Cosmas Mrombo Moka v Co-Operative Bank of Kenya Limited (Civil Case 6 of 2015) [2015] KEHC 8555 (KLR) (11 June 2015) (Ruling)

Cosmas Mrombo Moka v Co-Operative Bank of Kenya Limited [2015] eKLR

Neutral citation: [2015] KEHC 8555 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL CASE 6 OF 2015

SJ CHITEMBWE, J

JUNE 11, 2015

BETWEEN

COSMAS MROMBO MOKA ..... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT

RULING

1. The plaintiff filed his application dated 4/2/2015 seeking an order of permanent injunction restraining the defendant from auctioning his plot number number Kilifi/Mtwapa/3104 pending the determination of the suit. The applicant is also seeking a declaration that the planned auction of his property is premature and irregular: The matter came under Certificate of Urgency before Justice Angote on 5/2/2005. Temporary orders were granted. The application was fixed for interpartes hearing on 19/2/2015. Only counsel foe the applicant appeared and the interim orders were confirmed.

2. This ruling is in respect of two applications. One by the defendant dated 25/2/2015 seeking to set aside or discharge the orders granted on 19/2/2015 and the main application dated 4/2/2015 seeking orders of injunction: The application dated 25/2/2014 is supported by the affidavit of Kongore F. billy sworn on the same date. The main issue raised in the application is that the defence counsel appeared in Malindi Court on 18th February 2015. He got information that the Judge handling the matter was not not sitting that week. The advocate checked the cause-list for the ELC court and noted that the matter was not listed in the court's weekly cause-list. He was informed by the registry that the matter was listed before Chitembwe who was not sitting and all matters with interim orders would be mentioned before Justice Angote. The advocate was appearing in a different matter before Justice Angote that day and this suit was to come for inter-parties hearing the following day.

3. Counsels for the defendant submit that they later got informed that the duty court gave final orders instead of extending the interim orders. By that time the defendant had not entered appearance and

there was no representation. The application appeared not to be opposed. It is contended that the mistake is honest and excusable. However, the plaintiff's application ought to have been considered on its own merit and that the orders of injunction ought to have been limited to the duration of issuing a fresh statutory notice and not pending the determination of the suit. It is further submitted that the matter was for mention and not hearing as the court handling the matter was not sitting.

4. Mr. Olando, counsel for the plaintiff opposed the application. It is submitted that the defence counsel was not on record at the time the matter was listed for inter-parties hearing on 19/2/2015. the court heard the plaintiff's submissions in the absence of the defendant who had been duly served.

5. The record shows that a notice of appointment of advocate was filed on 19/2/2015. It is not clear to me how the notice was filed on 19/2/2015 yet it is dated 20/2/2015. the receipt issued is dated 20/2/2015. This can't be a mistake on the part of the court as the assessment of the fees on the face of the notice clearly indicate that it was done on 20/2/2015. Be that as it may, it is clear that when the matter appeared before Justice Angote, there was no representation for the defendant. The defence counsel maintains that the matter was for mention to extend the interim orders. I do agree with that line of reasoning as that seems to be the practice. The plaintiff's counsel took advantage of the fact that there was no appearance and reply to the plaintiff's application and argued his application. The argument was simply that the statutory notice was defective. Orders were granted restraining the defendant from auctioning the plaintiff's property pending the determination of the suit. Ordinarily, the court could have extended the interim orders and refer the matter back to the court handling the matter. It could also be that the Honourable Judge was not informed that this matter was brought to him from the other court. Having handled the certificate of urgency, Justice Angote could have thought that this was an ELC matter.

6. In essence therefore, although there was no appearance for the defence, since there was information that the court where the matter was listed was not sitting, the interim orders could only have been extended instead of being confirmed. I do also agree with the reasoning that the permanent orders ought not to have lasted pending the determination of the suit. It is clear that the defendant was served on 9th February 2015. By then, the defence counsel had instructions. The mistake not to appear on 19/2/2015 is excusable. This is not a case of totally ignoring a court case and failing to instruct an advocate. I do allow the application herein and discharge the orders granted ex-parte on 19th February, 2015. Since counsels for the defendant were aware of the matter and failed to exercise courtesy by talking to the plaintiff's counsel, they shall meet the costs of the application. The applicant is allowed in the above terms with costs to the plaintiff.

7. Turning to the application dated 4/2/2015, Mr. Alondo relied on the supporting affidavit. The auctioneers notice was not proper. The main issue on the notice is the date of the notice and service of the notice. Payment was to be made within 45 days from the date of the notice and no receipt. The applicant made proposal to settle the loan. Instead of discussing the issue amicably, the defendant came up with a totally different proposal. Be that as it may, the applicant kept on depositing some money into the account.

8. Mr. Alando further contends that the land is a matrimonial property. The valuation report indicated that the property is residential. Sections 105 and 106 of the *Land act* gives the court wide powers: the applicant is not a persistent defaulter. The applicant has dealt with the defendant for over 10 years. The applicant has established a prima facie case.

9. Mr. Kombere opposed the application and relied on his written submissions: Counsel contends that three reasons were given as the basis of the application. It is not disputed that the statutory notice was served. It is not stated how improper the statutory notice is. The notice lompties with section 90 of the

Land Act, 2012. Secondly, rule 15 of the *Auctioneers Act* provide for redemption notice: whether the notice should be 45 days before or after service is not stated. The notice was issued on 13/11/2014 for sale on 10/2/2015. The plaintiff was therefore given 45 days to redeem the debt: Finally, the plaintiff made a proposal and was asked to pay 10% of the outstanding amount. He instead paid Ksh.30,000/= which amount is negligible. The applicant has no prima facie case as the property was offered as security.

10. The application dated 4/2/2015 seeks to restrain the defendant from auctioning or in any other way interfering with the plaintiff's ownership and occupation of parcel number Kilifi/Mtwapa/3104 pending the hearing and determination of this suit.

11. The plaintiff is also seeking a declaration that the auctioning of his property was premature and irregular. The applicant would like the court to exercise its powers under section 106 of the *Land Act* 2012 to allow the plaintiff time to regularise his position:

12. From the pleadings, it is not disputed that the property was used as a security to procure a loan of Ksh.seven million (7,000,000/=). In his supporting affidavit the plaintiff avers that he was unable to continue servicing the loan as his business went low. He lost substantial amount through theft by one of his staff and his suppliers in Europe were involved in a messy divorce and all the money he sent to Europe was attached as a result of the divorce decree. The plaintiff further contends that he was issued with two notices. One dated 14/2/2014 for 30 days and another one dated 18/3/2014 for 90 days. He allowed the defendant to utilise his ksh.1.2 million in a fixed deposit account.

13. On their part, the respondent maintains that the applicant has defaulted in serving the loan. Notices were duly issued. When the auctioneers advertised the property for sale on 14/1/2015, the plaintiff made his alleged proposal to restructure the loan. He was asked to pay 10% of the loan balance totalling Ksh.636,737/= plus valuation and auctioning charges of ksh.252,474/= so that the loan could be restructured.

14. In an application of this nature, the applicant has to prove that he has a prima facie case with a probability of success. If the orders are not granted, the applicant will suffer irreparable damage or loss not capable of compensation by way of damages. The contention that the applicant made an offer to restructure the loan cannot be a basis for granting an order for injunction. The parties were already bound by the terms of the charge document. The defendant had the discretion to either allow or refuse the plaintiff's offer. The offer to pay 10% of the amount due was not unreasonable.

15. When the plaintiff filed this suit, he did not annex the alleged improper notice. He instead annexed demand letter dated 16th February 2014 and a 90 days notice dated 18th March 2014. The proper notice was issued on 22nd July 2014 giving the plaintiff 40 days to pay the loan balance. Reference is made in the notice to the earlier notices. The auctioneers gave the plaintiff 45 day notice from 5/11/2014 to pay the debt of Ksh.6,221,098.92/=. The applicant has not averred that he did not receive the statutory notice of 22nd July 2014 or the 45 days notice by the auctioneer. The contention that the auctioneer's notice ought to have been from the date of receipt and not date of the notice cannot hold. It cannot be the basis of issuing injunctive orders. There is no allegations that the 45 days notice was not received at all. How will the sender of the notice know that it has been received if the notice is sent by registered post in line with the terms of the charge. Naturally, few defaulters would acknowledge receipt of the notice. The notice was sent on 4/11/2014. The proposal to restructure the loan was made on 13th January 2015: This was after the expiry of the 45 days notice: the requirement to notify the borrower about the lender's intention to realise the security is intended to avoid auctioning borrower's properties without their knowledge. To say that I ought to have been given 45 days from the date of receipt of the notice and not from the date of the notice should not be a ground for issuing orders of injunction. In any case, the auction was scheduled for 10/2/2015. The applicant had the right to exercise his equity

of redemption before the fall of the auctioneer's hammer. He chose to file this suit on 5/2/2015. It is now June 2015 and it seems the position has not changed otherwise the parties would have arrested the writing of this ruling or file any form of agreement.

16. Since the property was issued as security for the loan, the plaintiff knew the consequences of failing to service the loan. The contention that the property is matrimonial one was not raised in the supporting affidavit or grounds of the application. It was raised in the submissions after the valuation report was filed. The property is incomplete and still under construction. It can only be intended for residential occupation and cannot be a matrimonial property as of now.

17. In the end, I do find that there is no prima facie case with a probability of success. The banks use customer deposits to give loans to borrowers. The parties herein were governed by the terms of the charge document. It could be true that the applicant is not a perpetual defaulter but the current loan is in arrears. The law has to take its cause. The application dated 25/2/2015 lacks merit and is hereby dismissed. Costs of this application shall follow the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JUNE, 2015.

SAID J. CHITEMBWE

JUDGE