



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO.36 OF 2012
JOSEPH OJWANDO OKANDA.....APPELLANT
VERSUS
CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

**[An appeal from the judgment and decree of Hon. Muneeni, P.M. IN Kisumu
CMCC NO.124 OF 2000 dated 23rd MARCH 2000]**

JUDGMENT

1. The Appellant, **Joseph Ojwando Okanda**, being dissatisfied with the judgment and decree of the Honorable Muneeni Principal Magistrate, dated 23rd March 2011 in Kisumu CMCC No.124 of 2000, filed this appeal raising four grounds as follows:

" 1. The learned Principal Magistrate erred in law and in fact in finding that the Appellant had been served with a statutory notice as prescribed by law.

2. The Learned Magistrate erred in law and in fact in finding that the Appellant was hiding behind technicalities to avoid paying the loan.

3. The learned Magistrate erred in law and in fact in failing to find that the Respondent was not entitled to bring the counterclaim and to exercise its statutory power of sale.

4. The learned Magistrate erred in law and in fact in finding that the Respondent had proved its counterclaim against the Appellant."

2. (A) The Appellant had commenced a case against **Co-operative Bank of Kenya Ltd**, the Respondent, through the plaint dated 21st January 2000. The case was registered as Kisumu CMCC NO.124 of 2000. The Appellant subsequently filed an amended plaint dated 30th August 2004 and the prayers were as follows:

" a. A declaration that the proposed sale of the charged property without complying with the Registered Land Act and Auctioneers Rules is illegal, irregular and void, and that the attempt to recover moneys over and above what is truly outstanding is oppressive and is designed to takeway the plaintiff's right to redeem the property.

b. Interest on costs at courts rates from the date of judgment until payment in full.

c. Costs of this suit."

(B) The Respondent filed a defence and counterclaim dated 29th February 2000 denying the Appellant's claim. In their counterclaim, the Respondent prayed for:

" a. A sum of Kshs.447,649.20.

b. Bank interest on (a) at prevailing rates.

c. Costs of the suit plus interest thereon at courts rates.

d. Any other or further remedy deemed fit by this honorable court."

(C) The Appellant testified as PW1 in support of his claim and in defence of the counterclaim by the Respondent. The Respondent called Pascal Kipkemoi Kigen, who is a credit officer and testified as DW1 in defence of the Appellant's claim and in support of the counterclaim. The learned Trial Magistrate then prepared and delivered the court's judgment on 23rd March 2011. A decree was extracted and issued on 13th March 2011. The Learned trial magistrate orders on the last page of the judgment are as follows:

" i) The proposed sale of the charged property was legal, regular.

ii) The amount of money recovered is a matter of the contract between the two parties. They agreed on the terms. The plaintiff cannot now term the sale oppressive and geared towards denying him a right to redeem his property.

iii) The defendants counter claim of Kshs.447,649.70 succeeds.

iv) The plaintiff's case fails with costs to the defendant.

v) Costs (and interest) to the defendant.

vi) Orders accordingly."

The orders in the decree are as follows:

" 1. The Plaintiff's suit be and is hereby dismissed with costs and interests on costs to the Defendant.

2. The plaintiff shall pay the Defendant the sum of Kshs.447,649.20 together with interests at the prevailing bank rates.

3. The Defendant shall have the costs of the counterclaim with interest thereon at court rates."

3. The counsel for the parties agreed to file written submissions as can be discerned in the proceedings of 8th April 2015, 7th May 2015, 15th June 2015. Then M/S Staussi & Asunah advocates for the Respondent's filed their submissions dated 10th August 2015 while M/s Otieno, Ragot & Co Advocates for the Appellant filed theirs dated 9th November 2015. This being a first appeal, the court is obligated to consider the evidence before the trial court and come to its own conclusions while warning itself that it did not see or hear the witnesses give their evidence. [See **SELLE -V- ASSOCIATED MOTOR BOAT COMPANY LTD** [1968] E.A 123]

4. ANALYSIS OF THE EVIDENCE

a) The court has considered the testimonies of PW1 and DW1 and there is no dispute that the Appellant

applied for a loan facility of Kshs.700,000 from the Respondent under his letter dated 13th May 1997. It is also clear that the Respondent processed the request of the Appellant and under their letter dated 21st July 1997 offered to lend him Kshs.300,000/= which the Appellant accepted in writing on 23rd July 1997 by signing the letter of offer. The Appellant offered the title of his land parcel **Kisumu/Padndpieri/1953** as security and a charge document dated 11th August 1997 was executed and registered.

b) That the charge document at page 1 clause (b) provided the rate of the interest changeable in the following terms at the top of page 2;

"... and it has been agreed that the repayment thereof with interest at the rate of 29% per annum shall be secured in the manner hereinafter appearing. The rate is subject to change depending on prevailing market forces."

c) The charge document, letter of offer, and letter applying for the loan dated 13th May 1997, among other documents, and the Appellant's evidence confirms the Appellant's postal address as **P.O. Box 1754 Kisumu**. The same address is also appearing on the statutory notices dated 9th April 1999 issued pursuant to **Section 74 of the Registered Land Act chapter 300 of Laws of Kenya** (Repealed) which was produced by DW1 as exhibit. The Appellant had denied receiving the statutory notice as can be seen in his averments in the plaint where he stated that; **" The defendant prior to putting up the property for sale has neither served the plaintiff with the statutory notice as mandatory required by the Registered Land Act, Cap 300 Laws of Kenya nor with a notification for sale in the manner and within the period stipulated by the Auctioneers Rule, 1997"** The Respondent replied as follows in their defence; **" The defendant denies the contents of paragraph 6 of the plaint that the defendant (sic) was not served with a statutory notice or a notification of sale and he is put to strict proof thereof"**. In his evidence DW1 testified that the statutory notice dated 9th April 1999 was being issued but agreed that he had no evidence that it was posted to the Appellant's address. He however believed that the Appellant got it because the Appellant **"wrote a subsequent letter to indicate he got the statutory notice"**. When pressed further DW1 stated that the Appellant **" did not specifically acknowledge receipt of the same."** This court has looked at the copies of the letters written by the Appellant to the Respondent which DW1 produced as exhibits and there is none that refers to the statutory notice dated 9th April 1999. The production of the statutory notice as exhibit by DW1 only shows that the Respondent issued the statutory notice. However the Respondent still had a duty to prove that the statutory notice they issued under **Section 74 of the Registered Land Act** (Repealed) was indeed served on the Appellant.

d) The provision of **Section 153 of the Registered Land Act** (Repealed) provides for service of notice under the Act. It states that;

"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 known place of residence or business in Kenya;**
- (c) if sent by registered post to him at his last known postal address or 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 where under 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".**

From the testimony of DW1, the Respondent intended to serve the statutory notice on the Appellant through the registered post. The notice produced as exhibit carries the words **"REGISTERED POST" on its face**. However there was no evidence offered by the Respondent to confirm that the notice was

posted to the Appellant or that it was served on him through any of the other ways set out under **Section 153 of the Registered Land Act (Repealed)**. The superior courts have in several decisions including that of **Ochieng and Another -V- Ochieng and Others** [1995-98] 2 E.A 260 taken the position that it is the duty of the Chargee to make sure that there is compliance with the requirements of **Section 74(1) of the Registered Land Act (Repealed)**. That burden is not in any way on the Chargor. That once the Chargor alleges non-receipt of the statutory notice it is for the Chargee to prove that such notice was infact sent. The Respondent herein failed to produce the certificate of postage to proof that the statutory notice they issued dated 9th April 1999 was indeed posted to the Appellant's address. In the absence of such proof, the Respondent's power of sale had not arisen by the time they instructed the auctioneer to place the advertisement to auction the charged property. That finding suffices to deal with this appeal.

(e) That the provision of **Section 74 (3) of the Registered Land Act(Repealed)** provided the instances where a Chargee, like the Respondent herein, could sue the Chargor, Appellant, for the money secured by the Charger. However no court action could be commenced until after the statutory notice served has expired. **[See Section 74(3) (d) of the said Act]**. The counter claim filed by the Respondent against the Appellant was therefore filed in contravention of **Section 74 (3) (d) of the Registered Land Act (Repealed)** in view of the court finding in (d) above, that no statutory notice issued under **Section 74(1)** of the said Act was served on the Appellant.

(f) That the evidence adduced by both the Appellant and Respondent shows that the

Appellant was still indebted to the Respondent under the Charge. The superior courts have in various decisions held that their role is to enforce or legitimize what the parties agreed between themselves. That position has been dealt with by this court in the case of **Dorice Achola Odero -V- Stephen Karanja T/A Dalali Traders & Another** in which the court referred to the following other decisions:-

i) **Moris & Co Ltd -V- Kenya Commercial Bank Ltd & Another 2 EA 605.**

ii) **Maltex Commercial Supplies Ltd & Another -V- Euro Bank Ltd (In Liquidation) (2007) eKLR.**

iii) **Mrao Ltd -V- First American Bank of Kenya Ltd & 2 Others [2003] eKLR.**

iv) **Hyundai Motors Kenya Ltd -V- East African Development Ltd [2007] eKLR and,**

v) **Elijah Kipngeno Arap Bii - V- Kenya Commercial Bank Ltd [2001] KLR 458.**

5. That having found as above, the court comes to the following determinations;

(a) That the learned Trial Magistrate erred in law and in fact in finding that the Respondent had served the Appellant with the statutory notice in accordance with **Section 74(1) of the Registered Land Act (Repealed)** while there was no evidence adduced by the Respondent to confirm service in any of the methods provided for under **Section 153 of the said Act**.

(b) That the Learned Trial Magistrate erred in fact and in law in finding that the correspondence produced as exhibits were sufficient for purposes of proving service of the notice contemplated under **Section 74(1) of the Registered Act (Repealed)**, while there was no evidence of the statutory notice dated 9th April 1999 being served on the Appellant. The Respondent had therefore filed the counter claim without the requisite notice being served on the Appellant and the suit commended through the counterclaim was therefore premature, and filed in contravention of **Section 74(3) (d) of the Registered land Act (Repealed)**.

(c) That the Appellant has succeeded in establishing his appeal on grounds 1 and 3.

(d) That the evidence adduced before the trial court including the correspondence between the parties clearly shows that the Appellant knew all along that he was indebted to the Respondent. The

evidence further show that the Respondent has all along been ready and willing to accommodate the Appellant requests in varying the due dates of the payments among others. That leads the court to take the position that this is an ideal case where each party should bear their costs.

6. The court therefore issues the following orders:

- a) That the appeal in respect of the order dismissing the Appellant's claim and allowing the Respondent's counterclaim is allowed with each party bearing their own costs.
- b) That the proposed exercise of power of sale by the Respondent over the charged property is hereby declared void for failure to serve the Appellant with the statutory notice under **Section 74 (1) of the Registered Land Act (Repealed)** (now Section 90 of the Land Registration Act. No.3 of 2012).
- c) That the Respondent is at liberty to issue and serve the requisite statutory notices if the Appellant is in arrears of the loan facility.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered at **Kisumu** this **9th day of MARCH 2016**

In presence of;

Appellant Absent

Respondent Absent

Counsel M/S Alinatine for Otieno for Appellant.

 Mrs Stausi for the Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016

9/3/2016

S.M. Kibunja J.

Oyugi Court Assistant

parties Absent

M/S Stausi for Respodent

M/S Alinatine for Otieno for Applicant.

Court: Judgment delivered in open court in presence of Mrs Stausi and M/S Alinatine for Respondent

and Appellant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/3/2016