



**Desnol Investment Limited v Family Bank Limited (Commercial Case E001 of 2022) [2022] KEHC 15805 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E001 OF 2022  
JN KAMAU, J  
NOVEMBER 30, 2022**

**BETWEEN**

**DESNOL INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

1. In its Notice of Motion dated and filed on March 4, 2022, the plaintiff herein sought for temporary orders of injunction against the defendant, its agents, employees or persons deriving authority from them, from anyway advertising for sale, selling by public auction, transferring and/or in any way interfering with its property known as land parcel number Kisumu/Ojola/3927 & 4116 (hereinafter referred to as the subject properties) be granted pending the hearing and determination of this suit.
2. Joan P Natome, a director of the plaintiff swore an affidavit in support of the said application on March 3, 2022. The plaintiff averred that it was the registered owner of the subject properties. It pointed out that a charge and five (5) further charges were registered against the subject properties to secure several amounts amounting to kshs 97,939,000/= that were advanced to it at different times by the defendant herein.
3. It was its contention that the defendant intended to sell the subject properties at kshs 75,000,000/= yet prior to the advancement of the loan, the subject properties had been valued at kshs 210,000,000/=. It added that through its auctioneer, the defendant had grossly and maliciously undervalued the subject properties that had been advertised to be sold. It asserted that it had instructed another valuer to value the subject properties.
4. It stated that an attempt to sell the subject properties at a value below kshs 210,000,000/= would not only be highly prejudicial to it but that it would be also a travesty of the law as serious loss and damage would be occasioned. It urged the court to stop the intended threats to auction the subject properties



for sale on March 4, 2022 or any other subsequent date thereof until and unless the issues complained herein were resolved.

5. In opposition to the said application, on March 10, 2022, Sylvia Wambani, a legal officer at Family Bank Limited swore a Replying Affidavit on behalf of the defendant herein. The same was filed on March 18<sup>th</sup> March 2022.
6. The respondent averred that the plaintiff was an overzealous litigant who kept on filing frivolous suits. It explained that the plaintiff by itself and directors filed two (2) suits before the High Court being Civil Suit no 3 of 2019 Desno Investment Limited vs Family Bank Limited and Commercial Suit no 3 of 2019 Joan P Natome & Another vs Family Bank Limited. It added that the aforesaid suits were consolidated and Commercial Suit no 3 of 2019 became the lead file.
7. It asserted that parties agreed on the settling of the arrears and that it was to proceed and sell the subject properties in the event of a default. It added that the default persisted forcing it to exercise its statutory power of sale and it filed an application under section 100 of the Land Act seeking to be allowed to purchase the subject properties, which was allowed vide a ruling of September 24, 2021. It was therefore its contention that this suit was filed further to the initial proceedings over the same subject matter and was therefore an abuse of court.
8. It further stated that its board approved the purchase of the security charges to secure facilities extended to the plaintiff in its meeting of December 15, 2021 and that the property (sic) was advertised for sale in the Daily Nation Newspaper issue of February 21, 2022 for auction on March 4, 2022.
9. It contended that the auction proceeded as scheduled with the highest bidder being its representative who entered a bid of kshs 76,500,000/= which position was communicated to it by the auctioneer in its letter dated March 7, 2022. It further stated that the Conditions of Sale and Memorandum of Sale were prepared and executed by the parties as confirmation of the sale of the charged property to it. It averred that the plaintiff's present application had been overtaken by events by virtue of the auction proceeding being conducted and concluded.
10. It was its case that the issue of undervaluation raised by the plaintiff was subject of litigation before the court in its application under section 100 of the Land Act whereby the court in its ruling held that the plaintiff's remedy lay in seeking damages if the subject properties were sold at an under value and that alleging undervaluation per se could not form a ground for the chargor to stand in the way of a chargee whose power of sale had arisen.
11. It further contended that prior to conducting the sale, it conducted a valuation of the charged property through transcounty valuers Limited and the reasons for the figures reached were enumerated in the valuation report. It added that it was not enough to allege undervaluation by producing a counter valuation and argued that there were a plethora of authorities offering direction on that.
12. It was emphatic even after the sale of property it was yet to recover the total sums due and the facility remained in arrears and continued to accrue interest at default rates. It added that it did not have money of its own and the money it offers as facilities belong to its depositors and the default on the part of the plaintiff stood to affect both the bank and its depositors. It urged the court to uphold the sanctity of lawful and proper commercial transactions in form and substance. It urged the court to dismiss the plaintiff's application with costs.
13. The plaintiff did not file any written submissions. The defendant's written submissions were dated May 19, 2022 and filed on May 23, 2022. This ruling is therefore based on the said written submissions and the plaintiff's affidavit.



## Legal analysis

14. The defendant submitted that the sale by public auction extinguished the equity of redemption at the fall of the hammer and existence of a valid sale agreement irrespective of whether or not the property had been transferred to a purchaser as was held in the cases of *Mbuthia vs Jimba Credit Finance Corporation and Another* [1988] eKLR and the case of *Ze Yu vs Nova Industrial Product Ltd* [2003] 1 EA (CCK) respectively. In other words, the mortgagor's right of redemption was lost as soon as the mortgagee either sold the mortgaged property by public auction or entered into a binding contract in respect of that mortgaged property.
15. It was emphatic that the Conditions of Sale and the Memorandum of Sale constituted valid and binding agreements over the subject properties and the agreement had not been vitiated or set aside and thus the equity of redemption was extinguished at the fall of the hammer as a result of which the Plaintiff lost any claim touching on the subject properties.
16. It further placed reliance on the cases of *Zum Zum Investment Limited vs Habib Bank Limited* [2014]eKLR and *Palmy Company Limited vs Consolidated Bank of Kenya* [2014]eKLR where the gist was that it was not sufficient for a plaintiff to merely claim that the intended selling price was not the best price obtainable at the time by producing a counter-valuation report but he or she was required to show that the defendant's valuer was not qualified or competent to carry out the valuation or that the valuation was carried out in consideration of irrelevant factors or was done way before the time of the intended sale or that the undervaluation was an infringement of section 97(2) of the *Land Act* calling for an explanation or rebuttal from the defendant.
17. It submitted that the validity of the valuation report dated October 18, 2021 by the plaintiff was not in question as it complied with rule 11 (1)(b)(x) of the Auctioneers Rules and all the tenets of section 97 of the *Land Act* as far as the valuation of the subject properties was concerned.
18. It further submitted that its valuer's competence had not been challenged, factors surrounding the preparation of the report had not been questioned and the timing of conducting the valuation had not been queried. It reiterated that this court had addressed itself on the issue of undervaluation in Commercial Case No 3 of 2019 Desnol Investments Limited vs Family Bank Limited.
19. It cited the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR where the court held that the three (3) conditions for the grant of injunction orders were to be applied as separate, distinct and logical hurdles which an applicant was expected to surmount sequentially in that if a *prima facie* case was not established, then irreparable injury and balance of convenience required no consideration.
20. It argued that the plaintiff did not demonstrate that it had a *prima facie* case with a probability of success or provide any evidence of the irreparable harm it was likely to suffer which was incapable of being compensated by way of damages in the event the order it had sought was not granted or show that the balance of convenience tilted in its favour for the reason that the sale and its attendant participation was commissioned and authorised by the court.
21. It argued that the plaintiff had failed to demonstrate that it had met the necessary conditions for the grant of the orders it had sought. It was emphatic that the injustice it would suffer outweighed the injustice that the plaintiff would suffered and thus urged this court not to allow the present application.
22. It was not in dispute that the defendant's statutory power of sale had crystallised following the plaintiff's failure to service the loan. It could therefore proceed to realise its security in any of the following ways provided for in section 98 of the *Land Act* No 6 of 2012. The same states that:-



1. If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be—
  - a. of the whole part of the charged land;
  - b. subject to or free of any charge or other encumbrance or charge having priority to the chargee’s charge;
  - c. by way of subdivision or otherwise;
  - d. by private contract at market value;
  - e. public auction with reserve price;
  - f. for a purchase price payable in one sum or by installments; or
  - g. subject to any other conditions that the chargee shall think fit, having due regard to the duty imposed by section 97(1).
23. Section 97(1) of the *Land Act* further provides that:-
  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”.
24. Going further, section 100(1)(2) and (3) of the *Land Act* stipulates that:-
  2. Other than in the circumstances provided to in subsection (3), a charge exercising the power of sale may, with leave of the court, purchase the property.
  3. If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at the public auction so long as the price bid for the charged land by the charge is the greater of-
    - a. The highest price bid for that land at the auction; and
    - b. An amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”
25. The defendant adduced in evidence a letter dated March 7, 2022 that confirmed the sale of the subject properties by public auction on March 4, 2022. It also annexed a copy of a receipt of kshs 7,650,000/ = evidencing deposit of ten (10%) per cent of the purchase price, Conditions of Sale which set out the terms of sale and the Memorandum of Sale which confirmed receipt of the said deposit and sale at the fall of the hammer.
26. As was correctly submitted by the defendant herein, the plaintiff herein filed the suit herein on the day of the auction, on March 4, 2022. As there was no explanation why the present application had not been filed in good time, this court declined to certify the matter and/or grant any substantive order *ex parte* as the status of the subject properties was unknown.
27. In the circumstances of the case, any order restraining the Defendant from exercising its statutory power of sale was not only tantamount to re-writing the contract between the parties which was not only illegal but it also had no legal basis. Indeed, this court noted that the Plaintiff had filed several suits seeking orders to stop the sale of the subject properties. This amounted to abuse of the court process.



28. In view of the evidence of the payment of deposit of ten (10%) of the purchase price at the public auction of March 4, 2022, this court found and held that the Plaintiff's right of redemption was extinguished at the fall of the hammer.
29. Sale of securities by way of public auction is one of the authorised modes in which a chargee may realise its securities under section 98(1)(e) of the Land Act. An assertion that there was undervaluation of a charged property was not in itself a ground for a chargor to stand in the way of a chargee whose power of sale has arisen as was held in the case of Palmy Company Limited vs Consolidated Bank of Kenya (supra).
30. However, it is important to point out that auctioneers and chargees cannot act with impunity. They have no free hand to sell charged properties as whatever amounts they fancy. If they do, they do so at their own peril. Indeed, chargees also have protection of the law that auctioneers and chargees must adhere to.
31. Consequently, in the event the plaintiff herein felt that the subject properties were sold at an undervalue, its remedy the defendant lay with suing for damages as provided in section 97(3) of the Land Act which states that:-
3. If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market.
    - a. there shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection (1); and
    - b. the charger whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1).
32. This court came to the firm conclusion that the plaintiff herein had not demonstrated that it had met the threshold of being granted an order for interlocutory judgment as had been set out in the case of *Giella vs Cassman Brown & Co Ltd* (1973) E A 360 which is that an applicant must demonstrate a *prima facie* case with a probability of success, he must demonstrate that unless the interlocutory injunction is granted, he will suffer irreparable injury, which would not adequately be compensated by an award of damages and that if the court was in doubt, then it ought to grant an injunction on a balance of convenience.

### **Disposition**

33. For the foregoing reasons, the upshot of this court's decision was that the plaintiffs' Notice of Motion application dated and filed on March 4, 2022 was not merited and the same be and is hereby dismissed with costs to the defendant herein.
34. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF NOVEMBER 2022**

**J KAMAU**

**JUDGE**

