



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 142 OF 2017**

**1. T.S.S. INVESTMENTS LIMITED**

**2. JUJA COFFEE EXPORTERS LIMITED.....PLAINTIFF**

**VERSUS**

**NIC BANK LIMITED.....DEFENDANT**

**R U L I N G**

**Outline and introduction**

1. On 4/5/2017, parties recorded a consent and agreed to have the suit herein to proceed by way of case stated for the determination of only substance question:-

**“Whether the defendant has complied with and fulfilled the statutory provisions in seeking to realize the security given to it by the plaintiff”.**

2. It was also agreed that in determining that started question, parties would rely on witness statements filed only. For that reason, parties were directed to file documents and submissions within set timelines and to attend court on the 25/7/2017 to highlight the written submission.

3. Come the 27/5/2017, the plaintiff had not filed the written submissions in time but only a day before with the consequence that the defendant had not filed any submissions. The defendant then saw, as against the plaintiff, a strategy to delay the determination of the matter purely to continue enjoying the orders of status quo ordered to enable the matter be fast tracked. Being guided by the spirit of the consent order that decreed that the matter proceeds by way of case stated, the court expunged the submissions filed out of time and ordered the matter to proceed on the basis of the affidavits on record.

**The Plaintiff’s Case**

4. The gist of the plaintiffs claim is that the principal director and majority shareholder of the plaintiff who dealt and negotiated the facility with the defendant was taken ill and died sometimes on 10/1/2017 hence it was only reasonable that the plaintiff gets time to place its affairs in order by getting time to have an administrator for the estate be appointed. Even as that was pending, there was a meeting between the parties sometimes on 16/3/2017 when the plaintiff acknowledged outstanding accounts and gave proposal on how to settle the same but before long the defendant reneged on the understanding and advertised the security for sale. To the plaintiff, that advertisement went out before the plaintiff was served with the requisite and mandatory statutory notices and therefore in bad faith and contrary to the law applicable. It is failure to issue and serve statutory Notice under Section 90 of Land Act that formed the gravamen of the plaintiffs case.

5. Particulars of what the plaintiff considered were unlawful were then set out and the plaintiff reiterated its willingness to an amicable settlement of the dispute. For those reasons the plaintiff sought from the court, against the defendant, orders injunction to stop the sale and a declaration that the scheduled auction was premature, irregular, wrongful, unjustified, null and void.

6. The plaint was accompanied by a witness statement by one TAUHIDA TAHIR SAID which essentially repeated the complaints in the plaint with addition that the advertisement was contrary and contravention of section 90 of the Land Act 2012 regarding issuance of statutory notices.

7. Together with the plaint was also filed a list of document which included correspondence exchanged between the parties and minutes of a meeting held as aforesaid on the 16/3/2017.

## The defendant's case

8. The defendant filed a statement of defence witness statement, and a bundle of documents on 18/5/2017. The position taken in those documents is that the plaintiffs did approach the defendant for a financial facility in the sum of USD 18,000,000, which loan was negotiated and secured with the full participation of all the directors of the plaintiff. It was then asserted that there was a default in repayment as covenanted for which reason the defendant did issue a statutory notices on 13/01/2016, a notice to sell on the 30/5/2016 and 19/6/2016 that the redemption notices were served on the 19/8/2016. To the defendant the realization process began in January 2006 long before the demise of the plaintiffs' said majority shareholder and director.

9. On participation of other director at the negotiation and securitization for the facility and access to security documents, the defendant averred that all the directors of the plaintiffs were involved and that the resultant perfected security documents were availed to the plaintiff directly and through its advocates on request. It was then added that the plaintiff being a corporate entity survives the death of any of its directors and did so survive the death of the said director and forth that the plaintiff has frustrated every effort at amicable settlement by cancelling meetings scheduled to conclude such negotiations while the debt continues to swell and did stand at Kshs.53,399,512.50 and USD19,367,142.84 as at May 2017.

10. For those reasons the defendant contends that its decision to advertise the security for sale was merited and just and was only done when it became apparent that the plaintiff was not acting with bona fides but merely engaging in delaying tactics. In conclusion the defendant does not deny jurisdiction but states that no notice of intention to sue was ever given prior to filing the suit.

11. Those pleadings were reiterated by the witness statement of WAWERU MATHENGE which has been cynchronised with the bundle of documents filed by the defendant. That statement refers to and exhibits the security documents and all the notices issued evidence of service thereof, correspondence, the newspaper advertisements and the statements of accounts as at May 2017.

## Analysis and determination

12. In line with the direction of court issued by consent of the parties, the plaint and the witness statements together with the list of documents are the only materials the court shall interrogate to find a resolution of the single issue before court.

13. That the parties entered into a loan agreement and perfected the terms thereon by virtue of legal charges dated the 12<sup>th</sup> March 2015 over two parcels of land, Mombasa Block XX/95 and L.R. No. MN/1/5207 is not in dispute. The legality and propriety of the said instruments are equally not denied just as much as the fact of default. That leaves the only issue to be whether after the said default the defendant as chargee did comply with the legal requirements before seeking to exercise its statutory power of sale. The fulcrum of the plaintiff's suit is that in seeking to realize the security offered the defendant did not satisfy the dictates of Section 90 of the Land Act. That provision at the pertinent parts provide;

**“90. (1) If a charger 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 in default for one month, the charge may serve on the charger 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 charger;**

**(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)...**

**(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the charge may:-**

**(a)...**

**(b) ...**

**(c)...**

**(d)....**

**(e) Sell the charged land.**

14. Clearly the law permit a chargee against whom a default has been made, like the defendant herein, to issue a notice which ought to resonate with the requirements of subsection 2 of the Act and in default the chargee is entitled to elect the remedy to pursue under subsection 3.

15. I have had a chance to peruse the statutory notices dated the 11/01/2016 to be found at pages 82 & 84 of the defendants list of documents and I am fully satisfied that the Notices is in full compliance with the requirements of the law. The notices were clearly addressed to the respective registered proprietors of the parcels of land, Mombasa/Block XX/95 and LR No. MN/5207 Section 1, MAINLAND NORTH (CR 18628). The notices disclose the nature of default, action required to remedy the default and the consequences of failure to take remedial action within 90 days from the date of service. At pages 85 and 86 is the evidence of service of the Notices by registered post received by postal corporation of Kenya on the 13/01/2016.

16. It would appear that those notices did not prompt the plaintiff into any action wherefore on the 12/5/2016, Notices of intention to sell were again issued, and this time round served in person as shown by the affidavits of service sworn by SAMUEL NGUNJIRI WAMBUGU before P.M. KAMARA on the 24/5/2016. Clearly Notices under Section 90 of the Land Act were not only issued by Were duly served.

17. I do find and hold that the defendant did comply with the legal requirements imposed upon it under section 90, Land Act fully and to the letter and that the plaintiff's only basis for challenging the exercise of statutory power of sale is wholly misconceived cannot be sustained but must fail. That finding itself disposes the plaintiff s suit which is hereby ordered dismissed with costs to be paid to the defendant by the plaintiff.

**Dated and delivered at Mombasa this 31st day of January 2018.**

**P.J.O. OTIENO**

**JUDGE**