



Savichem International Limited v Hi-Plast Limited & another (Insolvency Cause 19 of 2017 & Insolvency Petition 001 of 2019 (Consolidated)) [2023] KEHC 299 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 19 OF 2017 & INSOLVENCY
PETITION 001 OF 2019 (CONSOLIDATED)**

A MABEYA, J

JANUARY 27, 2023

**IN THE MATTER OF LIQUIDATION OF HI-PLAST LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT NO.18 OF 2015**

BETWEEN

SAVICHEM INTERNATIONAL LIMITED PETITIONER

AND

HI-PLAST LIMITED RESPONDENT

AND

I&M BANK LIMITED CREDITOR

RULING

1. This is an application filed by the respondent (“the company”) pursuant to Articles 48, 159 (2) (d) of *the Constitution* of Kenya 2010, sections 1A, 1B, 3, 3A, 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya and Section 97 of the *Land Act*.
2. The company sought to have this Court declare as unlawful, null and void the sale by auction of the property known as LR 209/ 8611/2 (“the suit property”) and consequently cancel the said sale.
3. The grounds for the application were that, the suit property was sold by auction at a price of Kshs.277,500,000/- which is below the market value and contrary to the Court Order of 18/11/2020 which directed that parties do consider the average of 2 valuation reports. That the secured creditor



- (“the bank”) bid and purchased the suit property at the aforementioned undervalued price. Finally, that the company was seeking to protect its interest since the suit property was not sold at the best price reasonably and as directed by the Court.
4. The company contended that the bank was conflicted since it was the charge. That it bid and purchased the suit property at a low sale price contrary to the Court order. That the said sale is prejudicial to the company and its creditors. That unless the transfer is stayed, the substratum of the application and suit would be lost.
 5. In opposition the bank filed a replying affidavit sworn on 1/7/2021 by its Recoveries Manager, Musa Dumbuya.
 6. He argued that vide a ruling delivered on 31/7/2019, the Court placed the company under administration and allowed the secured creditor to exercise its statutory power of sale subject to a current valuation being done. That as of 19/4/2021, the company was indebted to the bank to the tune of Ksh.214,827,133.33 and USD 276,197,557.93. That there being no legal impediment, the bank instructed Garam Auctioneers who advertised the suit property for sale on 4/5/2021 in the Daily Nation Newspaper of 19/4/2021. That at the auction, the bank emerged as the highest bidder.
 7. It was the bank’s case that the suit property was sold at the best reasonable price and that the valuation report relied on by the bank complied with section 97(2) of the *Land Act*. That the Court directed that the bank may consider the average of the company’s second valuation and the bank’s second valuation. However, the valuation by the company was above the one year mark and was a speculative valuation meant to scare any interested bidder and hence was not binding on the bank.
 8. It contended that it was not sufficient for the company to claim that the sale price was not the best price obtainable at the time by providing a counter valuation report. The company should have satisfactorily demonstrated why the valuation report relied upon by the bank did not give the best price obtainable at the material time.
 9. In his submissions, Counsel for the bank submitted inter alia that the bank purchased the suit property during the auction and that the transfer had already been effected. That in the premises, the only remedy available to the company was damages.
 10. I have considered the pleadings, annexures and submissions filed by both parties. The company sought to nullify a sale conducted through an auction on the basis that the suit property was sold at an undervalue. On the other hand, the bank argued that the sale was conducted lawfully and the already effected.
 11. The bank advertised the suit property and a public auction was held on 4/5/2021. The bank bid and emerged as the highest bidder at Kshs.277,501,000/- and a deposit of Kshs. 27,750,100/- was paid to the auctioneer in that regard. This is evidenced by the annexure marked ‘MD7’ in the bank’s replying affidavit.
 12. The question the court must answer is whether the suit property was sold in accordance with the orders of 18/11/2020 and section 97 of the *Land Act*.
 13. The order of 18/11/2020 directed that the parties exchange valuation reports and that the sale price be in accordance with the provisions of section 97 of the *Land Act*. It also directed that the parties consider the average of the 2 valuation reports as the sale price.



14. Section 97 of the Land Act provides: -

- “ 1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- 2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
- 3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
 - (a) ...
 - (b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void...”

15. Accordingly, under the Land Act, the chargee has the statutory duty to sell the charged property at the best price obtainable after carrying out a valuation. Further, the chargee owes a duty of care to the charger in the exercise of its statutory power of sale.

16. Both the bank and the company carried out valuations. This led the Court, in its order of 19/12/2020, to hold: -

“... the sale price shall be in accordance with the section 97 of the Land Act, parties may consider the average of the 2 valuation reports as the sale price.”

17. My understanding of the order above is that the valuation had to be in accordance with section 97 of the Land Act. Further, it gave the parties the option of considering the average of the 2 valuation reports as the sale price.

18. The valuation by the parties are as follows: -

- a. The company instructed valuers M/s Kiragu and Mwangi Limited who valued the suit property vide a report dated 29/4/2016 at Ksh.360,000,000/- for the market value but did not include a forced sale value.
- b. The bank's used the same valuers, M/s Kiragu and Mwangi Limited who valued the suit property vide a report dated 21/6/2018 at Ksh.337,500,000/- for the market value and the forced sale value at Ksh.282,000,000/-.
- c. The company commissioned a second valuation through M/s Morgan Wright Limited who valued the suit property via a report dated 15/4/2019 at Ksh.510,000,000/- for the market value and forced sale value of Ksh.430,000,000/-.
- d. The bank also commissioned a second valuation through M/s Real Appraisal Limited who valued the suit property vide a report dated 30/10/2020 at Ksh.370,000,000/- for the market value and Ksh.277,500,000/- as the forced sale value.



19. In *Gold Lida Limited v NIC Bank Limited & 2 others* [2019] eKLR, Tuiyott J (as he then was) held: -

“The impugned sale is said to have taken place on 13th June 2017 which would be less than a month after the valuation by GIMCO. In that sense the valuation was recent and the Bank may have fulfilled the obligation placed on it under section 97(2) of the *Land Act*.

As to the values returned by GIMCO, the Court observes that it has 3 reports before it all returning different values, albeit on different dates. These are:-

1. Landmark (valuation of 4th February 2013)
Open market value Kshs.550,000,000.00
Forced sale value Kshs.400,000,000.00
2. Mwaka Musau (valuation of 19th December 2014)
Market value Ksh.1,300,000,000.00
Forced sale value Kshs.975,999,000.00
3. GIMCO (valuation of 23rd May 2017)
Market value Ksh.650,000,000.00
Forced sale value Kshs.487,500,000.00

The valuations were done at different times and there is no knowing whether that explains the variations. However, on a cursory observation, the valuation commissioned by Gold Lida appears to be completely out of step with the others. As to which of the valuations is correct is a matter that cannot be interrogated fully at this stage of the proceedings. That may require a full-blown trial. However, the basis upon which the sale proceeded is not entirely disconnected with an earlier professional view. If, however, the valuation by GIMCO is found to be wrong and unjustified, then Gold Lida is not without a remedy.”

20. In this case, the valuations submitted vary, perhaps influenced by the time they were undertaken. I concur with the finding above in that the issue as to which valuation is correct is a matter that cannot be interrogated fully at this stage and may require a full hearing.

21. However, the valuation with which the auctioneer relied on at the auction was carried out on 30/10/2020 whereby the forced sale value was stated to be Ksh.277,500,000/-. This is less than a year before the impugned auction took place on 4/5/2021 and is therefore reliable.

22. Further, the order of 18/11/2020 only asked the parties to consider the average of the valuations as the sale price. That direction was not mandatory because of the use of the term ‘may’. However, the bank was directed to strictly comply with section 97 of the *Land Act* to obtain the best price possible.

23. Section 100 of the *Land Act* states: -

- (1) Other than in the circumstances provided to in subsection (3), a chargee exercising the power of sale may, with leave of the Court, purchase the property.
- (2) A court shall not grant leave unless the chargee satisfies the court that a sale of the charged land to the chargee is the most advantageous way of selling the land so as to comply with the duty imposed on the chargee by section 97(1).



- (3) If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at that public auction so long as the price bid for the charged land by the chargee is the greater of—
- (a) the highest price bid for that land at the auction; and
 - (b) an amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”

24. It therefore follows that, a chargee may bid and purchase a charged property that is being sold at an auction as long as the charge produces the highest bid and the bid is higher than the reserve price. Leave of the Court is not required where the sale of the charged property is by public auction.
25. In the present case, the last valuation of M/s Real Appraisal Limited dated 30/10/2020 gave the forced sale value of the suit property as Ksh.277,500,000/-. The public auction took place on 4/5/2021. The valuation was therefore within one year of the sale. The bank purchased the suit property for Kshs.277,501,000/-. That was above the forced sale value and was in tandem with the provisions of section 100(3) (b) of the *Land Act*.
26. In this regard, I am unable to find, without the valuations being subjected to a full trial, that the sale was contrary to section 97 of the *Land Act*. The bank was the highest bidder at the auction and it paid an amount above the reserve price of Ksh.277,500,000/-. If minded, the company can sue for damages.
27. In this regard, I find that the application is without merit and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

