notices still addressed to the plaintiff and copied to Faith Wanjiru Ng'ang'a, the directors of the borrower and the County Commissioner, Mombasa. The Notices made reference to the earlier notices given and demanded the payment of the sum of Kshs.71,059, 484 within 40 days from the date of service and in default the defendant would exercise its right of sale. Even the said notice was sent to the recipients by registered post. Based on such documents the defendant contended that there had been full compliance with the law and the plaintiffs was thus not entitled to any injunction because the debt, and default to pay were acknowledged it being shown by the bank statement that the debt stood at Kshs.74,346,298.41as at 15/7/2019.
7. The evidence in the pleadings filed and the two Affidavits sworn was the foundation upon which the two counsel orally argued the application with both filling lists of authorities.
8. Before the application was argued, the court did ask the plaintiff's counsel how far the proposed sale had reached and he, out of record,

reported that a sale agreement had been executed in August with a completion period of 90 days and that a deposit had been paid with the concurrence of the defendant and was indeed the sum paid the defendant pursuant to the orders of 30/7/2019. I did pose that question to appraise myself on the necessity to proceed with the application when parties had in fact agreed that the suit property be sold by private treaty to settle an admitted debt. However the plaintiff counsel took the view that the application be argued the concurrence of the parties for the sale notwithstanding.

Submissions by the parties

9. Even though the suit is founded on the allegations of failure to issue and serve statutory notices, with the Application specifically identifying non-compliance with Section 96(2) of the Land Act, in his argument Gakuo seem to have left that basis of the suit and sought to argue the application on the basis that there were no notices under Section 90 and further that the notifications issued by the auctioneer were defective. I do consider that to have been an inappropriate as the law forbids a party from departure from pleadings as a way of fostering and furthering the right to a fair hearing.

10. Accordingly all the submissions offered by the plaintiff beyond the pleading in the plaint shall not be taken into account in this determination. The same position goes for all the decisions touching on the validity of notices or their efficacy. I will limit myself to the question of matter or not the notices were ever issued and served under Section 96.

11. That tasks does not call for any engagement beyond finding out if it is indeed true that notices under the Act were never issued. If indeed the same were never issued then there would be a prima facie case pointing at outright violation of the law. To this court nothing presents a prima facie case better than an allegation that the requirement of the law has not been complied with.

12. Here the debt is admitted as much as the default to pay. In fact there is an admitted request to sell by private treaty and pay. The only reason given for challenging the right to realization is the alleged failure to serve notices and a further allegation that the advertisement would jeopardize the arranged sale by private treaty.

13. I have looked at the entire record and I do note that there was a notice dated 27/3/2018 which did disclose to the plaintiff the extent of default and required the remedy there of after expiry of three months. That notice to the court was a valid and sufficient notice for the purposes of Section 90(i). That notice having been exhibited by the plaintiff himself cannot be doubted as far as service is concerned. Upto that level Section 90(1) was duly complied with.

14. The plaintiff's complaint however is the alleged failure to comply with Section 96(2) & (3). That provision says:-

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on:-

a. the Commission, if the charged land is public land;

b. the holder of the land out of which the lease has been granted, if the charged land is a lease;

c. a spouse of the charger who had given the consent;

d. any lessee and sublessee of the charged land or of any buildings on the charged land;

e. Any other charge of money secured by a charge on the charged land of whom the charge proposing to exercise the power of sale has actual notice;

f. Any guarantor of the money advanced under the charge;

g. Any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

h. Any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. A chargee who has withdrawn from possession of charged land may not again enter into possession of that land, otherwise than by complying with the provisions of section 94 if the charger is in a fresh default under the charge.

15. All this law requires of the chargee is to issue a notice of atleast 40 days after that notice issued under Section 90 expires. In the Replying Affidavit filed, I have seen at pages 28 to 36 a notice dated 5/3/2019 and a list of postal items registered and posted by the defendant. The documents say and show that the notice was duly issued and dispatched. Dispatched not only to the plaintiff as the addressee but also to the borrower through two postal addresses in Mombasa and Nairobi as well as the County Commissioner and one Faith Wanjiru Nga'nga. Faith Wanjiru Nga'nga is shown in the legal charges as a person who gave her spousal consent from the creation of the legal charge. That notice clearly satisfied both Section 96 (2) and (3) of the Land Act and cannot be denied nor faulted. With such proof the most the plaintiff would have done was to show that the mail was never delivered but returned.

16. I do thus find that there being evidence that the statutory notice were indeed issued and served, there is no prima facie case disclosed and that being the case the very foundation of granting a temporary injunction is lacking and there cannot be a basis to grant any. Accordingly the application lacks merits and the same is hereby dismissed with costs.

Dated and delivered at Mombasa this 4th day of October 2019.

P.J.O. OTIENO

JUDGE