



REPUBLIC OF KENYA



**KENYA LAW**  
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**Port Florence Community Hospital Limited & another v Prime Bank Limited & another; Ajiki (Proposed Interested Party) (Commercial Case E004 of 2021) [2023] KEHC 26074 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E004 OF 2021  
RE ABURILI, J  
NOVEMBER 28, 2023**

**BETWEEN**

**PORT FLORENCE COMMUNITY HOSPITAL LIMITED ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA ADONGO ORON ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PRIME BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENT AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GEOFFREY AJIKI ..... PROPOSED INTERESTED PARTY**

**RULING**

1. The ruling determines the sole question of whether this court should grant the Applicant an interim stay of sale of its property being Land Parcel No. Kisumu Municipality/Block 4/135 and Kisumu/Korando/2284 and 2286 scheduled for public auction on 1<sup>st</sup> December 2023 as per the advertisement in the Daily Nation Newspaper dated 6<sup>th</sup> November 2023, pending interpartes hearing of the application dated 15<sup>th</sup> November 2023.
2. The subject application was filed in court under certificate of urgency on 16<sup>th</sup> November 2023 but this court declined to certify the application as urgent, this not being the first time that this matter is coming up in a similar manner.
3. I therefore directed the Applicant to serve the Respondents for interpartes directions. The Applicant did serve the Respondents and the 1<sup>st</sup> Respondent did appear through counsel having already filed and served a replying affidavit opposing the application but the Applicant's counsel wishing to file a response to the replying affidavit, which leave was granted yesterday morning.



4. In support of the interim stay, Mr. Rabala counsel for the Applicant submitted that the Applicants had paid 70% of the outstanding sum hence a sale of the property as scheduled would prejudice the applicants. That parties would be litigating in vain if the court declined to grant an interim stay.
5. That economy had slowed down business and that it was in the interest of justice that stay is granted as the Respondents would in no way be prejudiced as they can be compensated in damages including the Auctioneer's costs.
6. Opposing the prayer for interim stay pending interpartes hearing, Mr. Mutua Molo counsel for the Respondents submitted that on 28<sup>th</sup> April 2022, this court considered the complaint by the Applicant herein on the alleged propriety of the Respondents selling the properties in issue to realise security and that in a ruling, the court found that the Bank was entitled to realise its securities. That this application seeks out to this court to revisit the said ruling which this court cannot as the matter is now resjudicata.
7. Secondly, that the proceedings of 24<sup>th</sup> May 2022 are before this court wherein a consent was recorded marking this matter as settled on conditions set out therein including the Bank reserving the right to realise the security in the event that the conditions in the consent were not met, hence the application herein is not premised on any foundation.
8. Having considered the above oral brief submissions and without delving into the merits of the application as filed, the issue is whether I should grant a temporary stay of sale of the named properties pending interpartes hearing of the application dated 16<sup>th</sup> November 2023.
9. As I determine that sole issue, my attention is drawn to this old matter and why such an application should come at such a time. It is not lost to this court from the court proceedings that the same properties were scheduled for sale in 2022 upon which the Applicant approached this court with a similar application dated 6<sup>th</sup> January 2022 seeing for a temporary injunction to restrain the Defendants herein from disposing of the named properties by advertisement, public auction or otherwise until the suit instituted was heard and determined.
10. That application was heard and determined interpartes, and dismissed with costs to the defendants vide a ruling delivered on 28<sup>th</sup> April 2022 by F. A. Ochieng J.
11. Another application was filed dated 18<sup>th</sup> May 2022 under Certificate of urgency. It was certified as urgent and set for interpartes hearing on 24<sup>th</sup> May 2022 at 9.00am. on the latter date, a consent was entered into between the parties herein as follows:-
  1. The public auction of the suit properties, scheduled for 26<sup>th</sup> May 2022 is stopped on the following conditions:
    - a. The Plaintiffs pay to the 1<sup>st</sup> Defendant Kshs.4,000,000 on or before 24<sup>th</sup> May 2022 in reduction of the secured liabilities.
    - b. The Plaintiffs pay to the 1<sup>st</sup> Defendant a further sum of Kshs.4,000,000 on or before 30<sup>th</sup> June 2022 in further reduction of the secured liabilities.
    - c. The Plaintiffs shall pay to the 1<sup>st</sup> Defendant a further sum of Kshs.2,000,000 on or before 31<sup>st</sup> July 2022 in further reduction of the secured liabilities.
    - d. The Plaintiffs will pay the auctioneers charges and fees agreed in the sum of Kshs.496,425 on or before 15<sup>th</sup> June 2022.



- e. The Plaintiffs will pay the Defendant's legal fees and costs in the sum of Kshs.1,068,000 on or before 15<sup>th</sup> June 2022.
2. This suit is marked as settled on the terms set out above.
3. In default to compliance by the Plaintiffs, the 1<sup>st</sup> Defendant shall be at liberty to re-advertise the suit properties for sale.”
12. The consent above was adopted as the order of the court.
13. Vide another application dated 16<sup>th</sup> January 2023, a similar application to injunct the Defendant from selling the said property which was advertised for sale was filed on 17<sup>th</sup> January 2023. Justice J. Kamau who was seized of the application declined to certify it as urgent and directed service upon the respondents and interpartes directions on 19<sup>th</sup> January 2023. On the latter date, that application was withdrawn with no orders as to costs and by consent of both parties who indicated that they were at advanced stage of negotiating the matter.
14. Again, a similar application is before me following a threatened auction of the same properties on 1<sup>st</sup> December 2023 as advertised by the 2<sup>nd</sup> Defendant auctioneers.
15. As earlier stated, a consent order was entered into on 24<sup>th</sup> May 2022 settling the matter on conditions set therein and one such condition was that the 1<sup>st</sup> Defendant was at liberty to re-advertise the suit properties for sale in the event of default of compliance.
16. No application for review of that consent order has been placed before this court for consideration on merit. Instead, the applicants have approached this court as if there was no consent settling the matter and seeking to re-start the suit afresh and on fresh terms. That is unacceptable.
17. On that ground alone, I find and hold that the Applicant are not entitled to a temporary stay of sale of the advertisement properties as this court's process is being subjected to abuse and the court is being turned into an appellate court in the same proceedings.
18. I decline to grant an interim stay of sale of the advertised properties.
19. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023**

**R. E. ABURILI**

**JUDGE**

