



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 426 OF 2013

MOSES KIBIEGO YATOR.....PLAINTIFF

VS

ECO BANK KENYA LIMITED.....DEFENDANT

(Application to stop the bank from selling the suit land in exercise of its statutory power of sale; contention that no statutory notice was issued; defect in statutory notice; contention that no notification for sale was issued; argument that no spousal consent had been obtained; whether need for spousal consent can be retrospective; no adequate proof that statutory notice was sent to the correct address; no proof of service of notification of sale; no proof that advertisement of suit land was made before lapse of 14 days of the notification of sale; injunction granted on the stated statutory notice and notification of sale)

RULING

The application before me is dated 2 September 2013 filed by the plaintiff. The plaintiff wants the defendant restrained from selling, in exercise of its statutory power of sale, the land parcel Kiplombe/Kiplombe Block 6 (Kutsi)/42 (the suit land) pending hearing and determination of this suit. The plaintiff in his supporting affidavit to this application has deponed that he is the registered owner of the suit land. He guaranteed a loan advanced to one Stephen Kotut by the defendant bank, and offered the suit land as security. All along he assumed that all is well between the defendant and the principal debtor. However on 27 August 2013, he arrived home and found a Notification of Sale prepared by Valley Auctioneers, which notified him that they would proceed to sell the suit land pursuant to instructions received from the defendant bank. The applicant has deponed that the suit land is his matrimonial home and that he has a wife and children who reside in the property. He has averred that the intended sale of the land is improper for the following reasons :-

- (a) No statutory notice was ever served by the defendant.
- (b) No valid redemption notice was ever served as required by law.
- (c) No advertisement of the property has been placed in the newspaper as required by law.
- (d) No valuation of the property has been carried out.
- (d) No spousal consent was sought and granted prior to the charge transaction.
- (f) The equity of redemption is being clogged.

(g) No exercise of exhaustion of alternative remedies has been carried out prior to resorting to sale of the collateral.

It is further deponed that the applicant has contacted the principal debtor who informed him that he is awaiting money from a transaction that he carried out so as to enable him regularize payments of the loan. The plaint more or less contains similar averments. The main prayer sought in the plaint is a declaration that the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful. The plaintiff also wants a perpetual injunction restraining the defendant from seeking to exercise its statutory power of sale. To the application, the plaintiff inter alia annexed a notice dated 18 June 2013, giving the plaintiff 45 days notice to redeem the property. There is also an advertisement in the Daily Nation newspaper of 10 September 2013, by Valley Auctioneers, advertising the property for sale; the sale was scheduled for 13 September 2013.

The applicant sought interim orders in the first instance which I gave subject to some conditions which the applicant fulfilled. The purpose of this application therefore is to determine whether the plaintiff is entitled to a stay of sale pending hearing and determination of this suit.

The defendant filed a replying affidavit to oppose the application. The affidavit is sworn by Julius Korir, the Eldoret Branch, Bank Manager. He averred that the plaintiff guaranteed a loan of Kshs. 6 Million advanced to Stephen Kotut on 2 February 2010, and that a charge was duly registered against the suit land. The plaintiff also executed an instrument of guarantee. There was default and the bank issued a 3 month statutory notice on 6 July 2012 through the law firm of M/s Majanja Luseno & Company Advocates. The notice and a certificate of its posting were annexed. It is stated that default continued despite the statutory notice after which the bank engaged Valley Auctioneers to realize the security. It is averred that Valley Auctioneers issued a Notification of Sale dated 18 June 2013 and later advertised the property. It is also averred that consent of the spouse was not required by the then prevailing law. It is contended that the plaintiff's case is unmerited and the defendant has asked that the application be dismissed with costs.

The plaintiff filed a supplementary affidavit to address the matters raised in the replying affidavit. Inter alia, the plaintiff averred that the statutory notice bears a charge dated 22 February 2010 yet there was no such charge registered in the register of the suit land. It is also averred that the statutory notice bears rates of interest that are not in the agreement of the parties. It is also contended that the statutory notice was not properly served as service by registered post is not one of the recognized modes of service. It is further contended that the statutory notice was sent to a different address and further the certificate of posting does not show to which post office the notice was sent to. It is stated that the notification of sale was not duly served as no certificate of service was displayed. It is also averred that in any event, the notification of sale is defective, as it indicates the date of sale as 15 August 2013 yet the newspaper advertisement indicates the date of sale as 20 August 2013. It is further stated that no statutory notice was sent to the District Commissioner as required by Section 77 of the Registered Land Act.

I have considered the application, the supporting material and the material placed before me to oppose the application. I have also considered the submissions of counsels for both plaintiff and defendant.

It is not in dispute that the plaintiff guaranteed a loan and offered the suit land as security. It is also not in dispute that the principal debtor defaulted and the plaintiff did not make good the debt as he had promised. The only issue is whether the chargee's statutory power of sale has arisen so as to permit the defendant to proceed with the sale of the suit land in order to recover its money. The former law was comprised in Section 74 of the Registered Land Act (CAP 300) Laws of Kenya (now repealed) which provided as follows :-

74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

The current law is not much different from the former law. Section 90 (2) (b) of the Land Act, 2011 requires a three months notice as well, before the chargee can move to exercise his statutory power of sale.

In this case, the plaintiff has averred that the mandatory three months notice was not issued. The defendant has stated otherwise and has annexed a copy of what it believes is a three month statutory notice. I have looked at the notice. It refers to a charge dated 22nd February 2010 and registered on the same date. I have looked at the charge herein. It is dated 2nd February 2010 and registered on the same date. It is apparent therefore that the statutory notice is defective. The benefit of any defect in the statutory notice needs to be given to the chargor and not the chargee. In my view, the statutory notice was defective and invalid.

There is also the allegation that the notice could not be sent by registered mail. There is nothing wrong in sending a statutory notice by registered mail to the last known address of the chargor. One cannot invalidate a statutory notice on the reasoning that it was sent by registered mail. That is a recognized mode of service of a statutory notice. I have however taken a keen interest on the averment that the statutory notice was sent to the wrong address. The address in the letter is the same address given in the charge instrument and there should be nothing wrong with that. But I am unable to see in the certificate of postage the postal code via which the letter was sent. It could very well be that it was sent to the wrong postal code. There is therefore some doubt as to whether the statutory notice was sent to the correct address and the benefit of such doubt must be given to the plaintiff.

In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee. This was indeed the reasoning by the Court of Appeal in the case of ***Obel Omuom v Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)eKLR.***

In the instant case, I have some doubt as to whether the notice was properly dispatched to the proper address of the charge, and I therefore have doubt whether the notice ever reached the chargee.

Let me now turn to the argument that there was no proper service of the Notification of Sale. It is a requirement of the Auctioneers Rules, that a Notification of Sale be served prior to a sale of immovable property. The requisite provision is Rule 15 of the Auctioneers Rules. It provides as follows :-

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) record the court warrant or letter of instruction in the register ;

(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule

indicating the value of each property to be sold;

(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement

It will be seen from the above, that the Notification of Sale needs to give the chargor 45 days to redeem the property. The same ought to be served on the registered owner or an adult member of his family residing or working with him or where the person refuses to sign such notification, the auctioneer needs to sign a certificate to that effect. In this instance, there is no affidavit from the auctioneer stating when and upon whom the Notification of Sale was served. The Notification of Sale annexed to the affidavit of the defendant is blank on the date of service of the notice. It is also blank on the place and time of service. Neither is there a signature of the registered owner and no certificate from the auctioneer is attached to state that the registered owner refused to sign. The Notification of Sale annexed to the affidavit of the applicant gives 18 June 2013 as the date of service. But that is all. The place and time of service is not indicated and neither is there the signature of the registered owner, nor a certificate that he refused to sign.

The applicant stated that he found the Notification of sale on 29 August 2013 in his home. The prudent thing for the defendant to have done would have been to have the auctioneer swear an affidavit and say when, and upon whom, he served the Notification of Sale. If the proprietor refused to sign, then the requisite certificate ought to have been attached. None was done and I have no material to doubt the averments of the plaintiff that he was not served properly and that 45 days had not lapsed from the date of service to the date of advertisement in the newspaper which was on 5 August 2013.

It was also raised by the applicant, that the suit land is matrimonial property yet no spousal consent was obtained. Mr. Mathai for the applicant did not refer me to any law, but I think that he probably had in mind the provisions of Section 79 (3) of the Land Act, Act No. 6 of 2012, which provide as follows :-

S. 79 (3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

The Land Act came into force on 2 May 2012. This charge was created on 2 February 2010. When the charge was created, there was no requirement for spousal consent, and the bank cannot be victimized for not finding it necessary to obtain spousal consent when there was no requirement to do so. In my view, there is no way the provisions of Section 79 (3) of the Land Act, can apply retrospectively. A similar holding was made by my brother Mutungi J, in the case of ***Elizabeth Nthenya Wambua vs Philip Wambua Masila & 3 Others, Nairobi ELC No. 240 of 2012, (2013 eKIR)*** and I see no need to depart from that reasoning.

There were other grounds upon which the applicant sought to vitiate the sale, but I do not think that it is necessary for me to proceed to dwell into all of them, given that I have already held that the intended sale was not in accordance with the law.

It is clear, at least from the material presented before me at this stage of the proceedings, that it is probable that the chargee's equitable right of redemption had not arisen for want of a proper statutory notice and further, that the scheduled sale was probably premature, as the auctioneer did not comply with

the provisions of the Auctioneers' Rules. That is what I can tell from the material before me.

For the above reasons, I think the plaintiff has demonstrated a prima facie case with a probability of success and is entitled to the injunction sought.

I therefore bar the defendant from proceeding to offer for sale the suit land based on the purported statutory notice of 6th July 2012 or the purported Notification of Sale of 18 June 2013. I cannot also allow the plaintiff to be saddled with the auctioneer's charges for the sale intended for 13th September 2013 unless the defendant can prove at the trial that the process leading up to that sale was proper and lawful. For the avoidance of doubt, if there is default, the defendant is free to start the recovery process afresh and issue the proper notices as required by law. This ruling is restricted to the statutory notice of 6th July 2012 and the purported Notification of Sale issued thereafter.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF MARCH 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:-

Mr. Mathai present for the plaintiff/applicant.

Mr. Onkoba holding brief for M/s Kidiavai for defendant/respondent.