



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, OMOLO, LAKHA, BOSIRE & KEIWUA, JJ.A.)

CIVIL APPEAL NO. 133 OF 1999

BETWEEN

TRUST BANK LTD.....APPELLANT

AND

EROS CHEMISTS LIMITED.....1ST RESPONDENT

WHITESTONE AUCTIONEERS (K) LIMITED...2ND RESPONDENT

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful first defendant (the Bank) from a ruling of the superior court (Otieno, J.) given on 27 April, 1999. It raises, inter alia, a question as to the legal effect of a notice given by a mortgagee under **section 69(A)(1)** of the Transfer of Property Act before the exercise of the statutory power of sale.

By his ruling the judge granted the application made to him by the plaintiff by way of a Chamber Summons dated 7 April 1999 whereby he restrained the defendants by themselves their servants or agents from selling, disposing or in any other way dealing with the plaintiff's property, L.R. NO. 1870/X/60 maisonette No. 5 at Ring Road Westlands (the suit property) until the hearing and disposal of the suit.

The facts can be shortly stated. The first respondent is and at all material times was the owner of the suit property. It was also a customer operating an account with the appellant who was a holder of a legal charge over the suit property. On 24 March 1999 there appeared a notice in a daily newspaper by the second respondent on the Bank's instructions advertising the sale by public auction of the suit property to be held on 8 April 1999. Thereupon the plaintiff commenced a suit in the superior court against the Bank and the second respondent (the auctioneers) claiming a declaration that the intended sale was patently illegal.

On the same day the plaintiff also filed an application for an injunction restraining the intended sale on the ground that in breach of the statutory mandatory requirement of the law the Bank did not serve the requisite notice. The Bank, however, contended that it had served notices by its advocate's letters of 2 January and 5 February, 1996. It is perhaps convenient at this stage to set out the statutory provision and the relevant parts of the said two notices. Section 69(A)(1) of the Transfer of Property Act provides as follows:-

"A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until

(a) notice requiring payment of the mortgage money has been served upon the mortgagor or one or 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

(b).....

(c)....."

The relevant and material part of the Bank's letter of 2 January 1999 states:-

"Unless we receive your remittance for the said sum together with the amount due in respect of interest within 14 days from the date hereof, our instructions are to sell by public auction the immovable property charged to our client by way of security....."

And that of 5 February 1996 states, inter alia, as follows:-

"Unless we receive your remittance for the said sum of K.Shs.14,711,734/70 together with the amount due in respect of interest from the 1st day of January 1996 until payment in full within 14 days from the date hereof, time being of the essence, our instructions are to institute legal proceedings against you for the recovery thereof without any further notice to you whatsoever and you shall be liable for all costs and expenses (including court fees and legal costs) arising from and incidental to such legal action."

At the conclusion of the inter-partes hearing on 8 April, 1999 the judge indicated that for reasons which he would give on 27 April 1999 he would allow the application dated 7 April 1999 in terms of prayer 3 of the said application, i.e. for an injunction restraining the sale of the suit property until the hearing and disposal of the suit. The judge duly delivered his ruling on 27 April 1999 when he held, inter alia, that none of the notices from the Bank's advocate constituted a notice under **Section 69(A)(1)** of the Transfer of Property Act which also led him to the conclusion that the plaintiff had proved a prima facie case with probability of success. The judge also held that the plaintiff's loss, if any, would not be irreparable and that the plaintiff did not come to Court with clean hands as its Managing Director was not honest when he said that the first time he came to know of the impending sale of the suit property was when he read of it in the local daily; he clearly had notification of sale in the Bank's advocate's letter of 2 February, 1999.

Being aggrieved by this decision of the superior court the first defendant has now appealed to this Court. Each of the findings of the judge as set out above has given rise to a ground of appeal which Mr. Ougo, advocate for the appellant, has argued intensively and interestingly. We now turn to consider each one of them, but before doing so we record that the second respondent, the auctioneers, were neither present nor appeared at the hearing of the appeal before this Court thus depriving this Court of the benefit of any submissions that might have been made on their behalf. In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A)(1) of the Transfer of Property Act. The construction accorded to this section is not free from authority. In **Russell Company Ltd. V. Commercial Bank of Africa Ltd. & Another, Civil Appeal No. 80 of 1991 (unreported)** delivered on 15 October, 1993

this Court held that Section 69(A)(1) did not require the three months' period to be stated in the notice nor did its absence vitiate the notice or render it illegal. On the other hand, in **TRUST BANK LTD. V. OKOTH, Civil Appeal No. 177 of 1998 (unreported)** delivered on 14 January, 2000, this Court held that the notice is required expressly to specify the period of three months upon the expiry of which the mortgagee shall sell the suit property failing which the notice would be invalid and the mortgagee's power of sale would not have accrued rendering the sale invalid.

On this state of authorities, the existence of two conflicting decisions of the Court, in our judgment, raises questions of considerable difficulty which can only be resolved by application of first principles.

It is, we think, beyond dispute that since the establishment of this Court in 1977 it ceased to hold the position of an intermediate appellate court but became a final Court of Appeal for the sovereign State of Kenya. Its position is analogous to that of the House of Lords. The decisions of the House of Lords upon question of law are normally considered by the House to be binding upon itself, but because too rigid adherence to precedence may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so. So should this Court.

For these reasons we are satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. The next question is whether the decision of this Court in the **Russell case** was a wrong decision. It is immaterial if the earlier decision had been by a majority (which it was not) although we must add that a dissenting judgment cannot but cast some doubt on the correctness of the decision of the majority. We have carefully studied the decision and it appears to us that the only reason why it was held that the three months' period stipulated in **Section 69(A)(1)** of the Transfer of Property Act need not be specifically referred to in the notice to sell is because this is not so stated in the statute. 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 right 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 right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' 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 our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice. Without any hesitation, the notice in the Russell case threatening a sale of the charged property on a 14 days' notice was an invalid notice for accrual of a right of sale.

It is, however, of interest to add that Mulla on The Transfer of Property Act (8th Edn.) at page 602 states as follows:- "No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning." The final consideration on the first issue is whether, having come to the conclusion that this Court is free to depart from its own decision and that the Court's decision in the Russell case was wrong, should this Court now give a decision contrary to that given by this Court earlier. We have found this matter of the greatest difficulty. The earlier decision, with respect, is erroneous and surely this Court is not bound to perpetuate an error.

It is a recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the earlier decision and indeed it is the duty of this Court to rectify an erroneous decision. With considerable hesitancy we have come to the conclusion that this Court should declare, as we hereby do, that the decision of this Court in the Russell case is wrong. We uphold the learned judge in his finding that the notice in the instant case did not entitle the mortgagee to exercise a power of sale. As to the learned judge's finding that there was no irreparable damage established, we think that he was plainly right.

Of course, purely financial damage could not be regarded in principle as irreparable. A refusal or grant of injunction, however, is essentially a matter of discretion to be exercised judicially and taking all the circumstances of the case into consideration, the learned judge could not attach decisive importance to the question of irreparable damage since he had already held that the notice was invalid. It was urged that the Managing Director of the first respondent was dishonest. The judge did consider this factor but at the end

of the day and in the exercise of his discretion he was of the view, which we accept, that an order of costs would meet the justice of the case. We are satisfied that the learned judge dealt fully with the application before him and has not erred in principle or otherwise. There are no grounds upon which his discretion can be successfully challenged in this Court.

Accordingly and, for all the reasons above stated, this appeal fails and we dismiss it with costs.

Dated and delivered at Nairobi this 30th day of June, 2000

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR