



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. E002 OF 2021

LEVI HOUSE CONSTRUCTION & ENGINEERING LTD.....APPLICANT

VERSUS

ABC BANK LIMITED.....1ST RESPONDENT

MUGA AUCTIONEERS & GENERAL MERCHANTS.....2ND RESPONDENT

RULING

1. Before the Court is the application dated 3rd March 2021 by the Plaintiff/Applicant whose property is the subject of a statutory power of sale exercise by the 1st Respondent following default in repayment of a loan. The Applicant seeks the following prayers: -

i) Spent

ii) *THAT pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st and 2nd Respondents, their servants, their agents or assigns or any person acting at their behest from continuing with the auction of the property number KABETE/KIBICHIKU/3045 located within Kiambu County which is scheduled for auction on the 5th day of March 2021.*

iii) *THAT pending the hearing and determination of this suit, a mandatory order of injunction do issue compelling the 2nd Respondent to withdraw the statutory demand notice and notice of public auction so far issued relating to the suit property.*

iv) *THAT the costs of this application be provided for.*

Applicants' Case

2. The application is supported by the grounds on the face of it and by the supporting affidavit sworn by Lawi Gitonga Imathiu, the Director of the Applicant. The Applicant's case is that in the year 2015, it took out a loan facility from ABC Bank Meru Branch for a sum of Ksh 35,000,000/= and offered its property L.R KABETE/KIBISHIKO/3045 as security for the loan; That on 15th February 2021, the 1st Respondent issued a 14 days' notice to the Applicant indicating that its property would be auctioned on the 5th day of March 2021; That a valuation was conducted in the year 2018 wherein the property was valued at Ksh 60,000,000/= and in the year 2019, the 1st Respondent requested for a valuation which evidenced that the current market value of the property was Ksh 48,000,000/=; That the current valuation conduct by valuers appointed by the Plaintiff valued the property at Ksh 70,000,000/=; That if the said auction is allowed to proceed, the Applicants shall be greatly prejudiced because the same will have proceeded without carrying out a proper and objective valuation.; That the Applicants have proposed that the land be valued and a subsequent subdivision be done to enable the 1st Respondents sell only a portion of the land that is equal to the amount owed to them but the 1st Respondent has insisted on selling the land at a throw away price.

Respondents' Case

3. The 1st and 2nd Respondents opposed the application vide the replying affidavit sworn by Faith Nteere, the 1st Respondent's Legal Manager on 12th March 2021. Therein, it is averred that vide a letter dated 28th November 2014, the Applicant applied for a facility of Ksh 26,000,000/= for the purchase of property namely Title Number KABETE/KIBICHIKO/3045; That following the said application, the 1st Respondent issued a letter of offer dated 16th February 2015 in favour of the Applicant, which letter of offer was duly accepted and a Memorandum of Acceptance was executed on 20th February 2015; That the said letter was explicit that the facility was payable within 108 months by way of monthly installments of Ksh 455,657/=; That a charge dated 9th March 2015 was created over the suit property in favour of the 1st Respondent; That prior to the lending the 1st Respondent had commissioned pre-lending valuation which marked the suit property as having an open market value of Ksh 40,000,000/= and a forced sale value of Ksh 30,000,000/= and that the property was a 2 acre vacant

parcel; That the Applicant defaulted in servicing the facility with no efforts to regularize the continuing defaults to date; That following default of more than 30 days, the 1st Respondent invoked its statutory power of sale and issued a 3 months statutory notice through its Advocates; That following non-response, the 1st Respondent issued a 40 days' notice of intention to sell which was again ignored and following which the 1st Respondent engaged the services of the 2nd Respondent to auction the suit property; That the 2nd Respondent issued a 45 days redemption notice and notification for sale upon the Applicant through its Managing Director on 23rd April 2019; That since the issuance of all the aforesaid notices, the suit property has never been redeemed and neither has the Applicant made any viable offers as regards the redemption; That as stated by the Applicant's Director, the 2nd Respondent issued a courtesy notice as it sought to effect the sanding instructions of the 1st Respondent to carry out a public auction of the suit property; That the 2nd Respondent advertised for the public auction through the Daily Nation newspaper of 16th February 2021; That at all instances, the 1st Respondent observed attendant legal requirements and prior to the intended auction, it commissioned a pre-auction valuation of the suit property which marked the same to have an open market value of Ksh 40,000,000/= and a forced sale value of Ksh 30,525,000/= and that the suit land had been abandoned with no construction going on; That there is no doubt about the qualifications and/or competence of the valuers engaged by the 1st Respondent and that in all reports, the valuers set out the criteria for assessment for the value; That the Applicant's valuation is designed to defeat the exercise of statutory power of sale as there is a great variance in comparison to other valuation reports; That all valuers engaged by the 1st Respondents are usually recruited through a rigorous process to ascertain their competence, including the holding of current practicing certificates and indemnity covers; That the Respondents have complied with all legal requirements; That the outstanding amount is Ksh 31,099,523.05/= which continues to accrue interest; That the reliefs sought by the Applicant are untenable as the suit land is charged as a whole and parties are bound by their contracts and Court cannot rewrite contracts between parties; That the Application is moot and fatally defective since the supporting affidavit is dated at Chuka and commissioned at Nairobi contrary to Section 5 of the Oaths and Statutory Declaration Act, Cap 15 Laws of Kenya and that the annexures are not marked as is required under Rule 9 of the Oaths and Statutory Declaration Rules making the instant application moot; That the Applicant is undeserving of the orders sought since it has admitted the default and has not even made any proposal to either remedy the default and/or redeem the suit property with the application being filed a day before the auction was designed to defeat the auction.

Submissions by parties

Applicant's Submissions

4. The Applicant made oral submissions on 15th April 2021 urging on the need for an independent valuation of the property. It also filed written submissions dated 19th April 2021.
5. Relying on the case of **Alice Awino Okello v Trust Bank Limited & Another LLR No. 625 (CCK)** which was cited in the other case of **Kisimani Holdings Limited & Another v Fidelity Bank HCCC No. 744 of 2012 (2013) eKLR**, the Applicant submits that the balance of convenience is in its favour as the sale of its property is a serious matter that deprives one of a right recognized in law and as such, should not be allowed to proceed on doubtful circumstances.
6. It submits that unless an independent valuation is done before the sale of the charged property, it stands to suffer as it has already made partial payments to the loan facility and his payments were disrupted by the COVID 19 pandemic which affected not only his business but others as well. He submits that he has established a *prima facie* case as is required going by the case of **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**.
7. It submits that the valuation conducted by the bank in 2020 showed that the property has not appreciated over time but there is evidence showing that the bank is insincere with its valuations so conducted. It submits that going by its valuation report, there is a great variation with the report of the Bank and under these circumstances, the sale would greatly prejudice the Plaintiff occasioning it irreparable harm. It submits that the right to property under Article 40 of the Constitution of Kenya risks being violated and that it seeks to suffer irreparable harm that would not be adequately compensated by way of damages as the developments thereon have not been captured in the Bank's valuation report. Relying on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR**, it submits that in the interest of justice, the Court should allow its application and give it an opportunity to be heard on merit. Relying on the case of **Sussex Justices ex parte McCarthy (1924) 1KB 256 (1923) All ER 233** the Applicants submits that justice must not only be done but be seen to be done and he relies on Section 97 of the Lands Act to reiterate the importance of having an independent valuation.

Respondents' Submissions

8. The Respondents filed further submissions dated 21st April 2021. They submit that the Applicant strayed away from its prayers in the application and is now seeking for an independent valuation, a prayer that does not exist in the pleadings and yet parties are bound by their pleadings as held in the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR** where the other case of **Adetoum Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002** was cited.
9. They also submit that the Applicant has to prove to the Court, satisfactorily as to why the 1st Respondent's valuation report should not be used in obtaining the forced sale value of the suit land at the auction and that it is not enough that the Applicant alleges that there exists a discrepancy in the two valuation reports as held in the case of **Zum Zum Investment Limited v Habib Bank Limited (2014) eKLR**. They submit that the valuation was carried out within a span of 12 months from the intended date of auction by a competent and qualified valuer and the relief sought by the Applicant should therefore not be allowed. They further submit that in case the Applicant feels aggrieved as to the value of the property, it has a remedy which lies in filing a suit for recovery of damages pursuant to Section 99 (4) of the Land Act, 2012.

Issues for determination

10. From a reading of the Application before court and the various affidavits filed, the following two issues present themselves for determination.

i) Whether or not to grant an order for an independent valuation to be done over the suit property L.R No. KABETE/KIBICHIKU/3045 located within Kiambu County which is scheduled for auction on the 5th day of March 2021.

Determination

11. To begin with, this Court notes with concern that the Applicant, in the heading of various pleadings and documents keeps on oscillation between Lawi Gitonga Imathiu and Levi Construction & Engineering Co. Ltd. This is a serious mistake which goes to the root of Order 1 of the Civil Procedure Rules on parties to a suit. This will however not stop the Court from determining the matter on merits and in any event, the Respondents have not raised this in their pleadings.

12. The Applicant was offered a loan facility for the sum of Ksh 26,000,000/= by the 1st Respondent in the year 2015. The said facility was secured by a legal charge over the suit property **L.R No. KABETE/KIBICHIKU/3045** registered in favour of the 1st Respondent in March 2015. It is not in dispute that the Applicant defaulted. The Applicant does not dispute the 1st Respondent's authority to exercise its statutory power of sale. What is in dispute is the valuation report which the Respondents are relying on to conduct the sale. The Applicant urges that the Respondents have undervalued the property and it is necessary for an independent valuation to be done to reconcile the varying figures in the parties' respective valuation reports.

13. The current valuation report by the Applicant indicates that the value of the property was Ksh 70,000,000/= as at March 2021. On the other hand, the valuation by the Respondent indicates that the open market value of the property is Ksh 40,000,000/= and the forced sale value is Ksh 30,525,000/=. This is a difference of about Ksh 40,000,000/=. Should the Respondents sell the property at the forced sale value. The Applicant asks this Court to order that an independent valuation be done, failure to which, it risks suffering irreparable harm which may not be compensated by way of damages.

14. The Respondent has argued that first, the prayer for an independent valuation does not feature in the Applicant's application and second, even if it had featured, the Applicant has not satisfactorily shown why the Court should order for an independent valuation. It is true that the prayer for an independent valuation does not feature in the application before the Court and parties are bound by their pleadings. The prayers in the application before the Court seek a temporary injunction and mandatory injunction with respect to the intended sale. It behooved the Applicant to specifically pray for the same. However, the Court observes that in the contents of the application, to wit the grounds in support of the same, the Applicant has raised the issue of the valuation. Indeed, the entire application is pegged on the variance in the valuation reports by the Bank and the other by the Applicant.

15. While parties are indeed bound by their pleadings, the contents of Rule 10 of the Auctioneers' Rule 1997 have been brought to the attention of this Court. The same provides as follows: -

10. Independent valuation of goods attached A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.

16. Whilst the above provision relates to goods and not immovable property *per se*, the above is an indication that the law makers perceived of a situation where it may be necessary to order for an independent valuation in order to secure the interests of a debtor who stands the risk of having his property sold at an undervalue. It is instructive that the very Auctioneers rules provide for the sale of immovable property. **The Auctioneer's Rules, 1997** empowers a debtor to approach the court for orders for an independent valuer before sale of his property pursuant to Rule 10 thereof set out above. Rule 10 does not as with Rule 9 on police assistance, which provides as follows:

"9. Police assistance

(1) Where an auctioneer has reasonable cause to believe that—

(a) he may have to break the door of any premises where goods may be seized or repossessed; or

(b) he may be subject to resistance or intimidation by the debtor or other person; or

(c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property,

the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

(2) An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex parte.

[L.N. 144/2009, r.3.]"

Although Rule 10 is silent on the manner of approaching the Court for such an application, this Court observed that all other applications made pursuant to the Auctioneer's Rules are by way of Notice of Motion. In the absence of specific rule on procedure it may be filed as a Notice of Motion under Order 51 rule 1 of the Civil Procedure Rules with notice to the other parties. Pursuant to Section 3A of the Civil Procedure Act, this Court is of the view that it can entertain the instant application for an independent valuation under Rule 10 of the Auctioneer's Rules despite its not being a specific prayer of the Notice of Motion under consideration, in the interest of justice.

17. The principles that guide Courts in determining whether or not to order for an independent valuation have been previously considered by several decisions. In the case of **Palmy Company Limited v Consolidated Bank of Kenya Limited (2014) eKLR**, it was held as follows: -

“ The Court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97 (2) of the Land Act by the Defendant as to entitle the Court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction.”

18. In the case of *Zum Zum Investments Limited v Habib Bank Limited (2014) eKLR* which was cited in the other case of *Olkasasi Limited v Equity Bank Limited [2015] eKLR* Kasango J held as follows: -

“The Applicant needs to show, for instance, that the Respondent’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale.”

19. This Court considers that an applicant for an independent valuation must that the burden is on the Applicant to prove that the exists circumstances affording sufficient reason for an order for an independent valuation. In the present case, the Applicant has not raised any issue with the competency or qualification of the Respondent’s valuers. He has however raised an issue with the omission by the Bank’s valuers to adequately capture the developments on the suit property. In essence, the Applicant claims that the Respondent’s valuers failed to take into account certain relevant considerations. The Respondents on the other hand have however urged, that their report indicated that suit property has been abandoned and no construction work was ongoing. Indeed, the existence and/or non-existence of developments on any property has the potential of drastically affecting the value of the property. It would of course have been helpful for the Applicant to exhibit before this Court some evidence to show the rates of comparable properties in the vicinity. Notwithstanding that this was not done, and owing to the statutory duty placed upon a chargee under Section 97 (1) of the Land Act to ensure that he obtains the best price reasonably obtainable at the time of the sale, this Court finds that the balance of convenience tilts towards the Applicant’s case. Failure to take into consideration relevant factors as they are on the ground in conducting a valuation is a point of concern, which would only be solved by the involvement of an independent and third valuation.

20. The Applicant has further urged that the Respondent is being dishonest in alleging that the value of the property has not appreciated. Indeed, this Court observes that from the Respondent’s pre-lending report, done in 2015, the open market value of the property was Ksh 40,000,000/= and the forced sale value was Ksh 30,000,000/=. Pursuant to the exercise of statutory power of sale, the Respondent did a subsequent pre-auction valuation which indicates that the open market value of the property is Ksh 40,700,000/= and the forced sale value is Ksh 30,525,000/=. This Court finds it questionable, whether the property has only appreciated by a paltry Ksh 700,000/= and Ksh 525,000/= for the open market value and forced sale value respectively from the year 2015 to 2020. It is common ground that the value of land always appreciates and even then, the figures are always constantly rising every other year.

21. This Court has also considered that the said value, as indicated in the Respondent’s valuation report would appear not to be enough to offset the entire loan amount. The Respondents have indicated that the loan balance stood at Ksh 31,099,523.05 as at 11th March 2021, which amount continues to accrue interests until payment in full. Should the property be sold at Ksh 30,525,000/= there would still be some amount left which the Applicant would have to look for an alternative source to pay.

22. Should the Court decline to order for an independent valuation, there is a risk that the property may be sold at an undervalue, thereby causing substantial loss to the Applicant who will have to look for other sources to offset the balance. Although there is a remedy for filing suit for recovery of damages, this Court finds that at this point in time, noting that the auction is yet to be conducted, the most efficacious way to resolve the matter is by granting an order for independent valuation.

23. This Court also finds that the justice of the case demands for the expeditious conduct of the said valuation in order to forestall the interests which are currently accumulating and in order to ensure that the Respondent Bank recovers its dues as soon as practically possible.

24. In the end, the Court makes the following orders: -

Orders

25. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Court hereby orders that an independent valuation over property L.R No. KABETE/KIBICHIKU/3045 be conducted before the Respondents proceed with the intended sale.
2. The parties shall within seven days agree on a joint valuer to value the suit property, and in default of agreement **the court will appoint an independent valuer from the official list of Registered Valuers of Kenya** to value the property and prepare a joint valuation report.
3. The cost of the valuation shall be paid in the first instance by the plaintiff who seeks the independent valuation, subject to further orders of the court upon hearing and final determination of the suit.
4. The matter will, therefore, be mentioned for directions on 14 May 2021.
5. The Respondents will have the costs of the application, in any event.
6. Liberty to apply.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Ojwang' Sombe & Co. Advocates for the Applicant

M/S Wambugu & Murikui Advocates for the Respondent.