



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E050 OF 2021

DAVID SITUMA WEKESA.....1ST PLAINTIFF

ANNE WACHISI SITUMA.....2ND PLAINTIFF

-VERSUS-

I & M BANK LIMITED.....1ST DEFENDANT

GODFREY GITHINJI KAMIRI T/A WESTMINSTERCOMMERCIAL

AUCTIONEERS.....2ND DEFENDANT

NAIROBI REINSURANCE BROKERS LIMITED...3RD DEFENDANT

R U L I N G

1. This is a ruling on the plaintiffs' application dated 22/01/2021. The same was brought under **sections 3 and 3A of the Civil Procedure Act, sections 97, 102, 103 and 104 of the Land Act, Order 40 rules 1, 2, 3 and 4; Rules 15, 16, 17 and 18 of the Auctioneers Rules, 1997 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.**
2. The application sought orders to restrain the defendants from transferring and/or dealing with the property known as **Office Suit Nos. W4.1 and W4.2 and 3 parking bays** situated on Land **Reference No.209/21307** (hereinafter "the properties") pursuant to an auction conducted on 25/11/2020.
3. The application was based on the grounds set out in its body and the supporting affidavit of **David Situma Wekesa** sworn on even date. These were that; the applicant filed **Chief Magistrates Civil Suit No.1743 of 2020 David Situma Wekesa and Anne Wachisi Situma vs I & M Bank Limited** wherein injunctive orders were issued on 26/3/2020 but the matter was dismissed for lack of pecuniary jurisdiction.
4. That while negotiations were ongoing, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to sell the suit properties without notification contrary to **Rule 15 of the Auctioneers Rules 1997**. That the defendants deliberately devalued the suit properties and perpetuated a fraud with the knowledge of the 3<sup>rd</sup> defendant through a stage managed auction of 25/11/2020.
5. That the failure to issue the plaintiffs with a fresh notification of sale clogged the plaintiffs equity of redemption. That the conditions of sale were not adhered to as no bid was purchased nor the 25% of the purchase price deposited as per the conditions of sale.
6. The defendants opposed the application vide the replying affidavit of **Ernest Wanjohi Muthoni** sworn on 18/2/2021. It was contended that the 1<sup>st</sup> defendant extended a facility of Ksh.42,000,000/- to the plaintiffs in 2014. However, the plaintiffs defaulted whereby the 1<sup>st</sup> defendant proceeded to issue the requisite notices in accordance with the law. Despite as aforesaid, the plaintiffs persisted in their default whereby the auctioneers issued the 45 days Notification of Sale on 18/11/2019.
7. The plaintiffs were indebted to the 1<sup>st</sup> defendant to the tune of sum **Kshs. 32,713,207.94** as at 7/7/2020. They have severally admitted their indebtedness both through correspondence as well as in their pleadings. Further, their equity of redemption was extinguished upon the fall of the hammer at the auction and that the 1<sup>st</sup> respondent will suffer grave prejudice if the application is allowed.
8. **Patrick Chege Mugo** swore an affidavit on 10/2/2021 on behalf of the 3<sup>rd</sup> defendant in opposition to the application. He denied having

any relationship whatsoever with the 2<sup>nd</sup> defendant. According to him, the suit properties were advertised for sale in the *Daily Nation* of 9/11/2020 pursuant to which the 3<sup>rd</sup> defendant became the successful bidder.

9. The 3<sup>rd</sup> defendant paid 25% of the deposit within 2 days of the auction and another 25% on 19/1/2021 to the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant is ready to clear the 50% balance upon the completion of the sale. He denied that the 3<sup>rd</sup> defendant was involved in the valuation of the suit properties.

10. The Court has considered the depositions and the submissions on record. This is an injunction application. The principles are well known as set out in the ***Giella vs. Cassman Brown Case [1973] EA***. The applicant must establish a prima facie case with a probability of success. An injunction would ordinarily not be granted unless the applicant will otherwise suffer loss that cannot be compensated by an award of damages and that if the court is in doubt, it will determine the matter on a balance of convenience.

11. There is no dispute that the plaintiffs were indebted to the 1<sup>st</sup> defendant. They were in arrears which triggered the 1<sup>st</sup> defendant into commencing the recovery effort. The plaintiffs seek an injunction to prevent the transfer of the already sold suit properties in an auction held on 25/11/2020.

12. It was alleged that the auction was carried out irregularly thereby clogging the plaintiffs' equity of redemption. The irregularities alleged are; lack of 45 days' notice, under valuation and that the auction was stage managed. Further, it was contended that the notification of sale did not indicate the value of the suit properties contrary to ***Rule 15 of the Auctioneering Rules 1997***.

13. On record is a Notification of sale dated 18/11/2019. It indicated the amount due to the 1<sup>st</sup> defendant. There is an affidavit of service indicating that the same was duly served on the plaintiffs on 19/11/2019. It was not disputed or challenged. The auction took place on 25/11/2020, almost a year after the notice was given. There was no fresh notification of sale for that auction.

14. The 1<sup>st</sup> defendant submitted that ***Rule 15 of the Auctioneers Rules*** does not require a fresh notification of sale once an auction is postponed. That the auctioneers were only required to issue a 14 days' notice in terms of ***Rule 15(e) of the Auctioneers Rules*** which they gave on 9/11/2020 by way of advertisement in the *Daily Nation Newspaper*. The said advertisement was annexed at page 60 of the 1<sup>st</sup> defendant's replying affidavit.

15. **Rule 15 of the Auctioneers Rules** provides: -

**“Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

**(a) record the court warrant or letter of instruction in the register;**

**(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;**

**(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;**

**(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction**

**(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.”**

16. There is nothing in the aforesaid rule that a notification of sale need be re-issued. In my view, once such a notice has been issued and an auction aborts, there is no requirement for the re-issuance of the same. Only the 14-day notice is required.

17. In ***Nyando Enterprises Limited v Barclays Bank Kenya Limited [2018] Eklr***, it was held: -

**“In the premises, any averment that no Statutory Notice was served under Section 90 of the Land Act is clearly untenable. It is also immaterial that the Section 90 Notice was issued on 7 June 2016, for, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, even where the sale is not conducted as initially scheduled. In this respect, I would agree with and endorse the expressions of Warsame, J in *Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR* in which he had the following to say:**

**"The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charged property is out of the hands of the borrower”.**

18. The purpose of a 45 days notification of sale is to give a debtor an opportunity to salvage his property. To know the amount due and take

steps to save the same from the hammer. Once such notification and opportunity is given, there is no need for a repeat. Accordingly, there was no need for a fresh notice to be issued.

19. The second issue raised was that the value of the suit properties was not indicated in the Notice of sale as per **Rule 15(b) of the Auctioneers Rules 1997**. The Court saw the notice at page 46 of the exhibit to the 1<sup>st</sup> defendant's replying affidavit. The same did not specify the value of the suit properties. The question is whether the omission invalidated the notice.

20. In **Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited [2002] Eklr**, the court stated: -

**“The property in issue is a block of flats in Nairobi West. The property was knocked down at a public auction. If there was any irregularity in the conduct of the auction the applicant would be entitled for damages against the auctioneer pursuant to section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action”.**

21. Further, in **Erick O. Odindo v National Bank of Kenya Limited & 2 Others [2008] Eklr**, it was held: -

**“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by the chargee, non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction sale.”**

22. The view the Court takes is that, the requirement that the value of the properties be shown is only a guide. Failure to disclose is a mere irregularity that does not vitiate the sale. Any damage suffered is recoverable from those responsible for the auction after the trial.

23. On the issue of alleged undervaluation, there is evidence that on 22/11/2019, the suit properties had been valued at Ksh.38,500,000/-. The valuation dated 12/11/2020 by Danco Limited returned the value thereof at Kshs. 35,400,000/-. The plaintiffs obtained another valuation report in January 2021 which placed the value at Kshs. 38,500,000/-.

24. It would seem that the difference in the valuation is Kshs.4.1 million. There may or may be no hard and fast rules on valuation. That will be an issue to be tried at the trial whereby the respective valuers will be expected to support their valuation reports. Considering the margin between the two reports, it is doubtful, without concrete evidence, that there was collusion to under value the suit properties.

25. In **Zum Zum Investment Limited v Habib Bank Limited [2014] Eklr**, the court observed: -

**“In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant'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 way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”**

26. On the material on record, the plaintiffs have not satisfactorily explained why the 1<sup>st</sup> defendant's valuation should be held to be an undervaluation. It is not sufficient that they carried out a separate valuation which indicated the value to be higher. Further, there was no evidence of the alleged collusion.

27. Lastly, the plaintiffs claim that the 3<sup>rd</sup> defendant did not demonstrate that it deposited the sum of Kshs. 100,000/- with the 2<sup>nd</sup> defendant in order to obtain a bidding number nor did it show how the deposit of 25% of the purchase price was paid. That the 3<sup>rd</sup> defendant was pre-selected in the auction.

28. The defendants averred that 3 bidders attended the auction as shown in the Auction Register exhibited at page 61 to the 1<sup>st</sup> defendant's replying affidavit. That the highest bidder was **Mr. Patrick Mugo** who bid on behalf of the 3<sup>rd</sup> defendant for Kshs. 26,580,000/-. That the deposit of 25% was paid to the 1<sup>st</sup> defendant. Evidence of this was duly supplied by way of exhibits.

29. The Court's view is that the mere irregularity of failure to produce evidence of payment of Kshs. 100,000/- is not fatal to the auction sale. The sale duly took place. The irregularity does not invalidate the sale in the Court's view.

30. In the premises, the plaintiffs have not established a prima facie case with any probability of success. With that finding, there is no need to venture into the other two limbs of the **Giella Case**.

31. In any event, there was no evidence that the plaintiffs will suffer irreparable loss and damage. Further, the balance of convenience tilts in favour of the 1<sup>st</sup> defendant recovering its outlay.

32. The upshot is that the application dated 22/01/2021 is without merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY, 2021**

**A. MABEYA, FCI Arb.**

**JUDGE**