



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL CASE NO 2 OF 2017

ANDYMAC PALACE LIMITED..... PLAINTIFF

VERSUS

FAULU MICROFINANCE BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff herein first filed **Case No 3 of 2017 Andymac Palace Limited vs Faulu Micro Finance Bank Limited** at High Court of Kenya Mombasa on 18th January 2017. The file was subsequently transferred to High Court to Kenya Voi by Mwangi J on 23rd January 2017 and assigned the aforementioned serial number.

2. On the said date, the said Learned judge also granted an interlocutory injunction restraining the Defendant herein, its agents and/or servants from selling and/or disposing the properties known as Voi Municipality Block 1/238, Voi Municipality Block 1/402 and Voi Municipality Block 1/690 pending the hearing and determination of the Plaintiff's Notice of Motion application dated 17th January 2017 and filed on 18th January 2017.

3. The said Notice of Motion application was brought pursuant to the provisions of Sections 1A, 3A, 63 (e) of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4, 5 of the Rules made thereunder (**sic**). Prayers Nos (1) and (3) of the said application were spent. It sought the following remaining orders:-

1. Spent.

2. THAT this Honourable Court be pleased to grant to the plaintiff/applicant an injunction restraining the defendant/respondent by itself, agents, servants or otherwise howsoever from selling and or (sic) disposing by public auction or otherwise the properties known as Voi Municipality Block 1/238, Voi Municipality Block 1/402 and Voi Municipality Block 1/690 pending the hearing and disposal of the suit filed herein.

3. Spent.

4. THAT there be an order for the costs of this application.

THE PLAINTIFF'S CASE

4. Patience Manga Mwaluma, a director of the Plaintiff swore Supporting and Further Affidavits on 17th

January 2017 and 2nd March 2017 respectively in support of the Plaintiff's present application. The Plaintiff's Written Submissions were dated 2nd March 2017 and filed on 3rd March 2017.

5. It averred that it was the registered owner of Voi Municipality Block 1/238, Voi Municipality Block 1/402 and Voi Municipality Block 1/690 (hereinafter referred to as "the subject properties") which were charged to the Defendant. Its case was that on 8th November 2016, M/S Thaara Auctioneers served upon it a forty (45) day's Notification of Sale dated 5th November 2016 in respect of sale of a property known as Kwale/Diani Complex/1503, a property it said was unknown to it.

6. The deponent stated that he was informed by the Plaintiff's Chairman and General Manager that, save for a letter showing intention to refer the Plaintiff to the Credit Reference Bureau, no Statutory Notice had been served upon the Plaintiff herein. He added that the Plaintiff paid the arrears that had been demanded in the Defendant's letter of 3rd December 2015 and contended that any sale of the Plaintiff's subject properties ought to have been underpinned by a three (3) months' notice and that after expiry of the said period, a further forty (40) days' notice before any notification of sale could issue.

7. He denied that the Plaintiff had been served with the forty (40) days' Notice purportedly dated 19th April 2016 by registered post as had been contended by the Defendant herein and questioned why if the same was sent, it had to be sent mid of the following month. It was therefore the Plaintiff's contention that the purported sale of the subject properties was premature and urged this court to allow its application.

THE DEFENDANT'S CASE

8. In opposition to the said application, Purity Raaria, the Defendant's Legal Manager swore a Replying Affidavit that was filed on 15th February 2017. Its Written Submissions and List and Bundle of Documents were both dated 9th March 2017 and filed on 10th March 2017.

9. The said Replying Affidavit was not dated. Ramifications of this omission were dealt with later on in this Ruling.

LEGAL ANALYSIS

10. As was mentioned hereinabove, the said Defendant's Replying Affidavit was not dated. This was contrary to the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya). The same provides as follows:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date(emphasis court)the oath or affidavit is taken or made."

11. The failure to date the aforesaid Replying Affidavit may very well have been an oversight on the part of the Defendant. However, it was not an oversight that this court could overlook as a procedural technicality as envisaged under the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 for the simple reason that the provisions of Section 5 of the Oaths and Statutory Declarations Act are mandatory in nature.

12. Failure to date the said Replying Affidavit disadvantaged the Defendant as it denied this court an opportunity to interrogate its affidavit evidence. As matters stood in this matter, the Plaintiff's assertions, contentions and/or facts in its Supporting and Further Affidavits remained unrebutted and/or uncontroverted. That notwithstanding, this court took judicial notice of the contents of the Replying Affidavit and enclosures therein as they had not been expunged from the court record.

13. A perusal of the Plaintiff's Plaint showed that the Plaintiff had unequivocally admitted to being indebted to the Defendant herein. Its bone of contention appeared to have been that the intended sale of its

subject properties was in breach of the law and was therefore null and void for the reasons that it contended it was never served with the requisite statutory notices.

14. Notably, save for noting that Notices purportedly dated 19th April 2016 were sent mid the following month, the Plaintiff did not address itself to the question of postage of the Statutory Notices. However, the Defendant dwelt at great length on this issue and cited numerous cases such as the cases of **Brade Gate Holdings Limited & Another vs Jamii Bora Bank Limited [2016] eKLR** and **Abdulkadir Shariff Abdirahim vs Ecobank Kenya Limited [2012] eKLR** where the common thread was that once a statutory notice had been sent to the last known address of the chargor, the burden now shifted to such a chargor to prove that he did not receive such notice. This was a very important submission in this case.

15. A careful perusal of the Defendant's Notice dated 3rd December 2015 that was issued under the provisions of Section 90 of the Land Act dated revealed that it was addressed to P.O. Box 330 80300 Nairobi. This was a wrong postal address as the Letter of Offer clearly showed the Plaintiff's postal address as having been P.O. Box 330 80300 Voi.

16. Having said so, it was not clear to this court how the Plaintiff got this Statutory Notice because in Paragraph (5) of its Supporting Affidavit, the deponent therein averred that the Plaintiff paid the arrears that had been demanded by the Defendant herein. Appreciably, the Plaintiff never adduced any documentary evidence to prove that it paid the arrears in the sum of Kshs 153,072.50 that the Defendant had demanded in its said Notice dated 3rd December 2015. Consequently, for all purposes and intent, the Plaintiff remained indebted to the Defendant, which the latter could recover after complying with the law.

17. This court had a look at the said Notice dated 3rd December 2015 and noted that the Defendant complied with the requirements stipulated in Section 90 (2) (a), (b), (d) and (e) of the Land Act by clearly setting them out in the said Notice. Section 90 (1) and (2) of the said Land Act provides as follows:-

1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a. (a) the nature and extent of the default by the chargor;

b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c. if the default consists of the failure to perform or observe any covenant, express or implied, in the Charge, the thing the chargor must do or desist from doing so as to rectify the defect and the time, being not less than two (2) months, by the end of which the default must have been rectified;

d. the consequence that if the default is not rectified within the time stipulated in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the chargor in respect of certain remedies to apply for relief against those remedies.

18. In view of the fact that the Plaintiff had admitted the arrears contained in the Notice of 3rd December

2015 which had complied with the provisions of Section 90(2) of the Land Act and which it admitted having received the same despite the said Notice showing a wrong postal address, this court found and held that the Defendant had fully complied with the first requisite Statutory Notice and that for all purposes and intent, it was a valid notice, having given a three (3) months' notice to the Plaintiff to rectify the default. The Plaintiff herein was thus not entitled to a further three (3) months' notice.

19. The next notice the Plaintiff was entitled to was the forty (40) days' notice under Section 96 of the Land Act. Section 96 (2) of the Land Act stipulates as follows:-

“1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under [section 90\(1\)](#), a chargee may exercise the power to sell the charged land.

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.”

20. This court found it necessary to interrogate its validity or otherwise of the Notice that Defendant purportedly served upon the Plaintiff herein as the Plaintiff denied ever having received the same. A careful perusal of the Certificate of Postage that was annexed to the Defendant's Replying Affidavit showed that there were three (3) letters that were sent by registered mail to Patience Manga Mwaluma, Jackson Msagha Kibirisho and Andymac Palace Limited. The postal address was shown to have been P.O. Box 330 Voi.

21. Whereas the Defendant submitted that the failure to include the postal code of 80300 Voi was not fatal as Voi had only one post office unlike Nairobi which had more than one (1) post office thus requiring specification of postal code of the post office, this court was persuaded to give the Plaintiff the benefit of doubt of its assertions that it did not receive the Notice under Section 96(2) of the Land Act for the reasons shown hereunder.

22. The first reason was although all the entries of P.O. Box 330 Voi in the Certificate of Postage were highlighted, they had lines across them. It was unclear to this court if this was part of the Defendant's emphasis on the entries on the said Certificate of Postage or if the entries had actually been cancelled. The second reason was that the Notice under Section 96 of the Land Act dated 19th April 2016 was shown to have been addressed to P.O. Box 330 80300 Nairobi.

23. In the case of **Moses Kibiego Yator vs Eco Bank Kenya Limited [2014] eKLR**, Munyao J gave the plaintiff therein benefit of doubt in similar circumstances and rendered himself as follows:-

“... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served...”

24. Notably, this court did not want to engage in arguments as to whether or not the said Notices were returned to the Defendant unclaimed as it had no way of verifying the same. What was clear to it was that the Defendant had not fully demonstrated to it that it had fully complied with the law as far as service of the statutory notice under Section 96(2) of the Land Act was concerned. This court was thus hesitant to conclusively state that the Defendant's statutory power of sale had crystallised as against the Plaintiff's subject properties as the Defendant had contended.

25. Turning to the Notification of Sale from M/S Thaara Auctioneers dated 26th January 2017, the Plaintiff admitted having received the same despite it also bearing the wrong postal address. It, however, appeared to have been hand delivered as the same was shown to have been acknowledged by a Mr

Jackson Kibirisho on 8th November 2016 who the deponent had stated in Paragraph (5) of its Supporting Affidavit was the Plaintiff's General Manager.

26. Although this Notification of Sale was in compliance with the Auctioneers Rules, 1997, no valid notice could ensue subsequent to an improperly posted requisite statutory notice. It was therefore the finding and holding of this court that the said Notification of Sale by M/S Thaara Auctioneers was invalidated by the fact that proper service of the Notice under Section 96(2) of the Land Act upon the Plaintiff had not been demonstrated by the Defendant.

27. It is important to point out that improper service of a statutory notice is not in itself a sufficient reason for granting an injunction pending the hearing and determination of a suit more so where a party had admitted to a debt. In this regard, this court did not therefore find that this was a suitable case where it could grant an injunction pending the hearing and determination.

28. The circumstances of the case herein were distinguishable from the case of **HCCC No 31 of 2013 Fredrick A. Makumbi vs Kenya Commercial Bank Limited** (unreported) that was relied upon by the Plaintiff where Kasango J had in her Ruling of 23rd August 2013 granted such an injunction pending the hearing and determination of the suit which injunction she subsequently vacated in her Ruling of 18th September 2014 as the issue before the learned judge for determination related to the applicability of repealed law.

29. Rather, this court agreed with the Defendant's submissions that an injunction, if to be granted, could only be granted pending the issuance of fresh notices as was held in the case of **National Bank of Kenya Limited vs Shimmers Plaza Limited [2009] eKLR** it relied upon. The Court of Appeal rendered itself as follows:-

“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgage from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

30. This court also found itself in agreement with the Defendant that the Plaintiff did not meet the threshold set out in the case of **Giella v Cassman Brown (1973) EA 360** in which it was held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

31. Accordingly, having considered the pleadings, the affidavit evidence, the Written Submissions and the numerous cases in support of the parties' case which this court found not necessary to set them all out in this decision, this court found and held that the Plaintiff had made not out a *prima facie* case with a probability of success to warrant it granting an injunction pending the hearing and determination of the case herein.

32. Indeed, the Plaintiff had clearly admitted to being indebted to the Defendant and from the way the Plaintiff was drafted once the issue of notices was resolved, there was no issue for determination by this court. The Plaintiff was therefore unlikely to suffer any loss that would not be adequately compensated by damages if the injunction it had sought was not granted. In fact, the balance of convenience tilted in favour of the Defendant herein.

DISPOSITION

33. Accordingly, this court found that as there was no proof of proper service of the Notice under Section 96 (2) of the Land Act, the Plaintiff's Notice of Motion application dated 17th January 2017 and filed on 18th January 2017 is hereby allowed in the following terms:-

a. A temporary injunction be and is hereby granted in favour of the Plaintiff herein pending the issuance of fresh Notices under Section 96(2) of the Land Act and Notification of Sale under the Auctioneers Rules, 1997 by the Defendant and Auctioneers respectively, which respective notices shall take legal effect upon the Plaintiff not complying with the same.

b. As the Plaintiff had admitted being indebted to the Defendant, there shall be no order as to costs.

34. It is so ordered.

DATED and DELIVERED at VOI this 2nd day of May 2017

J. KAMAU

JUDGE