

Date and Time: Thursday, 9 September, 2021 12:01:00 PM MYT

Job Number: 152463259

Document (1)

1. [Noraini Binti Abu Bakar v Amislamic Bank Bhd \(Oh Siew Kuen, Third Party\)](#)
[\[2015\] MLJU 2214](#)

Client/Matter: -None-

Search Terms: akram hizri

Search Type: Natural Language

Narrowed by:

Content Type
MY Cases

Narrowed by
-None-

NORAINI BINTI ABU BAKAR v AMISLAMIC BANK BHD AND ANOTHER APPEAL

[CaseAnalysis](#)

| [2015] MLJU 2214

[Noraini Binti Abu Bakar v Amislamic Bank Bhd \(Oh Siew Kuen, Third Party\)](#) [\[2015\] MLJU 2214](#)

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

MOHD ZAWAWI SALLEH, ABANG ISKANDAR ABANG HASHIM AND BADARIAH SAHAMID JJCA

CIVIL APPEAL NOS: B-02(IM)-376-03/2015

7 December 2015

*Encik Nik Zarith bin Nik Mouspha Encik **Hizri** bin Hassan (Mohd Ashraf, Nik Zarith & Co) for the appellant.*

Encik Azrul Shahreen bin Aziz (Nik Hisham Fakhiah & Co) for the respondent.

Encik Charan Jit Singh a/l Santokh Singh (Mariadass Lock & Ainuddin) for the third party.

Datuk Dr Badariah Sahamid JCA:

JUDGMENT OF THE COURT Brief Background Facts

[1]The parties here are referred to as per the High Court proceedings.

[2]The Defendant was the registered proprietor of a double storey terrace house on a piece of land held under HS (D) 8464 pt No 1. Jalan 14/46 Seksyen 14, Bandar Petaling Jaya, Daerah Petaling, Negeri Selangor ('the said property').

[3]On 04.09.1996, the Defendant had obtained an Islamic financing facility of RM 50,000 from Abrar Finance Bhd (AFB). Pursuant to the said financing, the Defendant would repay the loan within 5 years. On 11.9.1996, the Defendant had executed a Property Purchase Agreement ("PPA") and Property Sale Agreement ("PSA"). As security for repayment of the loan, the Defendant had created a 1st party legal charge in favour of AFB. A personal guarantee by one Encik Ahmad Kamil bin Mohd Hassan was also executed as additional security.

[4]The assets and liabilities of ABF were subsequently vested in AmIslamic Bank Bhd, the Plaintiff in the High Court suit.

[5]On the Defendant's default of payment on the said loan, the Plaintiff commenced foreclosure proceedings to auction the property. On 18.12.2012, an order for sale was granted by Justice Suraya bt Othman in the absence of the Defendant. Subsequently, on 18.7.2013 a public auction was held in respect of the said property with the reserve price of RM670, 000.

....

[6]On the same date, the property was auctioned to a successful bidder, one Oh Siew Kuen (the intervener) at the reserve price of RMRM670, 000.

Decision of the High Court

[7]Subsequently, the Defendant made an application to the High Court, Shah Alam to set aside the order for sale dated 18.12.2012, and the public auction on 18.7.13 in respect of the said property, as null and void.

[8]On 23.01.2015 the High Court judge dismissed the Defendant's application with costs.

[9]This appeal before us is in respect of the abovementioned decision. In this appeal, the Defendant is the Appellant, the Plaintiff is the Respondent and Oh Siew Kuen is the Third Party/Intervener.

[10]The Defendant's contention is that the Defendant had not received any notice, communication or information from the Plaintiff of the foreclosure and public auction as the notice and other relevant documents, including the cause papers, had not been addressed to the property where the Defendant resides.

[11]The Defendant was only made aware of the foreclosure and auction when the Intervener visited the property to seek vacant possession from the Defendant.

Issue

[12]The primary issue raised in this appeal is whether sufficient notice had been given by the Plaintiff to the Defendant of the foreclosure proceedings and auction in respect of the said property?

Plaintiff's Contention

[13]On 19.07.2012, the Plaintiff had served a Form 16D on the Defendant as chargor at the following address: JKR 2931, Persiaran Ledang 50450 Kuala Lumpur ('Persiaran Ledang address').

[14]The Originating Summons and Affidavit in Support were also served on the Defendant on 5.11.2012 at the same address abovementioned.

[15]The Persiaran Ledang address was also the address for service pursuant to the PPA (First Schedule Items 2 and 3), PSA (First Schedule Items 2 and 3) and the Charge Instrument (P1).

[16]Clause 9 of the PPA states as follows:

Any notice request or demand requiring to be served by either party hereto to the other under the provisions of this Agreement shall be in writing and shall be deemed to be sufficiently served:-

- (a) *if it is given by the party or his or its solicitors by post in a registered letter addressed to the party to be served at his or its address hereinbefore mentioned or at such other address as the other party might have notified the party*

....

giving the notice as his new address and in such case it shall be deemed (whether it is actually delivered or not) to have been received at the times and when such registered letter would in the ordinary course be delivered.

[17] Pursuant to clause 9(a) of the PPA, it is the obligation of the Defendant to notify the Plaintiff of any change of address for service. Since the PPA and PSA was signed almost 20 years ago, the Defendant had never notified the Plaintiff of any change in the address for service.

[18] The Plaintiff had served the notice of Form 16 D, Originating Summons and cause papers in compliance with the PPA and PSA.

[19] In addition to the service of notice on the Persiaran Ledang address, the Plaintiff had also posted a notice on the said property which is also the Defendant's residential address i.e. No.1, Jalan 14/46 46100 Petaling Jaya, Selangor Darul Ehsan, which is also the address of the said property.

Defendant's Contention

[20] The gist of the Defendant's argument may be summarised as follows.

The address for service and the residential address

[21] From the time the PPA and PSA were signed in 1996, the Defendant had knowledge of both the Persiaran Ledang address as well as the residential Petaling Jaya address.

[22] There is also documentary evidence that on 20.06.2005, Am Bank (the charge bank at the material time) had sent a telex notification to the Defendant at the Petaling Jaya address. Thus, the Petaling Jaya address should be regarded as the most recent address of the Defendant.

[23] In support of the above, reference was made to the case of *Ramlan bin Kamal v Perbadanan Nasional Bhd* [2004] 1 MLJ 425, where Suriyadi J (as he then was) defined the term "last known address" as "the most recent known residence of the defendant and nowhere else".

[24] However, the Plaintiff had elected to serve the Form 16 D and the Originating Summons and cause papers on the Persiaran Ledang address.

[25] In addition, the postcode for the Persiaran Ledang address was incorrectly stated as 50450 instead of 50480.

[26] The Defendant did not receive the Form 16D and the Originating Summons and cause papers as they were served on the Persiaran Ledang address while the Defendant's residential address is the address of the said property.

[27] The Defendant was only made aware of the proceedings for foreclosure and auction when the Intervener visited

....

the Plaintiff's residence to seek vacant possession of the property.

Irregular and defective service of cause papers

[28]In addition or in the alternative, the mode of service of the Originating Summons is not in compliance with [Order 10 rule 3\(1\) \(b\) Rules of Court 2012](#).

[29]Due to the gravity of foreclosure proceedings, the Courts have emphasised strict compliance with procedures in respect of service of Form 16D and cause papers. See *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd*. [1998]2 CLJ 266 at p.283-284.

Findings and decision of the court

[30]After careful consideration of counsels' oral and written submissions, documentary evidence and relevant authorities, we are of the considered view that the Plaintiff had served sufficient notice of the foreclosure and auction of the property on the Defendant.

[31]We, therefore, dismiss the Defendant/Appellant's appeal with costs and affirm the decision of the learned High Court judge.

[32]The grounds of our decision are set out below.

[33]In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, the Supreme Court stated that an order for sale will not be granted against a chargor if the chargor can show, "*cause to the contrary*" within the meaning of s 256(3) of the National Land Code (NLC).

[34]The Supreme Court laid down the three categories of cases where "*cause to the contrary*" would apply:

- "(a) *when a chargor is able to demonstrate that the charge is defeasible upon one or more of the grounds specified in Section 340(2) and 4 (b) of the NLC;*
- (b) *when a chargor can demonstrate that the charge has failed to meet the condition precedent for making an application for an order for sale. For example, failure to prove the making of a demand, or service upon the chargor of notice in Form D; and*
- (c) *when it can be demonstrated that the grant of the order of sale would be contrary to some rule of law or equity to which the sale relates."*

[35]In the instant case, the "*cause to the contrary*" asserted by the Defendant is the failure of the Plaintiff to serve Form 16D on the Defendant.

[36]In our considered opinion, the Plaintiff had complied with this prerequisite by serving the Form16 D on the Defendant's address for service in the PPA and PSA. The details of the address had been provided by the Defendant in the PPA and PSA which were signed in 1996. It is not disputed that the Defendant had not, in the last

....

twenty years, informed the Plaintiff of any change in the address for service.

[37]According to clause 9(a) of the PPA, parties had agreed that a service on a party on the address given or a new address duly notified will be deemed as received. Since it is incumbent on the Defendant to notify the Plaintiff of any change of address for service, in the absence of any such notification by the Defendant, a service on the address provided by the Defendant would be deemed as good service.

[38]Section 256(3) (b) only stipulates “*service upon the chargor*”. Thus, in our opinion service of Form 16D on the address for service contractually agreed by both parties according to the PPA and the PSA is in compliance with the abovementioned provision.

[39]One of the issues raised by the Defendant is that the service of the Originating Summons and cause papers is irregular and defective as there is no contractual clause to provide for the mode of service of the Originating Summons and cause papers in compliance with [Order 10 rule 3\(1\) \(b\)](#) of the [Rules of Court 2012](#).

[40][Order 10 rule 3\(1\) \(b\)](#) of the [Rules of Court 2012](#) provides as follows:

Service of writ in pursuance of contract

3.(1) *Where-*

- (b) ***the contract provides*** that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his behalf as may be specified in the contract, in such manner or at such place (whether within or out of jurisdiction) as may be so specified. *(Emphasis added)*

[41]We find no merit in this argument.

[42]While section 9 of the PPA refers to “*Any notice request or demand*”, but does not refer specifically to Originating Summons and cause papers. A common sense approach is that the address for service contractually provided would be extended to other relevant documents, including Originating Summons and cause papers.

[43]In any event, in addition to the service of notice on the Persiaran Ledang address, the Plaintiff had also posted a notice on the Defendant’s residential address i.e.No.1, Jalan 14/46 46100 Petaling Jaya, Selangor Darul Ehsan.(‘Petaling Jaya address’). It is not disputed that the Defendant has been residing at the Petaling Jaya address since the PPA and PSA were signed in 1996. Thus, there is no question that the Defendant had been made aware of the foreclosure proceedings and auction.

[44]In the result, we find no merit in this appeal and thus the appeal is dismissed with costs.

Noraini Binti Abu Bakar v Amislamic Bank Bhd (Oh Siew Kuen, Third Party)

....

End of Document