Case Number:	Civil Appeal 61 of 2000
Date Delivered:	08 Dec 2000
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Samuel Elikana Ondari Bosire, Emmanuel Okello O'Kubasu
Citation:	Trust Bank Limited v Kiran Ramji Kotedia [2000] eKLR
Advocates:	none
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & O'KUBASU JJ.A.)

CIVIL APPEAL NO. 61 OF 2000

TRUST BANK LIMITED .....APPELLANT

AND

KIRAN RAMJI KOTEDIA .....RESPONDENT

(Appeal from an order and ruling of the High Court of Kenya at Nairobi Mulwa J) dated 3rd December, 1999 in

H.C.C.C. NO. 1319 OF 1999)

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JUDGMENT OF THE COURT

Trust Bank Limited , the appellant herein, advanced or was alleged to have advanced money to a company called Tamana Travel and Tours Limited , hereinafter called "the Company".

Kiran Ramji Kotedia, the respondent was a director of the Company. One of the conditions upon which the money was advanced or was to be advanced was that the respondent was to offer and did offer as security for the repayment of the money lent his property known as L.R. NO. 1870/111/443, Nairobi . So on the 27th May, 1998, a charge to secure the repayment of Shs.15 million was created over the respondent's said property. At some stage, the appellant was placed under the statutory management of the Central Bank of Kenya. The appellant thought the Company was not repaying the loan advanced to it as had been agreed. So on the 20th November, 1998, one Anuj Desai Advocate wrote to the Company as follows on behalf of the appellant:

" Date: 20th November, 1998

Tamana Travel & Tours Limited

P. O. Box 45026

NAIROBI UNDER CERTIFICATE OF POSTING

Dear Sirs

RE: Overdraft/Credit Facility with Trust Bank Limited of Tamana Travel & Tours Ltd

I act for Trust Bank Limited currently under Statutory Management by the Central Bank of Kenya Ltd, who has instructed me to demand from you the repayment of an overdraft credit facility granted to you, which I hereby do, of the sum being the balance with accrued interest, outstanding as at 31st October,

1998, of K.Shs.55,620,903.40 plus further interest on the same at the rate of 39% per annum from 1st November, 1998 until payment in full.

I hereby give you FOURTEEN (14) DAYS from the date of this letter to you to make payment as demanded.

Unless you make full and final payment to me on behalf of my client as herein demanded within the prescribed time, my instructions are to institute legal proceedings against you which shall include realisation of all available securities held by my client for the recovery of the sum demanded holding you responsible for all costs and other consequences thereof.

Yours faithfully,

ANUJ DESAI

cc. Trust Bank Ltd, Westlands Branch,

Att: Mr Vinod Chowdhry."

There can be no doubt on the material on record that this letter was received for on the 7th December, 1998, the respondent, as a director of the Company, wrote back to the appellant acknowledging the receipt of the letter and making proposals as to how the Company intended to repay the loan.

It would appear that no satisfactory arrangements were made for the repayment of the monies alleged to be outstanding so that on the 17th February, 1999, Mr Anuj Desai wrote another letter, this time to the respondent in the following terms: " Date: 17th February, 1999

Mr Kiran Ramji Kotedia

P. O. Box 45026

NAIROBI

Dear Sir RE:CHARGE OVER PROPERTY KNOWN AS TITLE NUMBER: I.R. 69129 OFF SHANZU ROAD, NAIROBI

I act for Trust Bank Limited and am instructed by them to write to you as under:

1.That my client agreed at your request to lend and advance to Tamana Travels & Tours Limited ("The Borrower") a principal sum of K.Shs.30,000,000/= upon the security amongst others of a first Legal Charge for K.Shs.15,000,000/= over your property known as : Title Number IR 69129, off Shanzu Road, in Nairobi.

2.That by a charge dated 27th day of May, 1998 made between yourself of the one part, the Borrower of the second part and my client of the third part you charged the said property to my client by way o f First Legal Charge to secure repayment of the said sum of K.Shs.15,000,000/= together with interest thereon and other moneys as described therein.

3.By the said charge you covenanted and or agreed to repay to my client the said sum and interest

and all other moneys aforesaid on the legal date of redemption now past or on demand.

4.The balance of the principal sums together with the interest and other moneys now outstanding against the Borrower as at 10th February, 1999 is K.Shs.59,887,483.90 with furthe r interest accruing at the rate of 21% per annum.

5.I hereby require you to pay to my client forthwith the said sum of K.Shs.59,887,483.90 being the principal sum and interest and other moneys now due and owing and made up to 10th February, 1999. The sai d sum of K.Shs.59,887,483.90 will carry further interest at the rate of 21% per annum from 11th February, 1999, to the date of actual payment in full.

6.I hereby give you notice that if such principal sum and further interest and other moneys are not pai d before the expiration of THREE MONTHS from the service of this notice upon you, then my client shall sell the property comprised in the said Legal Charge.

7.I also give you further notice that if after selling the property, there is still a deficiency i n recovering payment of the said sum of K.Shs.59,887,483.90 and further interest and other moneys thereon then the same shall be recovered from you personally under your Personal Guarantee and Indemnity to repay the outstanding sums.

Yours faithfully

Signed

ANUJ DESAI

cc. Trust Bank Limited, Westlands Branch,

The Mall

Att: Mr Vinod Chowdhry."

It was admitted before the superior court and before us that this letter was sent to the respondent under "Certificate of Posting" and such certificate was produced before the superior court and is to be found at page 115 of the record of appeal. It is clear from the recorded evidence that by July 1999, the sum demanded by the appellant from the Company had not been repaid and M/s Fore-Front Agencies, Auctioneers, Court Brokers, Repossessors and Private Investigators, were instructed to sell the respondent's property pursuant to the charge of 27th May, 1998. The court brokers issued a notice dated 14th July, 1999 to the respondent and that notice gave to the respondent forty-five days within which to pay the sum demanded and if no payment was made, the respondent's charged property would be sold by public auction on 20th September, 1999, at 11.00 a.m.

The respondent said he received the auctioneer's notice to sell his property charged to the appellant on the 1st September, 1999. According to the respondent, that was the first time he came to know anything about the intended sale of his property and it is clear that it was the notice which prompted him into taking action.

By a plaint dated the 16th September, 1999 and lodged in the superior court on the 17th September, 1999, some three days before the intended sale, the respondent, through his advocates M/s Kimani Muhoro, alleged that: "4.

The Defend ant has however through its servants, employees and agents contrary to the law of the land purported to illegally through its agent issued a notification of sale of the Plaintiff's charged property and further has illegally imposed interest rates that have no legal basis whatsoever."

The illegalities alleged by the respondent in its plaint of 16th September, 1999, were that the respondent: "(a)failed to issue to the plaintiff a statutory notice in exercise of its statutory power of sale;

(b)issued Notifi cation of sales (sic) which having failed to exercise chargees statutory power of sale (sic);

(c)issued a Notification of sale contrary to the provisions of the Auctioneers Rules;

(d)illegally imposed exorbitant and excessive interest rates AND the pla intiff prays for nullification of the said illegalities."

The only substantive prayer made by the respondent in the plaint of 16th September, 1999 was one that;

"The Defendant, by itself, its agents and servants be restrained from permanently carrying out the said intended sale of L.R. NO. 1870/111/443 NAIROBI, as the said sale is null and void, ab initio and further charging exorbitant and excessive interest rates."

As is usual in these cases, the plaint was accompanied by an ex-parte chamber summons framed under Order 39 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and the orders prayed for in the summons were: "1.THAT service of this application be dispensed with due to the urgency.

2.THAT this Honourable Court do issue an injunction restraining th e Defendant by itself or agents from selling, alienating, disposing by public auction or otherwise that parcel of land known as Land Reference Number 1870/111/443 - Nairobi at such auction set for 20th day of November, 1999 or another subsequent date until the hearing and determination of the Applicant's application and suit herein."

The chamber summons came for hearing before Mbaluto, J. on the very 17th September, 1999 when the suit was filed.

Needless to say, the summons was heard ex parte and an injunction issued, on the basis that failure to issue one would defeat the purpose of the application. The learned Judge, despite no offer by the respondent to do so, nevertheless ordered, correctly in our view, that the respondent should give the usual undertaking as to damages as a condition for the issue of the ex parte injunction.

The application for injunction eventually came up for hearing inter-partes before Kasanga Mulwa, J. on the 10th November, 1999 and by then there was an amended plaint on record filed on the 14th October, 1999, and an amended defence and counter-claim filed on the 28th October, 1999. There is also on record a further amended defence and counter-claim dated the 6th December, 1999 but that has no relevance to the issues relating to the grant of an injunction first by Mbaluto, J., ex-parte, on the 17th September, 1999 and secondly by Mulwa, J. on 3rd December, 1999. In the amended plaint, the Company was alleging that no money had been advanced to it by the appellant, but that averment could not have been taken into account in granting the injunction to the respondent because, that was not the basis on which Mbaluto, J. had granted to the respondent the ex-parte injunction which was subsequently confirmed after the inter-partes hearing before Mulwa, J. A party who has obtained an ex

parte injunction on one basis cannot be allowed to rely on a basis different from that on which the ex parte injunction was granted. Kwach, J.A. succinctly put it thus in the case of

UHURU HIGHWAY DEVELOPMENT LTD V CENTRAL BANK OF KENYA & 2 OTHERS, Civil Application No. NAI 140 of 1995 (65/95 UR), (unreported): "..... The first affidavit of Vaya was short, only nine paragraphs. The second affidavit ran into thirty - nine paragraphs. This affidavit raised a completely new case radically different from the case put forward in the ea rlier affidavit and on the basis of which the controversial order was obtained from Githinji, J. This again would seem to me to be irregular and if any authority is needed for this, I can do no better than to quote a short page from Halsbury's Laws of Eng land Vol 24, 4th Edition paragraph 1112:

`A plaintiff may not support the injunction by showing another state of circumstances in which he would be entitled to it but if he has obtained an ex -parte injunction which is afterwards dissolved on the ground of concealment of facts, he is not precluded from making another application on the merits. It is no excuse for a party to say that he was not aware of the importance of the facts which have not been brought to the notice of the court, or that he had forgot ten them; but mere ignorance of what a party might have known is not equivalent to concealment so as to amount to improper conduct.'."

There was no question or issue of concealment of facts in the case the subject of the appeal before us, but the respondent had obtained an ex-parte injunction before Mbaluto, J. on the grounds set out in his motion of 16th September, 1999 and only those grounds could have been urged before Mulwa, J. at the subsequent inter-partes hearing.

Accordingly, the question of the appellant not having advanced any monies at all to the Company could not be an issue before Mulwa, J. for that was not an issue when Mbaluto, J. granted the ex-parte injunction on the 17th September, 1999.

We can now deal with the grant of the injunction by Mulwa, J. and as far as we are able to discern it from his ruling of 3rd December, 1999, the learned Judge granted the injunction principally on the basis that the appellant had not properly served the respondent with the statutory notice of sale required by Section 69 A (1) of the Transfer of Property Act. The respondent's property was registered under the provisions of the Registration of Titles Act, Cap 281, Laws of Kenya, and consequently the substantive law applicable to it is to be found in the Transfer of Property of Act (hereinafter "the TPA"). Section 69 (1) of the TPA provides, inter alia:

"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 on the mortgagor or one of the two or more mortgagors, and default has been made in payment of the mortgage -money, or part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or

(c) ....."

The respondent alleged that the appellant had not served him with the notice required under Section 69 A (1) (a) above.

The appellant, on the other hand, contended that it had in fact served the respondent with the notice. We earlier on set out the letter written to the respondent by Mr Anuj Desai, advocate on behalf of the

appellant. Paragraph 6 of the said letter, and we repeat that paragraph, clearly told the respondent: "6.I hereby give y ou notice that if such principal sum and further interest and other moneys are not paid before the expiration of THREE MONTHS from the service of this notice upon you, then my client shall sell the property comprised in the said Legal Charge."

This notice was so clear and so precise in its terms that it exactly agrees with the kind of notice envisaged by this Court in the case of TRUST BANK LTD V EROS CHEMIST LTD & ANOTHER , Civil Appeal No.133 of 1999 (unreported) where the Court, consisting of five of its Judges said:

"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 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."

In the case in which these remarks were made, the point in issue was the length of the notice required as the mortgagee had threatened to sell the charged property if the mortgage money was not paid within fourteen days and without specifying that the sale would only take place if payment was not made within three months from the date of service of the notice. In the present appeal, the appellant specifically stated the amount of monies they were demanding from the respondent and it was specifically stated that if the monies were not paid within three months from the date of service of the notice, the charged property would be sold. With respect that, in our view, is what a notice under Section 69 A (1) (a) of the TPA ought to be.

But however correctly a notice is worded, it has and must, at the end of the day, be served on the mortgagor or chargor. The respondent, as we have seen, says he was never served with the notice. The respondent told the superior court that Section 102 (2) TPA provides for service of documents on a mortgagor, mortgagee or any other person required to be served. Section 102 (2) says:

"Any notice required or authorized by this Chapter to be served shall be sufficiently served if either:

(a) it is left at the last known place of ab ode or business in Kenya of the mortgagee, mortgagor, or other person to be served; or (b)in the case of a notice required or authorized to be served on a mortgagor, it is affixed in a conspicuous position to the property comprised in the mortgage; or

(c) it is served on an agent or attorney holding a power of attorney or authority from the mortgagee or mortgagor whereunder such agent or attorney is duly authorized to accept such service; or

(d) it is sent by post in a registered letter addressed to the mortgagee, mortgagor or another person to be served, by name, at his last known postal address, and if that letter is not returned through the post office undelivered; service by post as aforesaid shall be deemed to be made at the time at which the registe red letter would in the ordinary course be delivered."

So that the Act has provided four ways in which the appellant was entitled to serve the notice of sale upon the respondent. The appellant chose to serve the respondent through the post, but instead of sending the notice by registered post, the appellant chose to send it "under certificate of posting ". Mr Sarvia for the appellant, eloquently told us that the appellant chose to modify the method of service

provided in paragraph (d) of Section 102 (2) because the provisions set out in paragraphs (a) to (d) cannot be treated as being exhaustive. If the appellant had served the respondent personally, asks Mr Sarvia, would that not be treated as sufficient service for the purposes of Section 102 (2) of t he Act "

We think the answer to Mr Sarvia=s question lies in the fact that where personal service, which is always treated by the courts as the best mode of service, is effected there would be ready and available evidence to prove such service.

The person effecting the service would be able to make a return of service showing the manner in which the service was effected and whether the person served signed or refused to sign for the service and so on and so forth. If it was to be proved as a fact that personal service was in fact effected, we doubt whether a court would allow a person in the position of the respondent herein to allege that since he was personally served and the Act does not provide for such service, he was, therefore, not served. But we think we do not have to decide that point in this appeal.

The appellant having chosen to change the procedure of service allowed under Section 102 (2) (d) of the Act , the burden clearly shifted to him to show that the respondent actually received the notice. If the notice had been sent by registered post, all the appellant would be obliged to show was that the notice was in fact sent by registered post and that the same was not returned to it through the post. We do not know the implications of sending the notice "under certificate of posting " and whether that is the same thing as sending it by registered post. The appellant did not even call any evidence, e.g. from the post office itself, that the respondent had in fact received the notice. The respondent as we have seen, said he never received the notice and he only came to know about the intended sale of his property on the 1st September, 1999, when he was served with the notice of sale by the auctioneer.

In this state of evidence, we think Mulwa, J., was perfectly right in coming to the conclusion that the respondent had shown, prima facie , that the appellant's statutory power of sale had not accrued because that power is only exercisable after a valid notice of sale has been given pursuant to Sectio n 69 A (1) (a) of the TPA .

But the appellant next contended that even if the notice of sale had not been sent to the respondent, the appellant was nevertheless entitled to sell the property under Section 69 (A) (1) (b) of the TPA because interest due on the principal sum advanced to the Company had been outstanding for more than two months, and that being the case the appellant was entitled to sell without any notice. In support of that contention, Mr Sarvia cited to us the case of JAMES OMBERE OCKOTCH V EAST AFRICAN BUILDING SOCIETY & 2 OTHERS, Civil Appeal No. 205 of 1996 (unreported) where the Court having quoted the provisions of Section 69 (A) (1) proceeded to hold as follows: "It can be seen straight -away that under section 69 (A) (1) (b) there i s no need for the giving of the three month statutory notice when interest for more than two months is due and unpaid."

We respectfully agree, but the truth of the matter in the appeal before us is that the appellant, in seeking to realise its security under the charge, was clearly not doing so because interest on the sums advanced was due and unpaid for three months. If it was proceeding to sell on the basis of unpaid interest, there would have been no need for Mr Anuj Desai to draft the elaborate notice of the 17th February, 1999. That notice specifically gave to the respondent three months within which to repay the sums advanced or else have his charged property sold. We are satisfied the appellant was clearly not exercising its power of sale under Section 69 A (1) (b) of TPA. We think we have said enough to show that the learned Judge was right in granting to the respondent the injunction he had prayed for. In granting the injunction, the learned Judge, however, made certain conclusive and definitive findings on an interlocutory application, which findings may be somewhat embarrassing to the Judge who will

eventually hear the substantive suit. All we can say on this point is that such findings are unnecessary and uncalled for in an application for an interlocutory injunction and they cannot in any case be taken as binding even of the Judge himself if he had the misfortune to hear the main suit. But having said that, our view of this appeal is that it must fail. We order that it be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 8th day of December, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR