



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 177 1998

TRUST BANK LIMITEDAPPELLANT

AND

GEORGE ONGAYA OKOTHRESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Hayanga, J.)

delivered on the 4th day of May, 1998

in

H.C.C.C. NO. 1135 OF 1997)

JUDGMENT OF BOSIRE. J.A.

On 4th May, 1998, the Superior Court (Hayanga, J.) granted an interlocutory injunction to George Ongaya Okoth, the respondent in this appeal in its Civil Case No. 1135 of 1997, restraining Trust Bank Limited, the appellant in the appeal, from dealing with the respondent's two properties, namely L.R.No.1160/471 and L.R.No.1160/472, both situated in the Karen area of Nairobi. The appellant was allegedly seeking to sell the properties in purported exercise of a statutory right without giving the requisite three months statutory notice in terms of the provisions of section 69A of the Transfer of Property Act. Besides, it was alleged that the appellant was demanding from the respondent money which according to the latter was not due from him at all.

This being an interlocutory appeal care must be exercised to obviate, as far as it is possible, trespassing on the jurisdiction of the trial court. The dispute between the parties has not been resolved and their suit before the superior court is still pending.

Litigation between the parties started when the respondent brought action on 13th May 1997, by way of a plaint dated 12th May, 1997, praying for, inter alia, an injunction restraining the appellant from selling or otherwise alienating, mortgaging or otherwise dealing in or disposing of the two aforementioned properties; and, also, restraining it from clogging or fettering his right to redeem his properties and/or exercising the equity of redemption. Filed with the plaint was an application by Chamber Summons seeking injunctive reliefs, in effect, on the same terms as in the plaint, and in addition an order of prohibition, prohibiting registration or change of registration in the ownership, "leasing, allotment, user, occupation or possession or in any kind of right, title or interest" in the two properties

with any land registry until further orders of the court. The facts giving rise to the suit and injunction application are brief and straightforward.

By two written instruments of charge dated 5th March, and 28th October, 1991, respectively, the respondent mortgaged to the appellant several of his properties in Karen, Nairobi, to secure repayment by him of million and Kshs.2.5 million respectively, together with interest, commissions, legal charges and other expenses. Repayment of the loans would be by monthly installments, and in the event of default of any one installment, the appellant would be at liberty to, inter alia, appoint a receiver, and after due statutory notice to the respondent, realize its securities. There was default, and in or about March, 1994, the appellant appointed a receiver. Thereafter by consent of the parties some of the securities were sold. A total of about Kshs.37 million was realized which was credited into the respondent's loan account. The appellant also waived about Kshs.40 million allegedly as part of accrued interest. That notwithstanding and despite the fact that the appellant was collecting rents from some of the charged properties, the appellant, by a letter dated 26th August, 1996, addressed to the respondent by its advocates, Ndungu Njoroge & Kwach, demanded Kshs.75,408,911.75 from the respondent, being the outstanding Mortgage-Money. The letter was in the following terms:

"26th August, 1996

BY REGISTERED POST COPY BY ORDINARY POST

George Ongaya Okoth

P. O. Box 51562

NAIROBI

Dear Sir,

OUTSTANDING BALANCE OF KSHS.75,408,911.75. DUE BY YOU TO TRUST BANK LIMITED

We are instructed by our above named client to apply to you for immediate payment of Kshs.75,408,911.75 being the amount due by you to our client in respect of a loan/overdraft facilities granted to you at your request full particulars of which are known to you.

Our instructions are that the said sum carries interest at 34% per annum plus penalty until payment in full. Such rate of interest is subject to be varied and increased at our client's sole discretion without notice to you.

Unless we receive your remittance for the said sum together with interest thereon within FOURTEEN DAYS (14 days) from the date hereof, our instructions are to sell by public auction the immovable properties charged to our client by way of security.

Would you please note that no further notices will be sent to you and that any proposals made if acceptable and any installments paid by you subsequent to the date of this Notice will be accepted without prejudice to our client's rights.

Yours faithfully

NDUNGU NJOROGE & KWACH

Sign

A. K. IGERIA"

According to the appellant the aforequoted letter constituted the statutory notice under Section 69A (1) (a)

of the Transfer of Property Act. The respondent submitted both before the trial Judge and before us that the period of the notice in the letter is inadequate and also, that the letter does not state from which day the notice was to run. Consequently, he contended, the notice was invalid with the result that the appellant's attempt to realize its securities on the basis of the notice was wrongful and unlawful. It was, however, urged on behalf of the appellant that the notice was given in accordance with the relevant Section, that as long as a Mortgagee allowed three months from the date of the notice, it would be perfectly entitled to sell its securities, and that because it did not seek to sell the respondent's aforesaid properties until after the expiration of over six months, there was nothing objectionable about the notice. Hayanga J did not think the notice was valid or that the amount claimed was actually due and payable and he so ruled and thereby provoked this appeal.

There are several grounds of appeal, but to my mind, determination of this appeal, largely hinges on the issue whether or not the aforesaid letter constitutes a valid notice within the meaning of the provisions of section 69A(1)(a) above. The Section, in pertinent part, provides as follows:

"69A (1) 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"

From the wording of the section it is quite clear that the Period of the notice starts to run from the date of service of the notice on the chargor or any of the chargors where they are more than one. There was, however, debate before the trial Judge, and before us too, whether the notice must specifically state that the

payment of the Mortgage Money has to be made within three months from the date of service of the notice on the Mortgagor. Mr. Manyonge for the appellant was of the view that a lesser period may be stated provided that the Mortgagee does not sell until after the expiry of \pm three months. In that submission he relied upon the decision of this Court in the case of Russel Company Limited v. Commercial Bank of Africa & Another. Civil Appeal No. 89 of 1991 (unreported) in which the court held that view. Mr. K'Owade, for the respondent did not think that the case cited correctly states the law. In his view a statutory notice must not only state that payment should be made within three months from the date of service, but also, that the Mortgaged property would be liable to be sold if default in payment is made at the expiry of that period.

In his view if the aforesaid notice is accepted as valid there will be a departure from the statutory requirements. The appellant's notice clearly did not give the respondent three months to pay the Mortgage money. He was only allowed 14 days to do so. In the old English case of Metters v. Brown (1863) VIII Law Times Reports, 567, a Mortgagor sued the Mortgagee for an order setting aside a sale which was made by the executrix and devisee of the Mortgagee, under a power of sale contained in a Mortgage Deed, on the ground, principally, of no notice of the Sale having been given to the Mortgagor prior thereto. The notice in that case read in pertinent part, as follows:

"I hereby give you notice, and require you to pay to me, at the expiration of six calendar months from the date hereof, the sum of 550/-, which is due and owing to me as the executrix of Richard Jago, late of Plymouth, Devon, ... upon and by virtue of a deed dated 9th day of January, 1844, ... And take notice, that in default of your paying this sum, I shall proceed to a sale of the hereditament Mortgaged by you ..."

The notice in the above cited case is slightly different from

that in our case. The holding in the case is what is clearly

material. The Vice Chancellor of the Court of Chancery had this to

say about the notice reproduced above:

"The intention certainly was, in order to guard the rights of the Mortgagor, that there should be six months' notice of the intention on the part of the Mortgagee to sell. All that the power can be held to mean is that, previously to any sale, six months' notice of the intention to sell must be given. It has also been contended that the effect of the notice was to require the money to be paid at a particular time. That in my opinion is not a just view. The plain meaning of the words is, that there must be six months' notice given of the intention to sell. The notice was in fact a requisition to pay as well as a notice of intention to sell. It was as if the Mortgagee had said: 'Take notice, if you don't pay me on or before a certain day, I will sell the property.' But no time was fixed for the sale. That was, in my opinion, unnecessary; because, after the expiration of six months, the Mortgagee was entitled to sell at anytime, unless the money was paid."

In Russel's case (supra) a notice more or less similar to the one in our case was given. This court held that since the Mortgagee had at least three months after the expiry of the period of the notice, there was sufficient compliance with the provisions of the law with regard to notice. The notice fixed the date of its drawing as its commencement day.

Section 69A (1) (a) of the Transfer of Property Act fixes a commencement date of the notice. A Mortgagee has no right to pick on any other date as the date of commencement. The period runs from the date of service of the notice on the Mortgagor. For purposes of the aforementioned section the date of the notice is immaterial. Besides the sub-section requires that the notice specify what the Mortgagor needs to do before the expiration of the notice. He must make payment of the Mortgage Money. Besides the notice must warn him of the consequences of default, viz either to appoint a receiver or sell the mortgaged property. The notice in Russel's case, although it warned that if default was made in the payment of the Mortgage Money, the Mortgagee would sell the charged property, it did not give the Mortgagor the stipulated three months to pay. A statutory notice is in effect a demand letter to make payment. The relevant sub-section clearly stipulates "notice requiring payment of the Mortgage Money has been served, and default has been made in payment ... for three months after such service." So time starts running from the date of service and terminate three months thereafter. In Russel's case the commencement date was the date of the notice. To the extent that the Mortgagor's default was not considered from the date of service, and the requisite three months was not allowed from the date of service of the notice on the Mortgagor, it is my view that the notice in that case, did not with due respect, accord with the relevant section and was therefore invalid. The case does not therefore assist the appellant in this appeal. It is the notice of intention to sell which is required to run for three months from the date of its service on the Mortgagor, before the right to sell the charged property can accrue. The Legislature having stipulated that period and the date from which it would run, it is my view that giving a lesser period denies a Mortgagor a right to which the law expressly gives him. Holding otherwise it will mean that the period the Mortgagee withholds action after the expiration of the notice as the one here, will be treated as ex gratia or an act of good will on the part of the Mortgagee when it is not.

In view of the conclusion I have come to above, I do not consider it necessary to consider the other issues raised as to my mind they are best suited for consideration by the trial Judge. As I stated earlier, this is an interlocutory appeal and I eschew any attempt to deal with issues which need evidential proof. For instance the respondent contends that he does not owe the appellant any money, and that whatever money it is claiming from him comprises of illegal charges, commissions and fees. These are aspects which require oral testimony and the cross-examination of witnesses.

The upshot of the foregoing is that this appeal lacks merits and I would dismiss it with costs to the respondent to be taxed if not agreed.

Dated and delivered at Nairobi this 14th day of January, 2000.

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR