



**Harrogate Limited & another v Mwananchi Credit Limited;
Mistan Auctioneers (Interested Party) (Civil Case E843 of 2021)
[2023] KEHC 126 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E843 OF 2021
A MABEYA, J
JANUARY 20, 2023**

BETWEEN

HARROGATE LIMITED 1ST PLAINTIFF

ALICE MUTHONI THUO 2ND PLAINTIFF

AND

MWANANCHI CREDIT LIMITED DEFENDANT

AND

MISTAN AUCTIONEERS INTERESTED PARTY

RULING

1. This is a ruling the plaintiff's application dated 17/11/2022. It was brought under Articles 10, 40, 50 and 159 of *the Constitution*, Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Section 21 and 23 of the *Auctioneers Act*, Regulations 18 and 11(b) (x) of the Auctioneers Rules, 1997 and Sections 98(4) and 152E of the *Land Act*, Order 25 Rule 5, and Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*.
2. The application sought several orders including orders for temporary injunction restraining the Interested Party from implementing the eviction notice dated 3/11/2022 pending the hearing of the application and suit, orders directing the interested party to provide the seven documents listed in prayer 3 relating to the sale of the suit property, orders directing the respondent to provide an updated statement of accounts including the proceeds from the auction, declaration that no lawful auction was conducted on 27/10/2022, and orders that the applicants to pay the respondents Kshs. 86,249,960/= in line with the in duplum rule in instalments as indicated in prayer 8.



3. When the matter came up on 6/12/2022, this Court allowed prayers 2 restraining the eviction pending determination of the application, and prayer 4 seeking production of full statement of accounts from the respondent within 7 days.
4. The only pending prayers were injunction from evicting the applicants pending the determination of the suit, declaration of unlawfulness of the auction and orders on payment of outstanding amounts by the applicants as per their proposal.
5. The grounds for the application were set out on the face of the Motion and in the supporting and supplementary Affidavits of Shreedhar Girdharlal Hirji sworn on 17/22/2022 and 14/12/2022, respectively.
6. The plaintiff's case was that the alleged sale of the suit property by auction on 27/10/2022 was unlawful as there was no proof of compliance with the conditions for sale including proof of payment of 25% deposit by the purchaser despite there having been an expression in the auctioneer's certificate of sale MW-6B that the deposit had been paid.
7. That there was also no proof of payment of Kshs. 33,750,000/= either by RTGS, bank deposit slip or banker's cheque. That there was also no mention of receipt by way of cash, thus the attached evidence marked as MW7 being the receipt by the respondent to the auctioneer was unlawful as the respondent had deponed that it was a non-deposit taking microfinance institution, thus could not receive a cash deposit and the same ought to have been paid through a bank. That there was also no proof of payment of Kshs. 1 million deposit by the purchaser. It was thus alleged that no lawful auction took place on 27/10/2022.
8. It was further contended that though this court directed that the respondent provides a full statement of accounts, the respondent did not comply as the first loan disbursement to the 1st plaintiff was on 25/2/2020 as per the RTGS receipt dated 25/2/2022 at page 1a, b and c, yet the filed accounts commenced on 16/12/2020. That no payment of Kshs. 88,773,808.00 was made to the 1st plaintiff as indicated in the statement, as only Kshs. 7.5 million was disbursed to the 1st plaintiff on 17/12/2020 but that amount was not indicated in the statement.
9. The plaintiffs also challenged the valuation report dated 22/8/2022 for being unsigned and contended that the same was invalid, thus the sale was done without a proper valuation of the property. That the valuation report also indicated prices that were similar to a valuation conducted by the plaintiff in 2021 at pages 145 to 168, thus it was not possible that the price of the suit property had remained the same.
10. That the plaintiffs conducted their own valuation through QMACS Realtors Limited and according to the valuation dated 4/6/2021, the prices were much higher than those quoted in the respondent's unsigned valuation. It was also alleged the 2nd bidder was the auctioneer's son and there was evidence of the allegation on the Facebook page run by the interested party, further affecting the integrity of the auction sale.
11. It was thus contended that the applicants were facing eviction on the basis of a non-existent sale and that it was in the interest of justice that the suit was compromised to save on judicial time. It was contended that the 1st plaintiff only took a loan of Kshs. 43,124,980/= from the defendant thus in accordance to the in duplum rule, only double the amount was repayable, and the applicants were willing to pay the same within around 10 months.
12. It was further contended that the Supplementary Affidavit deponed by Mary Rita Wanjiku was sworn by Sylvia Wanjiru Njoroge on 6/12/2022 thus the same was defective and ought not have been considered.



13. The defendant opposed the application vide the replying and supplementary Affidavit of Sylvia Wanjiru Njoroge sworn on 1/12/2022 and 6/12/2022 respectively. That the challenge on accounts was not enough to restrain the defendant from exercising its statutory power of sale and the issue of repayment had been overtaken by events. That all requisite notices had been served prior to the sale as well as the 45 days redemption notice and the suit was advertised for sale and consequently sold on 27/10/2022 by public auction.
14. That one Alexander Kubo Mlawasi was the highest bidder and the property was sold to him for Kshs. 135 million, a memorandum of sale dated 27/10/2022 was executed and the interested party issued a certificate of sale of the suit property.
15. That 25% of the purchase price was paid in cash as deposit and the interested party transmitted the deposit to the defendant on the same day and a receipt was duly issued. A copy of the receipt for Kshs. 33,750.000/= was attached as SWN 8. That the balance was to be paid by 27/1/2023. That there was therefore clear indication that a valid sale took place on 27/10/2022 and any grievances between the plaintiffs and defendant could be addressed at the hearing of the suit. That the intended eviction was lawful as the purchaser would require vacant possession of the suit property upon completion of the sale.
16. The interested party similarly opposed the application vide the replying affidavit and further affidavit of Mary Rita Wanjiku sworn on 1/12/2022 and 19/12/2022. She was an auctioneer trading in the interested party's name. That upon receipt of instructions from the defendant, she advertised the suit property for sale twice and indicated conditions of sale. That on 27/10/2022, the property was sold to the highest bidder at Kshs. 135 million and a memorandum of sale and certificate of sale issued. That the purchaser paid 25% deposit on the same day and the same was transmitted to the respondent.
17. The allegation that an eviction notice was served was denied and it was contended that the interested party only issued a letter dated 3/11/2022. It was also denied that the second bidder in the auction, one Stanley Wanyoike was her son and denied ever running Facebook account or posting pictures together with the said Stanley on that account.
18. There was also the Supplementary Affidavit of the aforementioned Mary Rita Wanjiku who's admissibility is under contest as the same was sworn by a different person. The affidavit cannot be considered at this point and the court will determine how to treat the document upon considering the parties submissions on the issue at a later point in this ruling.
19. The application was disposed of by way of submissions. The plaintiff's submissions were dated 14/12/2022, while those of the defendant's respondents and interested party's were dated 19/12/2022. There are several issues that arise for the Court's determination including; (i) whether the intended eviction ought to be restrained pending the determination of the suit, (ii) whether this Court ought to declare the public auction of 27/10/2022 as unlawful, (iii) whether the Supplementary Affidavit of Mary Rita Wanjiku dated 6/12/2022 ought to be considered, and (iv) whether the plaintiffs ought to be allowed to compromise the suit and pay the debt in line with the in duplum rule.
20. I will first consider whether to admit the supplementary affidavit of Mary Rita Wanjiku dated 6/12/2022 ought to be struck out. The plaintiffs submitted that the Supplementary Affidavit offended the provisions of sections 5 and 8 of the *Oaths and Statutory Declaration Act* (The Act), as well as Order 19 Rule 3(1) of the *Civil Procedure Rules*, 2010. That an affidavit could not be deposed by one party and sworn by another before a Commissioner for Oaths and thus was fatally defective and ought to be struck out. The plaintiffs referred this Court to Supreme Court case of *Gideon Sitelu Konchellah*



vs Julius Lekakeny Ole Sunkuli & 2 Others (2018) Eklr and Charles Muturi V Invesco Assurance Co Ltd (2014) Eklr to support their proposition.

21. The defendant and interested party on the other hand submitted that the error was technical and was not substantial as it went to the form and not substance, thus curable under Article 159 of the Constitution, and under section 1A, 1B and 3A of the Civil Procedure Act. That there was only a misdescription or mix up on the names through a typographical error. They relied on the case of Mary Grace Ayugu vs Alice (2017) Eklr.
22. It is not in dispute the impugned supplementary affidavit was deponed by Mary Rita Wanjiku. However, the jurat who swore the affidavit was one Sylvia Wanjiru Njoroge.
23. Section 5 of the Act provides that: -

“Every Commissioner for Oaths before whom any oath is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
24. On the other hand section 8 of The Act states: -

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”
25. From the above, it is inferred that the role of a Commissioner is to truly attest the details of the deponent of the affidavit. The role of a deponent is to state the truth according to one’s own knowledge of the facts. In a scenario where an affidavit is not sworn by the deponent, is that purpose realized? The answer is in the negative.
26. A Supplementary Affidavit forms part of a party’s pleadings, thus the rules pertaining to all pleadings apply. There is no value in an affidavit which is for instance, undated, unsworn, or one that does not indicate the place where the oath is taken. The understanding is that the deponent will appear before the commissioner who in turn confirms that the deponent appeared at a certain place and date and took the oath.
27. It cannot be said that Mary Rita Wanjiku appeared before the commissioner and took an oath before him. The person who appeared was Sylvia Wanjiku Njoroge, and she swore the affidavit despite that she was not the maker of the same and could not attest to the contents therein. This goes to the substance of the document and is not a mere technicality as submitted.
28. In Gideon Sitelu Konchellab vs Julius Lekakeny Ole Sunkuli & 2 Others (2018) Eklr , the Supreme Court held that: -

“As regards the 1st Respondent, upon embarking on consideration of his ‘Replying Affidavit’, it came to the notice of the Court that the said affidavit is not signed, dated or commissioned. This posed the question to the Court: what is the effect of an affidavit that is not signed by the person who is said to be the deponent, not dated and/or commissioned by a Commissioner for Oaths/or magistrate?



The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the *Act* provides, thus:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Further, Section 8 states:

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”

Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.

We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.

A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect.”

29. Whereas Article 159(2) (d) of *the Constitution* of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities, it is not a panacea for all technicalities. An affidavit deponed by one person but sworn by another is not a procedural technicality that can be cured by Article 159(2)(d) of *the Constitution* of Kenya. The deposition goes to the root of the document, which becomes an oath and admissible, after duly complying with the mandatory provisions of sections 5 and 8 of The *Act*.
30. In *Zacharia Okoth Obanado -vs- Edward Akong’o Oyugi & 2 Other* the court held that: -

“Article 159 (2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”
31. From the foregoing, I find the supplementary affidavit sworn on 6/12/2022 is found to be fatally defective and the same together with any submissions made in relation thereto by either party is struck out.
32. This Court now turns attention to the first two issues which are inter-related and will be determined together. The conditions for consideration in granting an injunction are now well settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358. This is that, the applicant must establish a prima facie case with a probability of success, that he would suffer loss that cannot be compensated by an award of damages, and if in doubt, the application will be determined on a balance of convenience.



33. On prima facie case, it is not in dispute that the plaintiffs' application to restrain the respondent from exercising its statutory power of sale was dismissed in June 2022. It is also not in dispute that the defendant served the requisite statutory notices on the applicants ending in a sale of the suit property on 27/10/2022. What is challenged is that sale of 27/10/2022 on several grounds.
34. In response to that challenge, both the defendant and interested party contended that the 25% deposit was paid in cash to the interested party on the same day and transmitted to the defendant.
35. However, the Court notes that according to the conditions of sale, the deposit was payable by banker's cheque. The question that begs is, how would such a colossal sum be transported to the auction, be handed over to the auctioneer at the close of the auction, and then transported to the defendant? Why would the alleged purchaser be accommodated and deal with sale outside the express conditions of sale that required a banker's cheque? Isn't the law that huge transactions be conducted by way of bank transfers in order to curtail money laundering? This is a serious triable issue that can only be determined at the trial.
36. In any event, there is no evidence that upon handing over the huge sum of around Kshs. 34 million in cash by the purchaser to the interested party, the interested party ever issued any receipt to the alleged purchaser. All that was produced is an alleged receipt by the defendant to the interested party. To compound the matters further, there was no bank statement by the defendant to show the deposit of the aforesaid sum on the material date.
37. Accordingly, the Court is convinced that the payment of the 25% deposit is doubtful. Further, the Court also doubts the contents of the Memorandum of Sale and would require all testimonies for validation.
38. The other intriguing issue is the payment of Kshs. 1 million by the two bidders to participate at the alleged auction. There was no evidence to show that any of the alleged bidders deposited this sum with the interested party in order to participate in the alleged auction.
39. There was also the issue of the valuation relied upon by the defendant to conduct the alleged sale. The defendant relied on the valuation report dated 22/8/2022, the one produced in court was unsigned, yet clause 4.8 hereof limits the validity of the valuation to the extent that it is only signed. The same not having been signed is but a nullity. In any event, the values set out therein have been seriously challenged by the plaintiffs who produced an updated valuation report dated 29/9/2022 which quoted much higher prices for both the open market and reserved values.
40. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] Eklr, the Court quoted with approval the case of *R. J. R. Macdonald vs. Canada (Attorney General)*, and stated the applicable principles as follows: -
 - i) Is there a serious issue to be tried?
 - ii) Will the applicant suffer irreparable harm if the injunction is not granted?
 - iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")
41. In the present case, serious issues have been raised as to the legality or alleged sale that occurred on 27/10/2022. There is need for the matter to proceed to a full hearing to determine these issues. Although the plaintiffs have prayed for orders to nullify the said sale, that cannot be done at this stage, but after the trial. There are also serious doubts regarding the statement of accounts produced by the defendant in support of its case.



42. The other issue which is in serious dispute is the correct amount loaned to the plaintiffs. This is glaringly open in the statement of account produced by the defendant. Further, there is also a serious issue of the amount that would be recoverable due to the application of the in duplum rule.
43. All the foregoing show that this is not a simple matter that should be glossed over. The issues raised are so serious that unless they are properly interrogated at a full trial, serious injustice may be meted out on the plaintiffs. Although lenders are entitled to realize their securities, the realization of such securities must be in accordance with the law, transparent, above board and not rot with bad faith.
44. On whether the applicant will suffer irreparable harm if the interim orders are not issued, the answer is in the affirmative. They are threatened with an eviction which culminates from a possible illegal, unlawful and irregular sale of their property. If the orders are not granted, they would have been dispossessed of their property and rights of third parties may kick in thus compounding the matter.
45. In any event, the balance of convenience is to maintain the status quo until hearing of the suit.
46. Being of the foregoing frame of mind, I partially allow the application and for purposeful execution of the same, will make the following orders: -
 - a. The defendant and the interested party are hereby jointly and severally by themselves, their servants and agents, restrained from in any way whatsoever evicting the plaintiffs, or interfering with the plaintiffs' interest quiet possession of the property known as LR NO 2327/252, Karen Hardy, within Nairobi County.
 - b. Since the sale is in serious doubt, the defendant is restrained from transferring or in any way whatsoever interfering with the plaintiffs' interest in the property known as LR No 2327/252, Karen Hardy, within Nairobi County
 - c. This suit be listed on a priority basis for hearing and determination.
 - d. The plaintiffs will have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

