



**Malde Pleating Industries Limited v Bank of Baroda Limited & another (Civil Case E828 of 2021) [2022] KEHC 273 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E828 OF 2021  
WA OKWANY, J  
MARCH 31, 2022**

**BETWEEN**

**MALDE PLEATING INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**BANK OF BARODA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ZUWENA COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 27<sup>th</sup> September 2021 wherein the Plaintiff/Applicant seeks orders that: -
  1. Spent
  2. Spent
  3. That this honourable Court do grant stay of transfer of the Land Reference Number 1870/126/1 originally number 53/3 purported to emanate from the unlawful and/or unprocedural auction conducted on the 17<sup>th</sup> August 2021, payment of purchase price, transfer and/or any other dealings thereon by the defendants, their agents and or servants pending the hearing and determination of the suit herein.
  4. That the second respondent be compelled to produce the newspaper advertisement, valuation report, statements of accounts, statutory notices, letter of offer, charge and notification of sale of land reference number 1870/126/1(originally number 53/3)
  5. That the costs of this application be provided for.



2. The application is brought under Order 51 rule 1 of the *Civil Procedure Rules*, Order 40 rule 1, Article 159 of *the Constitution*. It is supported by the affidavit sworn by Sudhir Meghji Shah and is premised on the grounds that: -
1. That sometime between the year 2012 and 2015 the 1<sup>st</sup> defendant advanced various loan facilities to Malplast Industries for the purpose of running its daily operations and the said loan facilities were secured by creation of a charge registered over all that piece of land known as land reference number 1870/126/1 (originally number 53/3 (herein after referred to as the suit property) registered in the name of the plaintiff.
  2. That the said loan facilities were initially charged from Kenya shillings twenty-five million (506,000,000) as against the suit property and a further charge dated 6<sup>th</sup> November 2015 was created to secure an additional 80,000,000.
  3. That Malplast Industries Limited continued to service the loan facilities as agreed until the Company went under financial distress became unable to finance the loan facilities as demanded by the 1<sup>st</sup> defendant. Subsequently, Malplast Industries Limited was placed under administration by Victoria Commercial Bank in May 2022 causing the bank to become non performing.
  4. That Keysian auctioneers advertised the sale of the suit property by public auction in the Daily Nation on the 22<sup>nd</sup> June 2020. The auction was slated to take place on 14<sup>th</sup> July 2020 at 11.00am at their offices at CPF House 3<sup>rd</sup> floor.
  5. That on 14<sup>th</sup> July 2020 the auction was conducted but the bids were lower than the reserve price with Mr. Dilesh Bid offering the highest bid at 260 million.
  6. That in an attempt to prevent the plaintiff from redeeming the property or finding buyers, and in utter disregard of the Auctioneer Rules and the Act, the 1<sup>st</sup> and 2<sup>nd</sup> defendants in bad faith sold the property to the 3<sup>rd</sup> defendant on 17<sup>th</sup> August 2021 more than a year after the advertised date at a price lower than the previous bid of Mr. Dilesh.
  7. That there was no advertisement in the local daily nationwide newspapers of the sale of the suit property on 17<sup>th</sup> August 2021 and as such the auction was conducted in an unlawful and prohibitory manner.
  8. That the letter from the 1<sup>st</sup> defendants advocate dated 20<sup>th</sup> September 2021 indicated that Land Reference Number 1870/126/1 (originally number 53/3 (hereinafter referred to as the suit property) was duly sold pursuant to a public auction on 17<sup>th</sup> August 2021. The defendant's advocates also sought access into the plaintiff's premises for the Chief Government Valuer to conduct valuation for purposes of assessing stamp duty.
  9. That the auction was conducted in an un procedural and illegal way by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as there was no proper and current valuation report carried out by the 1<sup>st</sup> defendant within a span of 12 months from the intended date of auction evidencing the current market value of the suit property in clear contravention of the Auctioneer rules in blatant abuse of the law.
  10. That the 1<sup>st</sup> defendant could not rely on a valuation report that is more than twelve (12) months old. The valuation report was conducted in the year 2018 wherein the suit property was valued at Kshs 360,000,000 and the sale happened in 2021.



11. That despite the absence of a recognized and acknowledged valuation report of the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> defendants proceeded to sell the suit property at public auction failing to adhere to the Auctioneers rules and regulations following which letter dated 20<sup>th</sup> September 2021 expressly indicated that the suit property was sold to Zuwena Company Limited for Kshs 257,000,000.00 lower than estimated reserve price stated at Kshs 360,000,000 to the detriment of the owner of the suit property.
  12. That the alleged Kshs 257 million was not credited to the borrowers account on the said date of the Auction.
  13. That via a letter dated 24<sup>th</sup> September 2021, the plaintiff requested the 1<sup>st</sup> defendant to furnish it with all the statutory notices and other related documents but the 1<sup>st</sup> defendant refused and/or failed to make good of the request.
  14. That it is in the interest of justice that this application is allowed and orders herein granted.
  15. That no prejudice will be suffered by the defendant/respondent if the orders herein are granted whereas the applicant stands to be extremely prejudiced and suffer irreparable damage if the orders prayed for herein are not granted as it will be denied an opportunity to prosecute its claim
  16. That the right to property under Article 40 of *the Constitution* of Kenya risks being violated and the applicant stands to suffer irreparable harm that would not be adequately compensated by way of damages as the suit property registered in the Applicants has already been sold without a current and objective valuation carried out.
3. The respondent opposed the application through the replying affidavit the 1<sup>st</sup> defendant's Legal Manager, Mr. Martin Karanu, who states that the plaintiff is guilty of material non-disclosure of previous proceedings between itself and the 1<sup>st</sup> defendant over the same subject matter.
  4. He further avers that in the said previous court proceedings, parties entered into a consent to put off the auction on condition that the plaintiff settles the outstanding loan within 10 days failure of which the defendant would be at liberty to proceed to realize the security without issuing fresh notices. He avers that the plaintiff failed did not meet his part of the consent thus precipitating the auction in which the 2<sup>nd</sup> defendant was the successful bidder after which a memorandum of sale was executed. He contends that the suit property had been advertised for auction on three occasions and that the allegation that the auction conducted on 17<sup>th</sup> August 2021 was unprocedural is not true.
  5. He further avers that the valuation report was current as it was issued one month prior to the auction and that the price of Kshs 257,000,000 was more than the forced sale value of 75% of the market price of Kshs. 336,000,000. It is the 1<sup>st</sup> defendant's case that it is able to compensate the plaintiff should it succeed in the suit.
  6. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders to stay the transfer of suit land and payment of the purchase price pending the hearing and determination of the main suit.
  7. The gist of the applicant's case was that the sale of the suit property was replete with illegalities and that the 1<sup>st</sup> defendant was guilty of non-disclosure of material facts.



8. The 1<sup>st</sup> defendant, on the other hand, argued that the suit property was properly sold following the plaintiff's failure to repay the loan.
9. The principles governing the granting of orders of injunction were set out in the celebrated case of *Giella vs Cassman Brown* and restated in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

10. What constitutes to a prima facie case was discussed by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd* [2003] eKLR, as follows:-

“...In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”.

11. Applying the above principles to the present case, I note that it was not disputed that the plaintiff obtained a loan facility from the 1<sup>st</sup> defendant which loan it did not repay, as agreed. It was further not disputed that parties entered into a consent in previous proceedings wherein they agreed to put off the auction to enable the plaintiff settle the outstanding loan. The plaintiff did not meet its part of the bargain thus resulting in the 1<sup>st</sup> defendant's exercise of its statutory power of sale.
12. I am in the circumstances of this case unable to find that the plaintiff has made out a prima facie case against the defendants. The undisputed facts of this case indicate that the plaintiff has not approached this court with clean hands.



13. Furthermore, considering that the sale, by public auction has already taken place, this court finds that the applicant's equity of redemption was extinguished at the fall of the hammer and it cannot therefore seek a stay of the transfer of the suit property to the purchaser. I am guided by the decision in *Kamulu Academy Limited & Another Vs British American Insurance (K) Ltd & 2 Others* [2018] eKLR wherein it was held that: -

“The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...in the case of *Mbuthia vs Jimba Credit Finance Corporation and another* [1986-1989]1EA 340(CAK) considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second Respondent. The Court of Appeal held:- A sale destroys the equity of redemption in the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith...This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act. In the case of *Ze Yu Vs Yang Nova Industrial Produce Ltd* [2003] 1 EA 362 (CCK), Justice Nyamu (as he then was) held as follows: - “The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. *Mbuthia Vs Jimba Credit Corporation* [1986] LLR 3292 (CAK), *Grant Vs Kenya Commercial Finance Company Limited Civil Appeal Number 227 of 1995* and *Central Bank of Kenya Limited Vs Trust Bank and Others* [1996] LLR 472}} (CAK) applied.”

14. In *Joyce Wairimu Karanja vs James Mburu Ngure & 3 Others* [2018] eKLR the court held that: -

“Both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages.”

15. A similar position was adopted in *Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others* [2005] eKLR, where the court held that: -

“The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie proof that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages...What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages...The balance of convenience tilts in favor of the 5<sup>th</sup> Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5<sup>th</sup> Defendant away from his property just because the



plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction.”

16. Guided by the above-cited authorities, I find that the 2<sup>nd</sup> defendant acquired good title at the fall of the hammer during the auction whereupon the right of redemption was extinguished. I therefore find that the prayer to halt the transfer of the suit property is not tenable as the 2<sup>nd</sup> defendant has already acquired the title. I further find that, in the circumstances of this case, the only remedy available for the plaintiff should it succeed in the main case is award of damages.
17. Having found that the plaintiff has not established a prima facie case to warrant the exercise of this court’s discretion to grant orders of injunction and I find no reason to consider the two other conditions for granting an injunction.
18. In sum, I find that the application dated 27<sup>th</sup> September 2021 lacks merit and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Waigwa for Mrs Shalima for Applicant.

Mr. Githaiga for Respondent.

Court Assistant – Abdi

