Case Number:	civ app 18 of 89
Date Delivered:	20 Feb 1990
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	-
Judge:	Joseph Raymond Otieno Masime, John Mwangi Gachuhi, James Nyarangi Onyiego
Citation:	MUNGA CONCRETE WORKS LTD V INDUSTRIAL DEVELOPMENT BANK LTD[1990]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 18 OF 89

Munga Concrete Works Ltd.....appellant

v

Industrial Development Bank Ltd.....respondent

Judgment.

The background facts giving rise to this appeal can be stated briefly.

In 1988, the defendant, the Industrial development Bank, advanced a sum of shs.3,500,000/= by way of a term loan to the plaintiff, on the security of title number Kiine/Rukenge/408 and a debenture granted by the Registered Land Act, cap 300. Subsequently the plaintiff defaulted loan and the defendant invoked the powers of sale conferred by the charge. On June 7th, 1988, the divisional Land control board gave consent to the controlled transaction, the nature of the transaction being transfer by the charges in exercise of powers of sale to Premsukhalal Ruda Manji for a consideration of shs.300,000.

The next relevant event was that on August 2nd 1988, the appellant, then in receivership, filed a suit HCCC No 3131 of 1988 against the Respondent whose prayers were injunctive orders to restrain the defendant from selling the title in question, and to restrain the Defendant from selling the title in question, and to restrain the defendant from obtaining consent to sell that title. The plaintiff also prayed that the High Court do order the defendant to accept the plaintiff's loan repayment proposals. On the same day, the plaintiff took out a chamber summons under Order 39 r. 1 and r. 2 for orders that the defendant be restrained from selling title Kiine/Rukanga/408 and from applying for consent of the Divisional Land Control Board. that same day, the plaintiff was heard ex parte, and the defendant was restrained from selling the land. It was ordered that the application be heard inter-partes on August 10 1988, on which date after the hearing inter-partes, the High court ordered that the ex parte order do remain in force and that the hearing interpartes be held on August, 23, 1988.

At the commencement of the hearing inter partes, Mr Alibhai for the defendants, raised a preliminary objection to the effect that as the appellant firm was under receivership, its directors could not bring an action against the defendant debenture holder, the powers of the directors having been suspended with regard to the charged property. Counsel handed in written submissions on the preliminary issue.

On November 21, 1988, the Judge delivered a ruling with the startling heading Civil Case No 3131 of 1988 and Misc Case No 332 of 1988. There was no order by which the two matters were consolidated and so far as we can tell, the record for the miscellaneous matter was not placed before the Judge as it does not form part of the record of proceedings on which this appeal was argued and heard. So, the

Ruling of the judge which was heard on material in the substantive suit must be deemed to extend to and include the miscellaneous case notwithstanding that the Judge specifically holds that HCCC No 3131 of 1988 is incompetent and that there are just two brief references to the miscellaneous matter.

The Judge erred by referring to the miscellaneous case as if the same had been consolidated with and heard together with HCCC No 3131 of 1988.

The plaintiff has appealed to this Court on a number of grounds, including the following:

> “The learned Judge failed and erred in failing to consider and to apply the law properly to the matter and issues before her.
>
> “The Ruling of the judge is not supportable on law."

Mr Kariuki on behalf of the appellant contends, inter alia, that there was no valid notice in terms of the provision of section 74 of the Registered Land Act (Cap 300).

Mr Alibhai submitted that there was complete compliance with the section.

We consider that the two grounds of appeal reproduced above adequately embrace the issue of law raised on section 74 by Mr Kariuki.

Section 74 of the registered land Act provides:

> "74 (1) If default is made in payment of the Principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be. (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may:
>
> (a)appoint a receiver of the income of the charged property; or
>
> (b)Sell the charged property: Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that sub-section.
>
> (3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only.
>
> (a) where the chargor is bound to repay the same;
>
> (b) where, by any cause other that the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee

has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

(c) where the chargee is deprived of the whole or part his security by, or in consequence of, the wrongful act or default of the chargor; provided that:

(i)in the case specified in paragraph

(a)a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee with the chargee to pay the same; and

(b)no action shall be commenced until a notice served in accordance with subsection(1) has expired;

(ii)the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge."

Only sub-sections (1) and (2) are concerned with notice. The evidence with regard to notice is that on september 8, 1986, the respondent notified the appellant in writing that if, the appellant, had neglected to pay the outstanding amount of shs.5,218,062.70. The appellant was told that the outstanding amount is,

"due and payable ”immediately• failing which we shall be left with no alternative but to enforce the securities issued by yourselves in favour of this bank."

In the letter of September 8, 1986, the Managing Director of the Respondent firm made mention of his letter dated 6th May, 1986 which is not part of this record.

So, default had been made in payment of both the principal sum and of interest. Obviously there was default in the payment of periodical payments. The appellant had not observed the agreement. It is not however, clear from the letter of September 8, 1986, if the default had continued for one month. We do not know the substance of the earlier letter of May 6, 1986 as it is not part of the record before us.

Be all that as it may, under sub-section (2) of Section 74, if the appellant failed to comply with the notice and pay the arrears, the respondent could appoint a receiver of the income of the charged property or sell the charged property. But, the respondent having appointed a receiver as was the case here, could not exercise the power of sale unless the appellant failed to comply within three months of the date of September, 8, 1986, with a ”further notice• served on him under sub-section (2) There is no

evidence that there was a further notice served on the appellant pursuant to sub-section (2) of Section 74. It follows that Mr. Kariuki's contention that there was no valid service of the statutory notice is unanswerable. In our respectful view, the matter of proper service of notice in the instant case is a critical one. the failure to serve the statutory notice in accordance with section 74 (1) and (2) is fatal.

That is sufficient to dispose of this appeal. In the result, the appeal is allowed, the ruling of the Judge is set aside and the appellant shall have its costs of the suit in the High Court and also costs of this appeal.

Orders Accordingly.

Dated and delivered at Nairobi this 20th day of February, 1990.

JO NYARANGI

JUDGE OF APPEAL

JM GACHUHI

JUDGE OF APPEAL

JRO MASIME

JUDGE OF APPEAL