



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: OMOLO, TUNOI & GITHINJI, JJA

CIVIL APPEAL 78 OF 2004

BETWEEN

THE DELPHIS BANK LIMITED.....APPELLANT

AND

1. PRAFUL NATWARLAL SHAVDIA.....1ST RESPONDENT

2. VIRENDRA NATWARLAL SHAVDIA.....2ND RESPONDENT

3. PIONEER STATIONERS LIMITED.....3RD RESPONDENT

JUDGMENT OF THE COURT

This is an interlocutory appeal by the defendant in the suit, ***THE DELPHIS BANK LIMITED***, now the appellant. It is aggrieved by the decision of the High Court of Kenya at Mombasa (Sergon, J) dated 6th November, 2003, whereby the learned Judge granted the three plaintiffs, now the respondents, an order for temporary injunction to restrain the appellant from selling by public auction the property known as ***Mombasa/Block XXI/506, Flat No.3, Ganjoni***, the suit property, on the grounds that the respondents had not been duly served with the mandatory Statutory Notice of Sale under Section 74 of the Registered Land Act (the Act) and ***Rule 49*** of the Auctioneers Rules, 1997.

The facts giving rise to this appeal are simple and largely not in dispute. The respondents were granted an overdraft facility by the appellant and they offered the suit property as security. They each, also, executed personal guarantees for the loan. Default occurred and the appellant sought to recover the outstanding amount by exercising its Statutory Power of Sale. This prompted the respondents to file suit contending, inter alia, that they had not been served with the Statutory Notice of Sale; that the appellant had applied illegal, inequitable and unconscionable interest rates; that the outstanding and unpaid loan was nominal and that the value of the suit property had been grossly understated by the appellant and that if the sale was allowed to proceed the respondents would suffer irreparable harm.

The appellant in its defence countered seriatim the allegations in the plaint and averred that having failed to serve personally the statutory notice on the 1st and 2nd respondents, it sent the said Notice by Registered Post via P.O. Box No. 81930, Mombasa, which is the address given by them in the charge and guarantee. The Notice for the 2nd respondent was, however, returned unclaimed.

The learned Judge in a short ruling said:-

“It is evident that the registered mail was returned unclaimed with the remarks – R.T.S. – The crux of the matter is that the 2nd plaintiff was not served with the mandatory notice in the absence of any proof of service by other means.”

He therefore held that the respondents had established a prima facie case with a probability of success on the ground of lack of service and granted them the injunction sought.

In the appeal before us, *Mr. Khagram* for the appellant, faulted the learned Judge’s finding on the issue of service of the statutory notice of sale. He submitted that the learned Judge ought to have held that the 2nd respondent was deemed to be served with the mandatory Notice when it was sent to him by registered post at his last known postal address as required by Section 153 of the Act. He argued that the proof of posting was proof of service and it mattered not whether the notice was unclaimed.

It was a matter of common knowledge between the parties that the 2nd respondent was not in Kenya during the material time. He lived overseas. His agent, the 1st respondent held a General Power of Attorney as well as a Power of Attorney under the Act but he refused to accept service on behalf of the 2nd respondent.

It was admitted by the appellant that it did not attempt to serve the 2nd respondent by any other legally recognized mode of service.

Section 153 of the Registered Land Act reads as follows:-

“153. A notice under this Act shall be deemed to have been served on or given to any person –

(a) If served on him personally;

(b) If left for him at his last known place of residence or business in Kenya;

(c) If sent by registered post to him at his last known postal address or at his last known postal address in Kenya;

(d) If served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;

(e) If service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.”

It is evident that the appellant chose sub-section 153(c) of the Act as a mode to effect service upon the 2nd respondent. Under the section all that it needed do was to send the Notice by registered post to the 2nd respondent at his last known postal address in Kenya, that is P.O. Box No. 81930, Mombasa, and this it did. However, the sub-section militates against the appellant for two reasons. First, it is manifestly clear that the 2nd respondent did not reside in Kenya at the material time and the appellant knew this fact. Secondly, it knew that the 2nd respondent would not receive the Notice. In the circumstances, we think that the appellant was acting unreasonably in dispatching the Notice well knowing that the 2nd respondent would not receive it. It must follow therefore that it cannot be held that the 2nd respondent “shall be deemed to have been served” with the Notice under the Act. If it were held to the contrary it would mean that his property would be sold without his knowledge and this would constitute grave injustice to the 2nd respondent. We are certain that the section was not meant to be used unreasonably and

to perpetrate injustice. We think that the findings of the learned Judge are correct and he cannot be faulted.

For the foregoing reasons, this appeal fails and is accordingly dismissed with costs.

DATED and DELIVERED at NAIROBI this 7th day of October, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR