



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appeal 26 2002**

**NATIONAL BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**SHIMMERS PLAZA LIMITED .....**

**RESPONDENT**

(Appeal from a ruling and order of the High Court of Kenya at Nairobi)

(Onyango Otieno, J.) dated 4<sup>th</sup> December, 2001

**in**

**H.C.C.C. NO. 229 OF 2001**

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**JUDGMENT OF THE COURT**

This is an appeal against the ruling of the superior court (Onyango Otieno, J. – as he then was) dated 4<sup>th</sup> December, 2001 whereby the superior court granted an interlocutory injunction in favour of the respondent herein restraining the appellant from selling or disposing of L.R. No. 1870/IX/128 Westlands pending the hearing and determination of the suit or until further orders.

Sometime in 1997, the appellant National Bank of Kenya Limited (the bank) granted various banking facilities including over-draft; letters of credit guarantees and bills discounting facilities to M/S. TRADE WINGS LTD. (principal debtor). The banking facilities were secured by both an instrument of guarantee dated 30<sup>th</sup> January, 1997 given by Shimmers Plaza Limited (respondent) and a legal charge over L.R. No. 1870/IX/128 Westlands registered in the name of the respondent. Both the guarantee and the charge secured a mortgage debt not exceeding Shs.200,000,000/=. The principal debtor and the respondent have common directors.

By a notice dated 23<sup>rd</sup> May, 2000, the bank demanded the repayment of Shs.942,602,589.05 being the outstanding debt as at 30<sup>th</sup> April, 2000 from the respondent and gave notice to the respondent that the bank would exercise of its statutory power of sale if the outstanding debt was not paid within three months from the date of the notice. The notice was not complied with and the bank issued a notification of sale dated 9<sup>th</sup> February, 2001 notifying the respondent that the charged property which was valued at Shs.351,000,000/= would be sold by public auction on 28<sup>th</sup> February, 2001.

On 20<sup>th</sup> February, 2001 the respondent filed a suit in the superior court (*H.C.C.C. No. 229 of 2201*) against the bank. The respondent averred in the plaint, among other things, that the statutory notice was wrongful; that accounts between the bank and the principal debtor was disputed; that the principal debtor had denied the indebtedness in the sum of Kshs.1,056,793.95 claimed and that the liability of the respondent under the guarantee and charge was limited to Shs.200,000,000/=. The reliefs sought in the plaint were an order of injunction to restrain the sale of the charged property, pending the hearing of the suit; a declaration that the sum demanded was excessive; a declaration that the plaintiffs liability under the guarantee was limited to Kshs.200,000,000/=; a declaration that the respondent was not entitled to enforce the guarantee until the principal debtor had been called to repay and, lastly, a declaration that the statutory notice issued was contrary to the terms of the guarantee and charge instruments and therefore invalid and void.

The respondent filed a chamber summons together with the plaint seeking an interlocutory injunction restraining the bank from selling the charged property pending the determination of the suit. The superior court allowed the application for interlocutory injunction on the basis that the statutory notice was flawed as it stated wrongly that it took effect from the date of the notice thereby giving the respondent less than three months notice. The superior court stated in part:

“It is clear that this notice stated wrongly that it takes effect from the date of the notice and not from the date of service. That is wrong. Further it stated that it was served by registered post but there is no evidence of such service so that one cannot be certain as to when it was served.

As I have said hereinabove, this matter was raised in the plaint and I do find that based on this flaw, the Applicant has demonstrated that it has a prima facie case with probability of success”.

The superior court also considered whether the respondent had shown that it would suffer irreparable damage unless the injunction was granted and stated:

“The applicant has also raised the question of irreparable damage being suffered by itself in case the injunction is not granted. Although the applicant did not demonstrate how he would suffer irreparable damage and the respondent did not deny this allegation, I do however feel that I need not consider this aspect as I note that I have already made a finding that the applicant has shown a prima facie case with probability of success”.

There are three main grounds of appeal which were argued together, in essence that, the superior court erred in granting a temporary injunction on the basis of defective notice pending the hearing and determination of the suit when by its ruling it had already determined the issue of the validity of the notice at an interlocutory stage; that the superior court erred in not granting the appellant liberty to sell the charged property after issuing a fresh statutory notice in compliance with the law, and, lastly, that the superior court erred in law in failing to exercise its discretion under Order XXXIX Rule 2 (2) *Civil Procedure Rules* to issue an injunction for a shorter duration pending the issuance of a valid statutory notice.

Mr. Rachuonyo, learned counsel for the appellant submitted in support of the three grounds, that, the learned Judge should not have given an injunction until the determination of the suit as he had determined the issue of notice; that there was nothing to be heard on the issue of notice; that the learned Judge should have given an injunction until a proper notice is given and that where an interlocutory injunction is sought on the basis of a defective notice the order of injunction should be limited until the service of a fresh notice.

Mr. Billing, learned counsel for the respondent supported the ruling of the superior court and submitted, among other things, that the suit has not been determined because the other outstanding issues raised in the suit have not been determined. Mr. Billing however, conceded that there is nothing left to be determined regarding the notice and that the appellant has a right in law to re-issue a valid notice.

This is an interlocutory appeal. It is clear that the application for an interlocutory injunction was

decided on the basis of the provisions of Section 69 A (1) (a) of the *Transfer of Property Act* (TPA) and on the wording of the statutory notice.

Section 69 A (1) of the TPA provides:

“A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until –

(a) A notice requiring payment of the mortgage-money has been served on the Mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or.”

The statutory Notice dated 23<sup>rd</sup> May, 2000 provided in the relevant part, thus:

“THIS NOTICE is given under the terms of the Registration of Titles Act (Cap 281, Laws of Kenya) and therefore monies are due and payable within THREE (3) months from the date of this demand notice”.

It is obvious that the wrong statute under which the statutory notice was issued is cited. The superior court cited an authority from this Court to the effect that the TPA provided for a three months period to lapse after the service of the notice and that a notice which does not state that the sale is to take place after three months of the service of the notice is invalid. The superior court made a distinct finding that the statutory notice was flawed or wrong as it indicated that the mortgage money was payable within three months from date of notice.

It is clear from the ruling of the superior court that the superior court conclusively determined at an interlocutory stage the issue of the validity of the statutory notice, a fact conceded by Mr. Billing. However, it is true as submitted by Mr. Billing that the other issues raised in the suit touching on the respondent’s liability under the guarantee and the charge have not been determined and are still outstanding. Nevertheless, the superior court expressly stated that it was not necessary to consider those other aspects of the suit and did not exercise its discretion on the basis of those other issues. Moreover, the respondent did not give a notice of affirmation of the decision of the superior court on such other issues.

Mr. Rachuonyo does not contend that the learned Judge erred in his finding that the statutory notice was defective and does not ask us to reverse the learned Judge’s findings. Rather, Mr. Rachuonyo’s contention is that the learned Judge did not in the circumstances of this case exercise his discretion properly in granting an order of injunction pending the determination of the suit. He contends that the learned Judge should have granted an order of injunction until the bank has given statutory notice which complies with the law.

We respectfully agree with that view. An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.

In the result, we allow the appeal, set aside the order of injunction in terms given by the superior court and substitute therefor an order of injunction, thus:

“The Defendant/Respondent be and is hereby restrained by itself or its authorized agents, servants or employees from selling, disposing of transferring or otherwise dealing with Plaintiffs property known as Title Number: I.R. No. 55525 (L.R. No. 1870/IX/128 situate in Westlands, Nairobi until such time as the

Defendant/Respondent shall have served the Plaintiff with a valid statutory Notice in accordance with the law”.

The costs of this appeal are awarded to the appellant.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2009.

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR