



REPUBLIC OF KENYA



**Sheth v Diamond Trust Bank Ltd & 2 others (Commercial Suit E656 of 2021)
[2022] KEHC 12932 (KLR) (Commercial and Tax) (26 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E656 OF 2021
A MABEYA, J
AUGUST 26, 2022**

BETWEEN

VIPUL JASVANTRAI SHETH PLAINTIFF

AND

DIAMOND TRUST BANK LTD 1ST DEFENDANT

DALALI TRADERS 2ND DEFENDANT

HEMKUR HOLDINGS LIMITED 3RD DEFENDANT

RULING

1. Before court is an application dated August 3, 2021. It was brought under article 40 of the Constitution, sections 1A, 3A, 3B of the Civil Procedure Act, section 90 of the Land Act, section 68 of the Land Registration Act and orders 40 rule 1 and 51 rule 1 of the Civil Procedure Rules.
2. It sought orders for status quo regarding Maisonette Number 2 on LR No 187/11/314 IR No 86119, situate at Westlands, Nairobi (“the suit property”). That its application dated June 28, 2021 had been overtaken by events and for an injunction against the defendants from interfering with or selling the suit property pending the hearing of the suit.
3. The application was supported by the affidavit of Vipul Jasvantrai Sheth sworn on August 3, 2021. The grounds were that the applicant was the registered owner of the suit property. He obtained a total loan of Kshs 43,000,000/= from the 1st defendant. The same was secured by a charge on the suit property.
4. On June 1, 2020, the 1st and 2nd defendant advertised the suit property for sale by public auction. That the intended sale had been stopped vide a court order on October 6, 2021 in MCC/E5655/2020 - Vipul Jasvantrai Sheth v Diamond Trust Bank & Dalali Traders.



5. That on May 18, 2021, the said court delivered a ruling dismissing that suit for want of pecuniary jurisdiction. He had sought the restructuring of the loan and negotiations were in place.
6. That the suit property was sold to the 3rd respondent by public auction on April 7, 2021, and the applicant sought to challenge the process leading to the auction. That the sale was premature and malicious and intended to deprive him of the suit property.
7. That he would suffer irreparable loss as the suit property was prime and if lost compensation by way of damages would not be sufficient as no other properties of similar stature are available in the market for sale.
8. The 1st respondent opposed the application vide the affidavit of Tarminder Umesh sworn on August 23, 2021. It was admitted that the applicant had filed a suit in the lower court and obtained interim orders, but that the suit was later struck out for want of jurisdiction.
9. That the applicant took the loan but failed to service the same as a result of which the 1st defendant was prompted to exercise its statutory power of sale. It had duly served him with the statutory notices under sections 90 and 96 of the Land Act, and the 45 days redemption notice under the Auctioneers Act.
10. That the suit property was sold on April 7, 2021 to the highest bidder for Kshs 42,000,000/= and the purchaser duly paid the deposit. That the 1st defendant had engaged in negotiations between November and December 2020 but the applicant failed to respond and there were no ongoing negotiations as alleged.
11. The 3rd defendant opposed the application via the replying affidavit of Kirit Gudka sworn on September 13, 2021. He averred that the 3rd defendant was now the registered owner of the suit property having duly purchased it at an auction.
12. The applicant's submissions were dated August 27, 2021. The 1st and 2nd defendant also filed submissions dated September 21, 2021 whereas the 3rd defendant were dated September 20, 2021.
13. This court has considered the affidavits and e and written submissions on record.
14. This is an injunction application. The principles applicable are those set out in Giella v Cassman Brown & Company Limited (1973) EA 358. The applicant must establish a *prima facie* case with a probability of success, he must show that damages would not be adequate compensation and will therefore suffer irreparable loss. If the court is in doubt, then it will determine the matter on a balance of convenience.
15. The applicant seeks to restrain the sale and transfer of the suit property by way of public auction. However, there is overwhelming evidence that the event that the applicant seeks to restrain has already occurred.
16. There is evidence that the applicant was served with all the requisite notices by the 1st defendant. There is also evidence that the property was advertised for sale by public auction on March 23, 2021. Further, the property was sold to the 3rd defendant on April 7, 2021 for Kshs 42,000,000/=. There is evidence of the payment made by the 3rd defendant of both the deposit and the purchase price.
17. Finally, there is evidence that the transfer by the chargee was registered on August 4, 2021 and a title issued to the 3rd defendant in respect thereof.
18. There was no allegation or any evidence to suggest that the sale was illegal. The sale was in the exercise of the 1st defendant's statutory power of sale. There is also evidence that the 1st defendant attempted negotiations for settlement but the applicant failed to respond.



19. The applicant submitted that the property was undervalued. This was never pleaded in the application, and even then, there was no alternative valuation that was produced to challenge that of the 1st defendant.

20. In *Cyrus Nyaga Kabute v Housing Finance Co of Kenya Ltd & anor* [2009] eKLR, the Court of Appeal held: -

“However, in the special circumstances of this case, as both parties to the application have disclosed to the court, that a public auction which was intended to be stopped by an order of injunction has already taken place, the court is of the view that the application has been overtaken by events, and the court cannot restrain a sale that has already taken place. In addition, it is a fundamental principle of law that a court of law never acts in vain. We decline to grant the orders sought.”

21. This court reiterates the forgoing and holds that no *prima facie* case with any probability of success has been established. The sale by public auction was already conducted and the property registered in the name of the 3rd defendant who was a *bona fide* purchaser. The application has been overtaken by events. The court cannot restrain a sale that has already taken place.

22. The upshot is that the application is without merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

A MABEYA, FCI Arb

JUDGE

