



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 131 OF 2014

KHALIL HUD AHMED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITEDDEFENDANT

R U L I N G

1. The plaintiff has brought the Notice of Motion dated 22/2/2016 seeking in the main an order that the defendant by itself agents, servants or employees be restrained for selling, conducting an auction of the suit property, LR No. 14730 (CR 42769) SECTION 1, MAINLAND NORTH pending the hearing and determination of the suit.
2. The foundation of the Application is the order by Kasango J issued on 30/7/2015 by which the court granted an injunction against the defendant and restraining it from exercising its statutory power of sale 'until such time as the defendant shall issue statutory notices of sale as required under the law'. Despite such orders the plaintiff contend that defendant had failed to issue the requisite notices but had instead scheduled the security for sale on the 26/2/2016 and would proceed in violation of the court orders unless restricted by another order.
3. The Application was supported by an Affidavit sworn by the plaintiff in which besides the facts of failure to serve notices as ordered by the court, the defendant added that the suit property is his only matrimonial home where he lives with wife and children. It is added in the Affidavit that in executing the charge he did not involve his wife who has now threatened to leave him. The debt is however not denied as it is deponed that the loaner has refused to pay the debt advanced.
4. That application was opposed by the Respondent/Defendant by the Replying Affidavit sworn by one Mr. Lwanga Mwangi, the debt recovery officer. The Affidavit exhibits various documents exhibiting dealings between the parties including a letter of offer duly accepted by the plaintiff and his wife for guarantee of the sum of Kshs.17,200,000/=, standard lending terms also duly accepted as aforesaid, a charge dated 16/11/2012 duly executed and a spousal consent annexed and subsequently registered, a deed of guarantee also dated 16/11/2012 duly executed and stamped with revenue stamp together with Notices dated 18/8/2015 issued pursuant to Section 90 Land Act and said to have been sent by registered post and copied to others including the plaintiffs spouse, the debtor and its directors.
5. There is also exhibited, a 45 days notice and a notice of sale by Dalali Traders Auctioneers dated 7th and 21st December 2015 and shown to have also been dispatched by registered post. For good measure the defendant also exhibited bank statement of the accounts for the period between 20/9/2012 upto 31/3/2016. Showing a debit balance of Kshs.4,035,600.55 and Kshs.15,691,369.18 as at that date. On the basis of those documents the defendant avers that it has complied in full with the court orders but the plaintiff has todate failed to pay the outstanding debt.
6. The plaintiff filed submission dated 17/4/2018 solely relying on the provisions of section 90 and 102 of the Land Act without more while the defendant did not file any submissions but two bundles of authorities dated 25/4/2016 and 9/5/2017.
7. I have had the benefit of perusing the record of the Application, the Response thereto and the submissions and authorities cited and the only issue that has crystalised for determination is whether the defendant has complied with the terms of the court order in the ruling delivered in this suit on the 30/7/2015.
8. To that extent this application will fail or succeed depending on whether or not there was compliance with the terms of the that order. In that ruling the court having found that there had been default by the plaintiffs to pay the sum borrowed, however proceeded to grant an injunction on account of lack of evidence that statutory notices had been served but limited that injunction for a period as would be sufficient for the defendant to serve the requisite statutory notices. To this court the injunction granted to the plaintiff was never perpetual but would last for a period until the defendant complied with the law by serving the requisite notices.

9. Such injunction was also subject to the provisions of the law and could never override a written law including the provisions of order 40 Rule 6 Civil Procedure Rules. Consequently the orders would come to an end in the event of two occurrences taking place:-

i. Service and expiry of notices under section 90 and 96 Land Act,

ii. Application of Order 40 Rule 6 coming into play.

10. I have, as said before, perused the Replying Affidavit of LWANGA MUSANGI and it is clear to me that valid statutory notice under section 90 and 96 of the Act were duly issued and served by the defendant. Notice under Section 90 were issued and dated 18/8/2015 and dispatched by registered post on the 20/8/2018. Such notice expired on the 21/2/2016. Equally the notices by the Auctioneer were issued on 7th and 21st December 2015 respectively and shown to have been dispatched by registered post on 10/12/2018.

11. Those facts have not been controverted by the plaintiff who did not seek to challenge same by another affidavit. The notices having been served, I find that the court orders were duly complied with and the plaintiffs' complaint alleging lack of service cannot be any genuine. Infact, during submissions, the plaintiffs advocate conceded that the notices were indeed directed at the plaintiff's contractual address in the documents of charge.

12. That confession leaves no doubt that the notices were served and it matters not that the plaintiff resides in places outside Kenya. For the transaction between the parties the plaintiff gave to the defendant a contact address and it is that address the defendants used and they cannot be faulted even if it had to be proved that the plaintiff was not in Kenya when the service workplace.

13. There being a finding that there was compliance with the orders of 30/7/2015, there is no basis to fault the intended realization of the security by the defendant and therefore the application dated 22/2/2018 cannot succeed but must fail for lacking merits. I order it dismissed with costs to the defendant. The other reason and way to look at the application is whether there were any subsisting order on 26/2/2016 when the defendant sought to stage an auction sale. Noting that the orders were granted on 30/7/2015, the same could subsist till the 30/7/2016 or thereabouts and not later. It is therefore accurate to say that if the notices had not been issued in compliance with the court orders then the auction would have been in violation of the court orders. However, this was not the case as it has been found notices were duly issued.

14. Since this matter has been basically rotating around whether or not to grant a temporary injunction with any effort to have the suit on the merits, it is now directed that the parties shall attend court on the 12/7/2018 for case conference and for directions on the way forward.

Dated and delivered at Mombasa this 5th day of June 2018.

P.J.O. OTIENO

JUDGE

Delivered in open court in the absence of the parties who had due notice but choose not to attend.

P.J.O. Otieno J

5/6/2018