



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 35 OF 2019

1. MOSES MWENJERA NDABA

2. MAUREEN NJERI MUHINYA.....PLAINTIFFS

-VERSUS-

KENYA WOMEN MICROFINANCE BANK LIMITED.....1ST DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANTS

RULING

1. The plaintiffs/applicants filed a Notice of Motion application dated 16th April, 2021 brought under the provisions of Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A and 5 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The applicants seeks the following orders –

(i) Spent;

(ii) That this Honourable court be pleased to review the order granted on 16th April, 2021;

(iii) Spent;

(iv) That this Honourable Court do issue an injunction restraining the respondent herein by itself, its servants and/or agents or otherwise howsoever from selling, advertising for sale, alienating, transferring or in any other manner whatsoever disposing of the plaintiffs' property known as Title No. KWALE/DIANI S.S/2376 & 2992 until the determination of this suit;

(v) That this Honourable Court be pleased to adopt the ruling and order issued on the 2nd day of November, 2021 by the Environment and Land Court in Mombasa as an order of this Honourable Court; and

(vi) That costs of this application be provided for.

2. The application is premised on the affidavit sworn on 16th April, 2021 by Sophia Saeta, the applicants' Advocate. In response thereto, the 1st defendant/1st respondent on 29th April, 2021 filed a replying affidavit sworn on 27th April, 2021 by Norman M. Ondego, the 1st respondent's Pwani Zone General Manager. In a rejoinder, the 2nd applicant, Maureen Njeri Muhinya filed a supplementary affidavit sworn on 17th May, 2021.

5. The application was canvassed by way of written submissions. The applicants' submissions were filed on 17th May, 2021 by the law firm of Okao & Co. Advocates, while the 1st respondent's submissions were filed on 19th May, 2021 by the law firm of Sherman Nyongesa & Mutubia.

6. Ms. Saeta, learned Counsel for the applicants submitted that the 1st respondent was in breach of the Court order issued on 13th December, 2017, which required it to comply with the provisions of Section 97(1) and (2) of the Land Act by obtaining the best price at the time of sale and by conducting a forced sale valuation.

7. It was the applicants' submission that there was no proof that a forced valuation of the charged property was conducted and if at all a

valuation was conducted, then the same was never served upon the applicants and/or their Advocate on record. Consequently, it was discernible that the 1st respondent intended to sell the suit property at a gross undervalue which was way below the market price without following due process. She relied on the case of **David Gitome Kuhiguka v Equity Bank Ltd** [2013] eKLR.

8. Ms Saeta also submitted that since the 1st respondent was in breach of the orders of this Court by having failed to conduct a forced sale valuation, they could not plead *res judicata*. She indicated that since the suit property risked being sold at a gross undervalue, the loss that would be incurred by the applicants could not be remedied by an award of damages. She contended that the suit property was also the applicants' matrimonial home, and auctioning the same shall render them homeless. She stated that as such, the balance of convenience tilted in their favour. She relied on the decisions in **Giella vs Cassman Brown & Company Limited** [1973] EA 358 and **Mrao Ltd vs First American Bank of Kenya & 2 others** (2003) KLR 125, on the principles of injunction and what constitutes a *prima facie* case, respectively.

9. Mr. Mutubia, learned Counsel for the respondents submitted that it was common ground that the applicants successfully filed a similar application seeking an injunction and that they were granted a conditional injunction, as the Court ordered that such injunction would subsist for as long as the 1st respondent had not carried out a forced valuation as required under Section 97(1) of the Land Act. He also submitted that the applicants were still in default of the repayment of the loan and that no evidence had been furnished to the Court to demonstrate repayment of the same.

10. He further submitted that a valuation report was served upon the applicants' Advocates hence the 2nd applicant was not in a position to dispute service of the valuation report since she is not an employee of her Advocates on record. He stated that the 1st applicant admitted having received a Notice of an Auction on 20th March, 2021, thus all that she was required to do was to request to be supplied with a copy of the Forced Sale Valuation if she needed one. Mr. Mutubia contended that the applicants had been supplied with a copy of the Valuation Report by 20th March, 2021 and that is why both the 1st applicant and her Advocates or her Advocate on record did not protest or write to the chargee or the chargee's Advocates but instead waited up to 13th April, 2021 when they filed the application of even dated to frustrate the auction set for 22nd April, 2021.

11. Mr. Mutubia contended that under Section 97(1) and (2) of the Land Act there is no requirement on the chargee to serve or supply a copy of the forced valuation report upon the chargor prior to the sale. He cited the case of **Showind Industries vs. Gurdian Bank Limited & Another** (2002) E.A 284, where the Court held that an injunction is granted sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straightforward. He prayed for the application to be dismissed with costs. He cited the case of **Jopa Villas LLC vs Private investment Corp & 2 others** [2014] eKLR, where the Court stressed on the importance of upholding the sanctity of lawful commercial transactions. He also cited the case of **Mrao Ltd vs First American Bank of Kenya & 2 others** (supra), where the debtor had admitted having defaulted in payment of a loan just like the applicants in this case.

ANALYSIS AND DETERMINATION.

11. This Court has considered the application, the supporting affidavit, replying affidavits, supplementary affidavit and rival submissions including the various cases cited. The issue that arises for determination is whether the application dated 16th April, 2021 is merited.

12. In the supporting affidavit sworn by Maureen Njeri Muhinya, she averred that on 13th December, 2017, they were granted an injunction restraining the defendants from selling, alienating and/or in any manner, whatsoever disposing of her property until the suit was determined. Further, that the Court noted that the injunction would subsist as long as the 1st respondent had not carried out a forced sale valuation as required under Section 97(1) & (2) of the Land Act, 2012 but the respondents had not complied with the said Court orders.

13. She averred that the auction of the suit property had been set for the 22nd April, 2021, as contained in the advertisement and courtesy letter dated 10th March, 2021. She also averred that the matter came up on 9th May, 2021 to confirm compliance of pre-trial directions given on 9th March, 2021, and that their Counsel had complied and was ready and willing to take a hearing date. She deposed that irreparable harm and prejudice would be suffered if the auction was not stopped.

14. In the replying affidavit by the respondents in opposition to the application herein, its deponent Norman M. Ondego, averred that a similar application dated 27th June, 2017 was heard and determined. He further averred that the applicants had failed to service their loan as required by the loan agreement forcing the 1st respondent to invoke its statutory and contractual right of sale to recover the outstanding loan.

15. He deposed that pursuant to the orders issued on 22nd November, 2017, the respondents caused a copy of Valuation Report dated 13th September, 2019 to be served upon the applicants' Advocates vide a letter dated 9th October, 2019. He further deposed that since the 24th October, 2019, when the applicants' Advocates were supplied with a copy of the Valuation Report, no attempt had been made towards repayment of the loan, and that the said Report had not been challenged in any way.

16. The deponent also deposed that due to the Covid-19 pandemic, they were unable to offer the suit properties for sale in 2020, until 10th March, 2021 when the applicants were issued with a notification of sale. He stated that the present application is merely filed to frustrate the 1st respondent from recovering the outstanding loan since all the issues raised herein are *res judicata* and were fully canvassed and settled by the Court vide a ruling dated 22nd November, 2017.

17. In the supplementary affidavit sworn on 17th of My, 2021, the applicants reiterated the contents of the affidavit in support of the application and averred that for a chargee to exercise its statutory power of sale, it is required to conduct a valuation, and the report should be availed to the chargor as provided under Section 97 of the Land Act. They averred that no such service was effected upon the them and/or their Advocates. They stated that since no Valuation Report was served on them, their Advocate proceeded to fix the suit for pre-trial and even during the pre-trial conference, the issue of the valuation was never raised and they were shocked to receive an auction notice on 20th

March, 2021.

18. The deponent averred that she had intentions of repaying the loan but as a result of financial constrains aggravated by the Covid-19 pandemic, she was unable to make any more payments.

19. The law governing the grant of interlocutory injunctions is set out under Order

40 Rule (1)(a) and (b) of the Civil Procedure Rules 2010, which provides as follows-

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

20. The conditions for grant of an injunction were settled in the case of **Giella v Cassman Brown & Company Limited** (1973) EA 358, where the Court set out the conditions that a party must satisfy for the Court to grant an interlocutory injunction as follows-

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

21. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st respondent does not deny that it has instructed the 2nd respondent to auction the suit property but contends that it has a legal right to exercise a statutory power of sale. The applicants, on the other hand have not denied that they are indebted to the 1st respondent. They are only challenging the 1st respondent's rights, while contending that a forced valuation was not carried out by the 1st respondent before instructing the 2nd respondent to carry out an auction of the suit properties. Further, if at all the forced valuation was conducted, the Valuation Report was never served upon the applicants and/or their Advocate.

22. Having regard to the evidence presented through the parties' respective affidavits, this Court will now venture into considering if the instant application meets the threshold set for the granting of orders of interlocutory injunction.

Prima Facie case with a probability of success.

23. In **Mrao Ltd v First American Bank of Kenya & 2 others** (supra) the Court of Appeal defined a *prima facie* case as follows-

"A Prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".

24. Taking into account the settled principles of granting orders of injunction, and the facts surrounding this case, this Court notes that Section 97(1) and (2) of the Land Act embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than *"to obtain the best price reasonably obtainable at the time of sale"*. Apart from this, there is no other duty imposed. Section 97(2) of the said Act requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee to discharge the duty of care required by Section 97 of the Land Act. The said provisions state as follows-

"(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."

25. Gikonyo, J, in **Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 others** [2018] eKLR held that-

"...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under Section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers."

26. On the plain reading of Section 97(1) and (2) of the Land Act, there is no obligation placed on the chargee to furnish a copy of Forced Sale Valuation Report to the chargor. I however take a view that a chargor who has learnt of an intended sale (whether by Public Auction or Private Treaty) is entitled to inquire from the chargee whether it has caused a Forced Sale Valuation to be undertaken, and there would then

arise an obligation on the chargee to, without delay, answer to the inquiry and if a valuation has been undertaken, to timeously furnish a copy of the Valuation Report to the chargor. The circumstances herein are that no such inquiry was made by the chargors who argue that it is the duty of the chargee to furnish the chargor with a copy of a Forced Sale Valuation Report. As such, it is my finding that there is no duty placed on the chargee to provide a copy of a Forced Sale Valuation Report to the chargor under Section 97(1) and (2) of the Land Act. Consequently, there has been no breach of the provisions of Section 97 of the Land Act in this matter. See **Caroline Wairimu Wanjihia & another v I & M Bank Limited & another** [2017] eKLR.

27. On the issue of the regularity or otherwise of the Forced Sale Valuation Report by the 1st respondent, I note that contrary to the applicants' assertions, the 1st respondent exhibited an annexure marked as NMO-2b to its replying affidavit to demonstrate that it carried out a valuation of the suit property. The said report is dated 13th September, 2019. A Notification of Sale was however issued on 10th March, 2021 and the explanation given for the delay in the issuance of the said notice was that it was due to challenges arising out of the Covid -19 pandemic. Although the Land Act is silent as to what the age of the Valuation Report should be at the time of a public auction, this Court is of the view that just like in a sale by a private contract under Section 98(4) of the Land Act, the Valuation Report should at the time of sale not be more than six months old. There is however a divergent opinion by Courts that a valuation that is not more than a year old is good enough (see **David Gitome Kuhiguka Vs. Equity Bank Ltd** [2013] eKLR).

28. Courts have also held that undervaluation *per se* cannot form a ground for the issuance of orders of injunction since breach by a chargee in selling the property at an undervalue can be remedied through a claim for damages. See **HCCC No 318 of 2009 John Mwenja Ngumba & Another vs National Industrial Credit (NIC) Limited & another** [2014] eKLR, where it was held that the issue of whether or not the property therein had been sold at the proper price was to be determined at full trial.

29. In their affidavit, the applicants claim that the property in issue is matrimonial property, this Court notes that both applicants signed the facility letter offering the property LR No. KWALE/DIANI/S.S/2376 registered in their joint names as security for the loan advanced to them. In so doing, the said property became a commodity for sale by the bank in the event of them defaulting on repayment of the loan.

30. Since the Valuation Report relied on by the 1st respondent is older than one (1) year, the said respondent is hereby ordered to undertake a current valuation of the property before advertising it for sale. The applicants will also be at liberty to undertake valuation of their property.

31. For the reasons given in this ruling, it is my finding that the applicants have not satisfied the conditions set down in **Giella v Cassman Brown** (supra) for the grant of an order for injunction. The applicants' Notice of Motion dated 16th April, 2021 is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Saeta for the plaintiffs/applicants

No appearance for the defendants

Mr. Oliver Musundi – Court Assistant.