



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
HCCC CASE NO 707 OF 2012

THUGI RIVER ESTATE LIMITED.....1ST PLAINTIFF

PAUL K. MUIE.....2ND PLAINTIFF

VERSUS

CITI BANK N.A LIMITED..... DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 3rd January 2014 was brought under the provisions of Section 13 (7) (a) and 19(i) of the Environmental and Land Court Act, 2011, Act No 19 of 2011, Sections 1A, 1B and 63 (e) of the Civil Procedure Act, 2010, Order 40 2(1), 4(1) of the Civil Procedure Rule (sic), The Constitution of Kenya and all other enabling provisions of the law. Prayers Nos. (1), (2) and (3) are spent. The remaining orders were as follows:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. **Pending hearing of this suit the Defendant, its servants, agents, employees or anyone acting under them or on their instructions be prohibited from selling either by private treaty of public auction, advertising for sale, entering or otherwise dealing in any manner whatsoever or howsoever dealing either L. R No 87503/3 (Title No I R 61875) Thika.**
 - v. **Pursuant to prayers Nos 3 and or 4 being granted the Plaintiffs do give an undertaking as to damages.**
 - vi. **The time for compliance with the order granted by the Honourable Justice Mutava in this matter extended by a further period of 90 days up to 31st March 2014.**
 - vii. **Costs of this application be provided for.**
2. The grounds under which the said application was premised were generally as follows:-
 - a. **That the Defendant had breached a contractual agreement with the Defendant.**
 - b. **That the Defendant was obligated to issue the Plaintiffs with a Statutory Notice under**

Section 90 of the Land Act.

- c. **That upon expiry of the said notice, the Defendant was obligated to serve the Plaintiffs with a Notice to sell the security under Section 96 (2) of the Land Act.**
- d. **That the notice was served but was premature as the mandatory Statutory Notice under Section 90 of the Land Act had never been served upon the Plaintiffs. The purported sale was therefore premature as the Defendant's power of sale had not arisen.**
- e. **That the Plaintiffs were in the process of disposing of a property to enable them comply with an order of Mutava J and in the circumstances, there were just and proper cases for the granting of the reliefs sought.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of Paul K Muita, SC which was sworn 3rd January 2014. He deposed that he accepted a Notification of sale from Mr. Issac Maina of M/S Principal Auctioneers under protest because neither himself or his wife had ever been served with a Statutory Notice of Sale.
4. He contended that the Plaintiffs ought to have been served with a Statutory Notice under Section 90 of the Land before they could be served with any Notification of Sale because the Statutory Notice that was issued on 20th February 2004 was declared improper. He stated that instead of cancelling the said notice, the Defendant issued what it referred to as a "Further Statutory Notice" which the Plaintiffs insist ought to be cancelled and a fresh notice issued.
5. The deponent deposed that he was in the process of disposing of another property which would enable him deposit a sum of Kshs 42,000,000/= as had been agreed upon, well before 31st March 2014.
6. Nathan Njoroge Kihungu swore a Replying Affidavit on behalf of the Defendant. The same was sworn on 17th January 2014 and filed on 20th January 2014. He stated that the Plaintiffs' application was vexatious and an abuse of the court process intended to delay the Defendant's recovery of the monies that Plaintiffs owed it.
7. The said Nathan Njoroge Kihungu pointed out that the Defendant issued a Statutory Notice demanding the sums the Plaintiffs owed it vide letters dated 23rd February 2000, 20th February 2004 and 21st August 2013, the latest one having been issued in accordance with Section 90 (1) of the Land Act and pursuant to the order of Mutava J made on 25th March 2013. He annexed copies of the said Notice and Certificate of Postage as exhibits in his affidavit.
8. He also averred that the Plaintiffs had over the years made promises to pay the monies they owed the Defendant but none of the promises had been honoured. He contended that the Plaintiffs had had more than sufficient time to meet their obligations under the Charge. It was the Defendant's belief that the latest representations were nothing more than just a bid to buy more time with no intention of fulfilling any promise.
9. In his Further Affidavit sworn on 17th January 2014 and filed on 20th January 2014, Paul K. Muita SC annexed a copy of a letter of offer from one of the prospective buyers. He added that the Statutory Notice was defective as it not disclose the sum of monies the Plaintiffs owed the Defendant. He stated that there was need for the Defendant to produce statements of accounts to indicate the status of the Plaintiffs' loan account and to determine whether the Defendant was in breach of the in duplum rule.
10. He was insistent that a proper Statutory Notice was one that complied with Section 44A of the Banking Act as had been observed by Onyancha J.

LEGAL SUBMISSIONS BY THE PLAINTIFF

11. The Plaintiffs filed their written submissions dated 29th January 2014. The Plaintiff submitted that they were never served with the Statutory Notice dated 21st August 2013 and that a closer look at the said notice showed that they never been received it. They pointed out that the said Notice was ambiguous as it made reference to several amounts therein as opposed to the exact amount they owed the Defendant as was required under Section 90(2) of the Land Act. It was therefore the Plaintiffs' argument that the Statutory Notice did not meet the threshold of a proper Statutory Notice.
12. It was the Plaintiffs' further submissions that Section 102 of the Land Act gave a Chargor right to discharge a charge on payment of any sum due any time before sale of a charged property. They argued that they had paid off the bulk of the loan and that given reasonable time, they were ready to settle the balance.
13. In its written submissions dated 5th February 2014 and 6th February 2014, the Defendant submitted that the Plaintiffs' application was essentially seeking to restrain the Defendant from exercising its right to sell the charged property. It pointed out that the loan advanced to the Plaintiffs remained unpaid with the Plaintiffs having made no effort to pay the said loan or redeem the charged property.
14. The Defendant argued that the issue of the levying of interest on other charges had been ventilated in several courts of competent jurisdiction culminating in a decision by Onyancha J that it re-issue a Statutory Notice. It submitted that the Plaintiffs did not stand to suffer any prejudice if it served them with a Further Notice to sell and that the issuing of a Statutory Notice with the word "Further" did not negate the said notice as it put the Plaintiffs on notice of its intention as regards the subject property.
15. The Defendant was emphatic that the Plaintiffs were served with the Statutory Notice of 21st August 2013 which was evidenced by Certificate of Postage, a copy whereof was attached to the affidavit of Nathan Kihungi Njoroge. The Defendant urged the court to consider the provisions of Section 151 of the Land Act which provided that service could either be personal or by post.
16. It was the Defendant's contention that the Plaintiffs had moved from denying to service to challenging the validity of the Statutory Notice on the ground that the same was ambiguous. It argued that the said Statutory Notice conformed with both the provisions of Section 90 of the Land Act in addition to the details that were ordered by the court and that the figures shown therein were as follows:-
 - a. **The amount borrowed (USD 300,000).**
 - b. **The amount due as at 1st May 2007 when Section 44A of the Banking Act came into force, (USD 725,537.00).**
 - c. **The fact that interest ceased to be applied on 15th February 2013 when the amount capped by Section 44A was reached in the sum of USD 1,451,074.**
 - d. **The fact that the Court's order to deposit a sum of Kshs 42 million had not been complied with.**
 - e. **The sum demanded to be paid within 3 months (USD 1,451,074).**
17. The Defendant referred the court to paragraph 19 of the Plaintiff's Supporting Affidavit where the Plaintiffs had undertaken to deposit a sum of Kshs 42,000,000/= which was the basis of the order of Mutava J of 25th March 2013 and which sum has never been paid to date. It denied that the Plaintiffs had paid the outstanding loan. It argued that the Plaintiffs' course of conduct of seeking extension to comply with the orders of Mutava J and the purported sale of the subject property without its consent or knowledge militated against any further indulgence by the court.
18. The Defendant asked the court to disregard the Plaintiffs' submissions that the Election Petition interfered with the 2nd Plaintiff's financial planning as the order issued by Mutava J lapsed on 25th July 2013 which was long before the said Election Petition. It therefore urged the court to dismiss

the application herein and strike out the Plaintiff under the powers granted to the court under Section 1A and 1B of the Civil Procedure Act and to award it costs on a full indemnity basis.

LEGAL ANALYSIS

19. The issue of the running of time was raised by both parties. The Plaintiffs argued that the court had found that time stopped running between 21st December 2013 – 6th January 2014 while the Defendant pointed out that this was an error on the face of the record. The court has noted the said arguments but finds the argument to have been overtaken by events as the Statutory Notice has by now run its full course. The court will therefore not deal with the same but rather, it will consider the other substantive issues herein.

20. The issues that have been raised by the Plaintiffs mainly revolve around the question of whether or not the Statutory Notice dated 21st August 2013 constituted a valid Statutory Notice issued under Section 90 of the Land Act. The said section stipulates as follows:-

90. (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) 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;

(d) The consequence that if the default is not rectified within the time specified 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 to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the charge may—

(a) Sue the chargor for any money due and owing under the charge;

(b) Appoint a receiver of the income of the charged land;

(c) Lease the charged land, or if the charge is of a lease, sublease the land;

(d) Enter into possession of the charged land; or

(e) Sell the charged land;

21. Perusal of the Statutory Notice attached to the Replying Affidavit and marked “NNK” dated 21st August 2013 shows that it contains the following:-

i. **Mode in which the said notice was served upon the 1st Plaintiff, which was under Certificate**

- of Posting and by Registered Mail. A Certificate of Postage was attached thereto.**
- ii. The addressee, who is the 1st Plaintiff and its postal address.**
 - iii. Reference to the Charge over L.R 8750/3 (I.R. 61875) to the Defendant.**
 - iv. Reference to Section 90(1) of the Land Act, 2012 and the order of Mutava J issued on 25th March 2013.**
 - v. Reference to the agreement entered into between the 1st Plaintiff and the Defendant, the Charge and the amount of USD 300,000 that was advanced to the 1st Plaintiff.**
 - vi. Particulars of breach of the said agreement by the Plaintiff.**
 - vii. The circumstances under which the 1st Plaintiff went into default making the entire balance then outstanding as at 31st January 2000, due and payable.**
 - viii. The circumstances under which the account continued to accrue interest which stood at USD 725,537 as at 1st May 2007 when Section 44A of the Banking Act (The Duplum Rule) came into force.**
 - ix. When interest at 12% per annum ceased to be applied on 15th February 2013 and outstanding sum was thus capped at USD 1,451,074 which amount remained outstanding as at 7th August 2013.**
 - x. Order of Mutava J of 25th May 2013 which directed the 1st Plaintiff to deposit a sum of Kshs 42,000,000/= in a joint account with the Defendant which the Plaintiff had not complied with.**
 - xi. Date of when the first Statutory Notice was issued.**
 - xii. Advise that the Defendant was issuing the Statutory Notice of 21st August 2013 pursuant to the order of Mutava J of 25th March 2013.**
 - xiii. The amount of USD 1,451,074 that the Defendant was demanding from the 1st Plaintiff.**
 - xiv. Notice that the Defendant would exercise its statutory power of sale pursuant to Section 96 of the Land Act, 2012 after three (3) months.**
 - xv. Notification that any monies paid to the Defendant by the 1st Plaintiff would be accepted on a without prejudice basis and purely on account and that same would not discharge the debt due until full repayment of the sum of USD 1,451,074 along with all costs, fees, charges and expenses incurred by the Defendant in connection with the recovery of the said sum.**

22. If one was to look at Section 90(1) of the Land Act, 2012, it is clear that the Defendant informed the 1st Plaintiff of the following:-

- i. The nature and extent of the default which as at 21st August 2013 stood at USD 1,451,074.**
- ii. The 1st Plaintiff's right to redeem the subject property and/or the requirement to rectify the default within three (3) months.**
- iii. The consequence of not rectifying the default within three (3) months which would entitle the Defendant to sell the charged property as contemplated under Section 90 (3) (e) of the Land Act, 2012.**
- iv. Its right to exercise its statutory power of sale under Section 96 (1) of the Land Act, 2012.**

23. The court has carefully considered the Plaintiffs' argument that the Statutory Notice did not indicate the exact amount they owed the Defendant which instead made reference to a sum of Kshs 42,000,000/=, USD 725,537 and USD 1,451,074 rendering the said notice ambiguous. However, the court disagrees with the said argument for the reason that the sum due was given.

24. The inclusion of the sums of USD 725,537 and Kshs 42,000,000/= did not render the figure ambiguous because the Defendant demanded an all inclusive figure of USD 1,451,074. It does not appear to this court that the Plaintiffs were being called upon to pay any other figure other than USD 1,451,074 stipulated on page 2 of the Statutory Notice dated 21st August 2013.

25. The setting out of the details giving the historical background of how the 1st Plaintiff and the Defendant entered into an agreement for the advancement of the sum of USD 300,000, how the 1st

- Plaintiff defaulted, how the said amount accrued interest and when the Duplum Rule became applicable herein or the amount the 1st Plaintiff had been ordered to deposit pursuant to the court order did not in any way invalidate the Statutory Notice.
26. It cannot be right as the 1st Plaintiff has argued that the Statutory Notice should refer to the amount secured by a charge because it is obvious that by the time a chargor defaults in payment of the monies, the amount cannot be the same as it was in the Charge Instrument.
 27. The payment of the loan, default in repaying the loan and the interest applied on the outstanding sum at any given time will definitely mean that a Statutory Notice cannot therefore refer to the monies only secured by the Charge Instrument. Monies advanced can never remain static for the reasons mentioned hereinabove and a Statutory Notice must give the position obtaining at any given time.
 28. There is no one format of how a Statutory Notice should be drawn. It is a matter of style and is not cast in stone. However, it must contain all the requirements set out in Section 90(1) of the Land Act, 2012 for it to be deemed to be valid. It was not necessary for the Defendant to have given a historical narrative of the matter in its Statutory Notice dated 21st August 2013 but that in itself did not invalidate the said Notice. It does appear to this court that the details therein were given *ex abundante cautella* due to the historical background of this matter which appears to have been very contested and lengthy.
 29. It is correct as the 1st Plaintiff submitted that a Chargor has a right of redemption as provided for under Section 102 of the Land Act, 2012. The Defendant informed it of that right in its Statutory Notice dated 21st August 2013. Whereas the 2nd Plaintiff had indicated that it had potential buyers who could purchase another valuable property, the Defendant argued they had never communicated the same. In this regard, the court agrees with the Defendant that the Plaintiffs' did not appear to proceed expeditiously to clear the outstanding monies. The court did not understand from the Plaintiffs' affidavits that they intended to dispose of the subject property. However, if that was their intention, the Defendant was right that any sale of the subject property could only be in accordance with the provisions of the Charge Instrument and that the court would be overstepping its mandate if it was to find otherwise.
 30. The court cannot verify whether or not the Plaintiffs argument that they had paid off the bulk of the loan. Suffice it to state that the learned Mutava J ordered it to deposit a sum of Kshs 42,000,000/= by 25th June 2013 and which it admitted as at the time of bringing the present application, it had not done so.
 31. It was the duty of the Plaintiffs to move the court before the period they had been given to deposit the sum of Kshs 42,000,000/= had lapsed and/or expired. They did not do so. They only moved the court to stop the intended sale of the subject property when they received the Notice to sell dated 28th November 2013.
 32. The court has considered the Plaintiffs argument that they did not receive the Statutory Notice dated 21st August 2013 but has noted that the postal address of P.O. BOX 14746- 00100 Nairobi used in the said notice was the same one. This is the same address that has been used in the Supporting Affidavit of Paul K Muite, SC and in the Certificate of postage and schedule on page 4 of the Replying Affidavit. The Domestic Way Bills on pp 6-7 of the said Replying Affidavit show that there were deliveries to Edith Muite on 22nd August 2013. They do not, however, appear to have been acknowledged in which case the court cannot confirm whether or not the said Edith Muite received the same.
 33. In a case where one party asserts that it has served another and the other party denies that such service took place, the court can only be guided by the documentary evidence that has been placed before it. In the absence of any evidence by the Plaintiffs to the contrary, the court has no option but to accept that the Certificate of Postage annexed to the Defendant's Replying Affidavit

evidenced proper service of the Statutory Notice dated 21st August 2013 upon the Plaintiffs.

34. Having considered the facts of this case, the pleadings, the oral and written submissions and the case law by the parties through their counsel, this court has come to the conclusion that the Plaintiffs were duly served with the Statutory Notice dated 21st August 2013 which had for all purposes and intent, conformed to the requirements in Section 90 (1) of the Land Act, 2012. It was valid and cannot be cancelled to make way for another Statutory Notice as had been argued by the Plaintiffs.
35. This court's hands are tied in that the course of justice must flow. The Plaintiffs did not comply with the order of the learned Mutava J issued on 25th March 2013 and as has been stated hereinabove, only sought the court's intervention when they received a Notice of Intention to sell dated 28th November 2013. They have not given the court any plausible explanation why they had not complied with the aforesaid orders. The explanation that the 2nd Plaintiff's financial planning was affected by the General Elections in 2013 where he participated as a Presidential Candidate may have been feasible but again the Defendant cannot be stopped from exercising its statutory power of sale when the same has arisen and/or crystallised.
36. It is the finding and holding of this court that granting an injunction in this matter would merely be interfering with the parties' contract that they entered into at the time the Defendant was advancing the 1st Plaintiff a sum of USD 300,000. The role of this court is limited to protecting a party whose contractual rights have been infringed upon.
37. The court finds that it will have gone beyond its mandate in this dispute in giving a further extension of one hundred and twenty (120) days to enable the 1st Plaintiff dispose of another property so as to offset the outstanding amounts herein. Nothing stops the parties, however, from agreeing on an extension of time to deposit the sum of Kshs 42,000,000/= or disposing of the other property.
38. The bottom line, however, is that this court cannot extend such period without the consent of the Defendant particularly where there has been non-compliance with the court orders on the part of the Plaintiffs and full compliance with the provisions of the Land Act, 2012 by the Defendant upto this point.
39. The court does, however, wish to point out that the sale of the subject property, if at all must strictly adhere to the provisions of the Land Act, 2012 as failure to do so would not stop this court from issuing appropriate orders to ensure that parties fully comply with the law.

DISPOSITION

40. The upshot of this ruling is that, this court does not find any merit in the Plaintiffs' Notice of Motion application dated and filed on 3rd January 2014. In the circumstances foregoing, the same is hereby dismissed with costs to the Defendant.
41. Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 4th day of March 2014

J. KAMAU

JUDGE