IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 18 OF 2006

BETWEEN

ROMANUS OKENO …..... APPELLANT

AND

BANK OF BARODA …..... RESPONDENT

(Appeal from a judgment & decree of the High Court of Kenya at Kisumu (Tanui, J.)

dated 26th January, 2005

in

H.C.C.A. NO. 255 OF 2000)

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JUDGMENT OF THE COURT

In or about 1982 and 1983, an entity called ***Lake Quarry Limited*** ("the borrower") borrowed from the respondent, Bank of Baroda (K) Limited, certain sums. As security for that facility, parcel number Kisumu Municipality/Block 6/70 ***("the suit property")*** registered in the name of the appellant, ***Romanus Okeno,*** was offered to the respondent. The appellant executed a charge and a further charge over the suit property.

The borrower defaulted in repayment of sums under the charges and the respondent served a statutory notice of sale and advertised the suit property for sale. Through an entity called ***Matongo Investments Company Limited Auctioneers,*** a notification of sale of the suit property was served. The appellant then filed suit in the High Court at Kisumu seeking an injunction to restrain the respondent from selling the suit property; an order declaring that the statutory power of sale under the charge had been rendered null and void by virtue of the Limitation of Actions Act; in the alternative that no valid statutory notice had been served upon the appellant; an order compelling the respondent to deliver to the appellant relevant documents and a duly executed discharge of the said charges and a declaration that the scheduled sale of the suit property was illegal.

The appellant also lodged an application seeking a temporary injunction pending the hearing of the suit. On 4th September, 2000, an order to maintain the status quo was recorded by consent pending the hearing of the application. The respondent subsequently filed its defence, which was later amended, and a replying affidavit.

The application fell before ***Birech, Commissioner of Assize*** (as he then was), for consideration and in a reasoned ruling made on 19th April, 2001, the learned Commissioner of Assize allowed the application for temporary injunction and therefore restrained the respondent from selling, alienating or in any manner disposing of the suit property pending final determination of the suit. The learned Commissioner of Assize was of the view that a statutory notice had not been served upon the appellant.

The suit was eventually heard by ***Gacheche J,*** (as he then was) but judgment was prepared and delivered by ***Tanui J.,*** (as he then was), on 26th January, 2005. On the complaint regarding failure to serve a valid statutory notice, the learned Judge found that the statutory notice dated 26th October, 1996 gave sufficient notice to the appellant to redeem the charges. Notwithstanding this express finding, the learned Judge thereafter made what would appear to have been a contradictory finding. In his own words:-

> ***"I also find that there is evidence that the said statutory notice was invalid".***

On the complaint regarding service of an invalid notification of sale by the auctioneer, the learned Judge agreed with the appellant that the notice had indeed been served without a current valuation of the suit property. The learned Judge however, found that nothing turned on that defect in the notification of sale as the defect was no longer relevant.

On the plea of limitation, the learned Judge found that the respondent had not sought recovery of any monies and further that given the date of issue of the statutory notice, the Limitation of Actions Act could not apply.

In the end the learned Judge dismissed the appellant's case with costs.

Aggrieved by that decision, the appellant filed the appeal before us premised upon seven grounds. Those grounds were however reduced to two when ***Mr. Aboge,*** learned counsel for the appellant consolidated grounds 1 and 2; and grounds 5, 6 and 7, after abandoning grounds 3 and 4. Two issues were raised in the grounds argued before us. The first issue relates to the findings of the learned Judge on the statutory notice of sale and the notification of sale by the auctioneer. The second issue argued by Mr. Aboge was that it was not proper for Tanui J., to prepare and deliver a judgment in a case where evidence was heard by another Judge.

Mr. Nyamweya, learned counsel for the respondent, in response to the submissions of Mr Aboge, contended that the ultimate finding of the learned Judge on the validity of the statutory notice was not challenged. In his view, on the evidence adduced at the trial, the prayers sought could not be granted.

We have given the matter anxious consideration and agree with learned counsel for the appellant that the final conclusion on the validity of the statutory notice of sale could not be reconciled with the findings of the learned Judge. In his own words:-

> ***"Under the Registered Land Act, the statutory notice has to state that the notice has to be complied with within three months from the date of service of it but the defendant's statutory notice dated 26.10.96 gave three months from the date of it. As both the defendant and the plaintiff operated within Kisumu Municipality at the time, the date of service may have coincided with the date of the notices. It was therefore the onus of the plaintiff to have given evidence that that was not so. The plaintiff admitted when he was cross-examined that he was served with the said statutory notice and on behalf of the principal debtor he responded to it seeking more time to look for money. I also find that there is evidence that***

the said statutory notice was invalid."

Notwithstanding the express finding of the learned Judge that the statutory notice was invalid, the learned Judge did not determine the consequences of such failure to serve a valid statutory notice. In what would appear to be a contradictory conclusion, the learned Judge stated that the appellant had ***"not made out his case on a balance of probabilities to warrant the grant of the reliefs sought."*** That finding, in our view, contradicted the decision of a five-bench decision of this Court in the case of ***Trust Bank -Vs- Eros Chemits and Another [2000] 2 EA 550.*** That case related to ***section 69 A (1)*** of the Transfer of Property Act of 1882 ***[India]*** where this Court expressed itself as follows:-

> ***"The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment the notice is to guard the rights of the mortgagor because if the statutory notice of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his rights to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three month's period to lapse after service of notice. In our judgment a notice seeking to sell the charged property must expressly state that the sale shall take place, after the three months' period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid."***

In the Trust Bank case ***(supra),*** the Court clearly laid out the object of serving a statutory notice in matters of mortgages under the Transfer of Property Act. In our view, the object of serving a statutory notice in matters of charges under ***section 74 (1)*** of the Registered Land Act is not different and the distinction made by the learned Judge between the two sections could lead to absurd results. The learned Judge must have appreciated the problem with his attempt at distinguishing the two sections because in the end he found that the statutory notice served upon the appellant was invalid. The consequences of failing to serve a valid statutory notice were clearly stated in the Trust Bank case *(supra).* Failure to serve a valid statutory notice of sale meant that the right to sell the charged property was not exercisable. To exercise the right would deny the appellant the right conferred upon him by statute.

With regard to the complaint that the judgment of Tanui J, was irregular as the learned Judge did not hear the evidence, our view is that the complaint is not serious and was not and could not be strongly urged. Our views are buttressed by the provisions of ***Order 18 rule (1)*** which read:-

> ***"8 (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence, had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it."***

It is plain therefore that, Tanui J., had power, under the above provision, to prepare and deliver judgment on the evidence adduced before ***Gacheche J.*** In our view, Tanui J., dealt with the evidence taken by Gacheche J., as if the same had been heard by him. We do not think that the course taken by the learned Judge should have been the subject of complaint at all.

With regard to the complaint regarding service of a defective notification of sale by the auctioneer, we think nothing turns on the same. We say so, because the auction had been stopped by the time judgment was delivered and any subsequent sale process would obviously be subject to another notification of sale being served by the auctioneer to be instructed by the respondent.

Our final consideration relates to the findings of the learned Judge, on whether the respondent's right to serve a statutory notice had been extinguished under the Limitation of Actions Act. Although the appellant had made that complaint in his amended plaint, he did not mention the complaint in his grounds of appeal and learned counsel did not raise it in his oral submissions before us. In the premises, our

conclusion is that the appellant accepted the findings of the learned Judge on his plea of limitation. We think that was the proper course to take as the learned Judge of the High Court cannot be faulted on his findings about that complaint.

In the end, given our findings on the failure to serve a valid statutory notice, this appeal is allowed, in part. The judgment of Tanui J. dated 26th January, 2005 is hereby set aside and is substituted with judgment for the appellant declaring, as invalid, the statutory notice of sale served by the respondent. The respondent is at liberty to realize its security in accordance with the Law.

The appellant shall have the costs of this appeal and those of the High Court.

Judgment accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MAY, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR