



REPUBLIC OF KENYA



**Maina & another v Family Bank Limited (Civil Suit  
E004 of 2023) [2024] KEHC 9522 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9522 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL SUIT E004 OF 2023  
WM MUSYOKA, J  
JULY 26, 2024**

**BETWEEN**

**JOHN KARIUKI MAINA ..... 1<sup>ST</sup> PLAINTIFF**

**TESIA SUPERMARKET LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

1. I am called upon to determine the Motion, dated 1<sup>st</sup> November 2023. It seeks for an order of temporary injunction, to restrain the defendant from advertising for sale, selling or auctioning and or alienating Busia Township/522, pending the hearing and determination of the suit herein.
2. The factual background to the Motion, is set out on the face of the Motion, and the affidavit, sworn by the 1<sup>st</sup> plaintiff on 1<sup>st</sup> November 2023, in support. The 1<sup>st</sup> plaintiff is one of the directors of the 2<sup>nd</sup> plaintiff, and the registered owner of Busia Township/522, which was offered as security for a loan that the defendant granted to the 2<sup>nd</sup> plaintiff in April 2020. It is alleged that the attention of the plaintiffs was drawn to a notice to dispose of the said property by public auction. The 1<sup>st</sup> plaintiff alleges that he was not served with the requisite notices prior to the property being advertised for sale. He argues that he would suffer substantial loss should the property be sold. He asserts that the sale would be irregular and illegal, for failure to adhere to the strict rules governing public auctions, and in particular a valuation report being procured before the property is advertised for sale, physical service of the redemption notice and personal service of the notification of sale. He avers that when he learnt that the sale price indicated in the auction notice was Kshs 62,000,000.00, he instructed a valuer, to undertake valuation of the property, who returned a value of Kshs 130,000,000.00. He avers that he was never furnished, despite requests, with the obligatory loan statement and the letters of offer signed by the 2<sup>nd</sup> plaintiff. He states that the 2<sup>nd</sup> plaintiff had means, and it operated other accounts with the defendant, under the names of Kanungo Quarry and Construction Company and Halisi Maize Flour, which had



- also taken loans with the defendant, and which they had repaid. He asserts that the valuation of the property, before the loan was taken, put the value of the property at Kshs 115,000,000.00, and that the relationship between the plaintiffs and the defendant over the 12 years involved transactions of over Kshs 2,000,000,000.00. He called for a joint valuation of the property.
3. He has attached a number of documents. There is a copy of the certificate of lease for Busia Township/522, showing entries of the various transaction registered against the lease between 2008 and 2014. There is an application from the 2<sup>nd</sup> plaintiff for grant of advance and loan facilities from the defendant, dated 20<sup>th</sup> April 2020. There is a copy of a loan statement, running from 30<sup>th</sup> September 2020 to 31<sup>st</sup> August 2023. There is a letter, dated 6<sup>th</sup> October 2023, from Keysian Auctioneers, addressed to the 1<sup>st</sup> plaintiff, giving 21 days' notice before the auction of the said property. There is also a notification of sale of movable property by Keysian Auctioneers, dated 4<sup>th</sup> October 2023, indicating that the same was served via email. There is a valuation report, dated 30<sup>th</sup> October 2023, carried out on instructions of the 1<sup>st</sup> plaintiff, where current market value is placed at Kshs 127,000,000.00, and the reserved price at Kshs 95,250,000.00. There is also a notice, to the public, of a sale of the property, to be carried out on 6<sup>th</sup> November 2023. Finally, there is a letter, from the Advocates for the 2<sup>nd</sup> plaintiff, addressed to the defendant, asking for a comprehensive bank account statement.
  4. The defendant filed a replying affidavit, sworn on 15<sup>th</sup> November 2023, by Sylvia Wambani. She avers that the plaintiffs were the owners and the borrowers of the outstanding moneys in question, and it is asserted that the defendant had done due process in proper exercise of its contractual and statutory power of sale of the property in question. On valuation of the property, it is averred that a valuation had been done in 2022, for a sale that had been scheduled for 8<sup>th</sup> February 2023, and that that valuation was still valid. It is averred that the plaintiffs had been given adequate notice and time to remedy the default, but that they had failed to honour their obligations, necessitating exercise of the statutory notice by the defendant. It is asserted that the court had already settled the law on how a valuation report can be challenged. It is asserted that valid notices had been issued. It is argued that any restraint on the exercise of the statutory power of sale would prejudice the interest of other customers, whose moneys were lent out to the plaintiffs. It is argued that the plaintiffs had come to court with unclean hands, being their own default to repay the moneys in dispute. It is submitted that the application was devoid of merit.
  5. A number of documents are attached in support. There is the letter of offer, dated 28<sup>th</sup> September 2020, restricting the loan. There is the legal charge, dated 24<sup>th</sup> February 2013, the account statement running from 20<sup>th</sup> September 2020 to 13<sup>th</sup> November 2023. There is a notice from the defendant to the 1<sup>st</sup> plaintiff, dated 3<sup>rd</sup> August 2020, being a notice under section 90 of the *Land Act*, served by registered post. There is a notice under section 96 of the *Land Act*, from the defendant, addressed to the 1<sup>st</sup> plaintiff, allegedly served by registered post. There is a 45-days-notice and notification of sale of immovable property, dated 23<sup>rd</sup> October 2022, from Keysian Auctioneers, received by the 2<sup>nd</sup> plaintiff on 25<sup>th</sup> October 2021, and also served by mail, posted on 25<sup>th</sup> October 2022. A letter from Keysian Auctioneers, dated 25<sup>th</sup> October 2022, indicating that the requisite 45-days' notice had been served, by registered post. There is another letter to that effect, dated 31<sup>st</sup> October 2022. There is also an affidavit of service, sworn on 2<sup>nd</sup> November 2022, by Muganda Wasilwa, of Keysian Auctioneers, indicating that he had also personally served the notification of sale on the 1<sup>st</sup> plaintiff on 27<sup>th</sup> October 2022, after he had been instructed to do so on 24<sup>th</sup> October 2022, by the defendant. There is an auction report, dated 2<sup>nd</sup> November 2022, where current market value was placed at Kshs 90,000,000.00, and the reserve price at Kshs 67,500,000.00, and rental value was said to be Kshs 700,000.00 per month, or Kshs 8,400,000.00 per year.



6. The 1<sup>st</sup> plaintiff swore a supplementary affidavit, on 8<sup>th</sup> December 2023. He reiterates that he was never served with the requisite notices, arguing that there were inconsistencies in the narratives on the service of the 45 days' notice and the notification of sale. It is also argued that there was no disclosure of who was served with the said notices. He further avers that he was not informed of the valuation of 8<sup>th</sup> February 2023. He avers that when the property was valued prior to the loan being given, the value was fixed at Kshs 115,000,000.00, but for the purposes of sale, the value was reduced to Kshs 70,000,000.00.
7. I note that the defendant has filed a defence, upon being served with the application, and summons to enter appearance, in which it has flagged 2 issues for determination, arising from the matters pleaded in the plaint, to wit, whether the defendant has lawfully exercised its statutory power of sale over the charged property, and whether the plaintiffs are entitled to the order sought in the plaint, for restraining the defendant from exercising its lawful power of sale over the charged property. These issues are summarised in the list of issues, dated 16<sup>th</sup> November 2023, and filed herein, by the defendant, on 21<sup>st</sup> November 2023. The defendant has joined issues with the plaintiffs with respect to the matters in controversy.
8. The issues flagged by the defendant, for trial in the main suit, at the hearing of the matter, are the same issues that the defendant raises in the response to the application, dated 1<sup>st</sup> November 2024, that is to say issues around whether the right to exercise the statutory power of sale has arisen or accrued and has been properly exercised, and whether the plaintiffs are entitled to permanent injunctive orders. Determining these issues, at the interlocutory stage, would effectively dispose of the entire suit, without giving opportunity to the parties to ventilate their respective cases fully, and it would render the suit nugatory.
9. In view of that, and to preserve the substratum of the suit, I am persuaded that the orders sought in the application, dated November 1, 2023, should be granted. I hereby, therefore, confirm the interim orders that I granted on 2<sup>nd</sup> November 2023, so that a temporary injunction issues, in terms of prayer 3 of the said Motion, to subsist pending the hearing and determination of the suit. It is so ordered.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 26<sup>TH</sup> DAY OF JULY 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the plaintiffs.

Ms. Onsare, instructed by Maina & Onsare Partners Advocates LLP, Advocates for the defendant.

Ms. Nabolindo, instructed by DK Nabolindo & Company, Advocates for the interested parties.

