



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL CASE NO.39 OF 1997

NATIONAL BANK OF KENYA LTDPLAINTIFF

VERSUS

GEORGE OGWENO WANGADEFENDANT

R U L I N G

1) On 17th July 2014 the Plaintiff Bank filed the following Notice of Motion:-

1) That there be and it is hereby ordered a stay of proceedings in this suit to allow the applicant time to exhaust all its remedies against the charged property land parcel Title NO.BUKHAYO/BUGENGI/2441 before proceeding with the hearing and final determination of this suit.

2) That costs be provided for.

2) In reaction to that Application the Defendant raised a Preliminary Objection to the said Application based on the following grounds:-

I. The purported statutory notice relied on for institution of this suit is admitted to be defective, as provisions of S.74 of the Registered Land Act (not repealed) were not complied with.

II. On the plaintiffs' own admission that the purported notice dated 6th February, 1993 giving the respondent/defendant 14 days to pay the alleged debt was invalid, the suit filed on the basis thereof is null and void.

III. The suit being null and void for one compliance with the condition precedent as provided in the Proviso to S.7 4(3) © of the Registered Land Act, (now repealed) there is no valid suit to be stayed.

IV. The applicant/plaintiffs by affidavit dated 29th April, 2014 by Benard Mwanga, the branch manager, in support of their Notice of Motion for amendment of the plaint at paragraphs 8 and 9 stated they had exhausted their statutory powers of sale, hence there are no more statutory powers of sale to be exhausted, the absence of which the application is incompetent.

V. The application dated 16th July, 2014 for stay of this suit is therefore incompetent and the same should be dismissed alongside the suit itself.

3) Vide a letter of offer dated 15th March 1991 the Bank, at the request of the Defendant, granted to the Defendant a term loan of ksh.200,000/=. Part of the security to be taken by the Bank was an already existing charge for ksh.100,000/= over land described as Bukhayo/Bugengi/2421 and which to be further charged for ksh.60,000/=. The securities were put in place.

4) It is alleged by the Bank that the Defendant defaulted in repayment of the facility and so by a letter dated 6th February 1993 the Bank through the firm of Manwari & Co Advocates issued a 14 day notice demanding full payment. About four years later on 12th September 1997 the Bank brought this action for Recovery of the debt amount. The Bank now thinks that it did not fully comply with Section 74 of the Registered Land Act (**now repealed**) and in paragraph 8 of The Affidavit of Bernard Mwangi sworn in support of the Notice of Motion of the same day, the Deponent states:-

“That it has not emerged that the said notice issued and served by M/s Manwari & Co Advocates upon the Respondent did not fully comply with the provisions of Section 24 of The Registered Land Act

(now Repealed)”.

The Notice of Motion is an attempt by the Bank to make up for what it sees as a lapse.

5) In the Preliminary Objection, the Defendant takes that stance that the Notice of Motion serves no purpose because the suit before Court is incompetent. That the Bank having admitted that the no valid Statutory Notice under Section 74 (1) of The Registered Land Act (now repealed) had been issued, there can be no valid suit. Counsel pointed out the Proviso to Section 74 (3) which reads

Provided that-

(i) In the case specified in paragraph (a) -

a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the charge to pay the same; and

b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

The thrust of the Defendants argument is that the Court has no business staying an invalid suit.

6) In further submissions made by Counsel at the request of the Court, Counsel for the Defendant emphasized that the issue as to whether or not the Plaintiff had issued a valid notice had been determined with finality in a Decision of Muchemi J of 2nd May 2012 and any attempt to renew it would be to affront the principle of Res Judicata.

7) Counsel further pointed out that even if it were to be assumed that the letter dated 6th of February 1993 was properly served upon the Defendant it would still fall short of the requirements of statute. Counsel argued that the notice contemplated in Section 74(1) of The Registered Land Act was a 3 months notice. Counsel sought to persuade the Court that the provisions of Section 74(1) must be read together with the provisions of Section 65(2) which provides:-

“A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the charge on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the charge.”

8) The second limb of the Preliminary Objection is that the Notice of Motion is an abuse of Court process as the Bank had earlier led this Court to believe that it had fully exhausted its Statutory Power of

Sale. In this regard the Defendant drew my attention to the affidavit by Bernard Mwangi sworn on 29th April 2014 on behalf of the bank in which he stated,

“That on or about 6/21/1993 the respondent through the firm of Manwari and company advocates issued and served upon the applicant a statutory notice for the sum then outstanding in the sum of ksh.649,666.10 in full compliance of sections 74 of the registered land Act (now repealed) long before the filing of the instant suit but the applicant failed and/or neglected to comply with the said notice. Attached hereto is a copy of the notice dated 6/2/1993 marked TJ-3.”

9) The Plaintiff responded to the Preliminary Objection by way of written submissions dated 10th October 2014 and oral submissions made in Court on 10th February 2015. In the written submissions, the Plaintiff argued that the Preliminary Objection was an abuse of Court process as it was an attempt by the Defendant to effectively argue his application dated 27th July 2012 for striking out of the Plaintiffs suit. Secondly, the Plaintiff argued that its Notice of Motion of 16th July 2014 which is the subject of the Preliminary Objection, was motivated by its desire to comply with the Law.

“The Defendant (sic) now says it is willing to issue the Defendant with Statutory Notice that comply with the Law and the respondent should not be denied that opportunity.”

It was further argued that the suit before Court is not incompetent.

10) In his address to Court, Mr Bokongo submitted the 14 day Notice issued by Mr. Manwari may well have been a valid Statutory Notice under the provisions of Sections 74 (1) and 74 (3). Counsel argued that for purposes of filing suit, Section 74(1) does not specify the period of the Notice. What the law requires is a reasonable Notice. I was urged to find that the 14 day Notice is reasonable. In asking the Court to uphold the validity of the Notice, I was urged to find that the issue of the validity of Notice was not a matter determined in the decision of Muchemi J.

11) As I turn to decide the matter at hand, I need to point out that this suit was commenced at a time when the Registered Land Act (**now repealed**) was in operation. The Statute Applicable to the controversy herein is the Repealed Act and all the provisions of Statute hereinafter discussed are provisions of that Statute.

12) The Decision of Muchemi J. delivered on 2nd May 2012 was in answer to the Defendants Notice of Motion dated 29th October 2010 for Review. In supporting that Application, the Defendant swore an affidavit on 29th October 2010 in which he averred, in paragraph 9, as follows:-

“THAT I know of my own knowledge that the respondent have not at any time served me with a statutory notice as required under the Registered Land Act of their intention to sell my security, nor to file a suit against me for recovery of the loan.” (my emphasis)

13) In the submissions filed on 8th December 2011 in support of that application, the Defendant pressed that point in addition to other arguments he made. The Defendant submitted, *inter alia*,

“They did not plead service of the required statutory notice under section 74(1) nor that any above situations as provided in section 74(3) existed to justify the filing of the suit against the applicant.

Proviso (1) section 74(3) states as follows:-

I. In the case specified in paragraph (a)

II. No action shall be commenced until a notice served in accordance with subsection (1) has expired.

The respondent had to plead in their plaint that they had served a statutory notice under the said

provison, and that the notice had expired. It is therefore clear that the institution of the suit offended section 74(3) and the proviso quoted above. Neither did they show at the trial that they had complied with the law. The suit is therefore incompetent and the judgement was without jurisdiction.”

Those were indeed powerful submissions by the Defendant.

14) What, if any, was the Plaintiffs response to the issue that it had not served the Notice required by Section 74(3) read together with Section 74 (1). The Plaintiff filed Grounds of Opposition dated 29th November 2010 in which no mention was made on the issue of the Statutory Notice. Similarly, the Plaintiff in its submissions of 9th February 2012 did not directly address the issue. Even on the occasion of highlighting of submissions, the Plaintiff’s Advocate chose not to respond to the issue of non-service of a valid Notice.

15) In dealing with the now vexed question of Notice under Section 74, the Learned Judge held,

“Nevertheless, the parties are bound by the terms of the charge and y the law applicable. The loan advanced to the applicant was a mortgage loan where a security was given. On perusal of the contents of the plaint, it is clear that the claim was a commercial one of money owed to the bank by the applicant. The chargee had the right to sell the security to recover the amount owed to him. Being a mortgage loan the chargee was obligated to comply with the provisions of the law relating to mortgage loans before he filed this suit.; The chargor’s remedy lies in exercise of his right of redemption under section 72(1) and 74 of the Land Registered Act. The provisions of Section 74 are clear on how the charge shall exercise his right of redemption:

“74(1)

.....

The chargee has two options:

to sell the charged property or appoint a receiver of the income of the charged property. The Respondent did not take any of the options under Section 74 (2). The other remedy open to the charge is provided for under section 74(3):

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In the case before me, no situation existed to give good ground to sue the chargor. The reason for this scenario is that the chargor had secured his mortgage loan and that the remedies under section 72 and 74 of the Act were available. The Respondent has not shown that he undertook the process of redemption as provided by the law. The bank will only sue the charger in any of the three situations provided for under section 74(3) occurs. The reason or this scenario is that the chargor has secured his mortgage loan and that the remedies under section 72 and 74 of the Act were available. The Respondent has not shown that he undertook the process of redemption as provided by the law. The bank will only sue the

charger in any of the three situations provided for by Section 74 (3). I have already pointed out that none of those situations was in existence at the time this suit was filed. Even if it did, the bank had an obligation to issue a statutory notice to the charger before the decision to sue was made. It was also a requirement that the applicant should have given an undertaking to pay the amount owing. There was no proof of such an undertaking in order justify the filing of the suit.” (my emphasis)

In my view, the Learned Judge made at least two (2) findings.

Firstly, that the Respondent had not demonstrated that it had undertaken the process of redemption as provided by Section 74 (2). Secondly, that the Bank had not issued a Statutory Notice upon the chargor before suing (see the emphasized sentence of that decision). That Notice could only have been the Notice to be issued under Section 74(1) of the Act as required by the proviso in Section 74 (3). Whether or not the Notice preceding the filling of a suit had been served in accordance with Section 74(1) was an issue that was alive before Muchemi J and on which she had rendered herself.

16) And that determination by the Judge was not a statement made in *obiter*. This is demonstrated by the conclusion of her Decision in which the Judge stated:-

“I come to a conclusion that the judgement of Justice Mbiti delivered on the 9th February 2000 was based on an incompetent suit and that the evidence adduced failed to disclose the actual dispute between the parties. I find this to be a sufficient cause for review or setting aside of the judgment.”

Clearly, the determination that the suit was incompetent was part of the rationale for the Decision of the Learned Judge. For that reason, I will agree with the Defendant that the question as to whether or not the suit was incompetent for non-compliance with the condition set out in the proviso to Section 74 (3) (i) was determined in the said Decision of 2nd May 2012. That being my finding, I have to uphold the argument by the Defendant that to revisit the question of the validity of the purported Notice of 6th February 1993 would be to go against the principle of *resjudicata*. If therefore, the Plaintiffs suit is incompetent and invalid, it would be needless for this Court to stay it in accordance with the provisions of the proviso (ii) to Section 74 (3) as there will be no valid suit to be stayed. The result is that I uphold the Defendants Preliminary Objection. And on that Ground alone I do hereby strike out the Application dated 16th July 2014.

17) Although the Defendant has in the Notice of Preliminary Objection, also asked this Court to strike out the entire suit, this may not be the occasion to determine that issue as the Defendant has through his Application dated 27th of July 2012 specifically sought the striking out of the suit for being incompetent. That Application is pending. The Defendant will have to prosecute the Application.

18) As I conclude, this Court on reflecting deeply on the *resjudicata* arguments made by the parties, must have the grace to admit that the following observations made by me in a Ruling delivered herein on 19th December 2013 were in fact made in error. The observations were,

“18. If I understood the rationale of decision well, and I hope I do, it is that the Plaintiff’s action was premature as it had not demonstrated that it had exhausted all the remedies provided by Section 74 of The Repealed Registration of Land Act. I do not understand the Judge to hold that the action was incompetent for any other reason and that is perhaps why the Judge did not strike out the entire suit.”

As I have already held herein, one of the reasons why the Judge allowed the Application for Review was that the suit herein was incompetent. On my analysis of that Decision by the Judge, I have reached the conclusion that one of the reasons she found the suit to be incompetent was because it did not comply with proviso (i) (b) to Section 74 (3) as read with Section 74 (1).

19) Back to the matter at hand. The Preliminary Objection dated 27th August 2014, is hereby upheld and

the Application dated 16th July 2014 is hereby dismissed with costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 11TH DAY OF MARCH 2015.

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

BOGONKO.....FOR PLAINTIFF

BALONGO.....FOR DEFENDANT