



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**COMM CASE NO. E716 OF 2021**

**BETWEEN**

**JUDITH NYABOKE .....PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC .....1ST DEFENDANT**

**JAMES ONYANGO T/A**

**NYALUOYO AUCTIONEERS .....2ND DEFENDANT**

**RULING**

1. The Plaintiff has moved the court by the Notice of Motion dated 29th July 2021 made, inter alia, under Order 40 rules 2 and 4 of the Civil Procedure Rules seeking an injunction restraining the 1st Defendant (“the Bank”) and the 2nd Defendant (“the Auctioneer”) from selling her property; LR No. 330/250 situated in Lavington, Nairobi (“the suit property”) in exercise of the Bank’s statutory power of sale pending the hearing and determination of the suit.
2. The application is supported by the Plaintiff’s affidavits sworn on 29th July 2021 and 6th August 2021 respectively. The Bank opposes the application through the affidavit of its Legal Counsel, Jackson Nyaga, sworn on 5th August 2021. Both parties filed written submissions which they adopted in support of their respective positions.
3. In her affidavit in support of the application, the Plaintiff did not annex any documents to the affidavit. She however stated that she was the registered proprietor of the suit property which had been to secure advances to one Walter Onchwari. The Bank, on the other hand, gave a full account of the relationship between it and the Plaintiff supported by various documents which the Plaintiff did not dispute.
4. According to the Bank, the Plaintiff and her associate, Walter Onchwari (“the Borrower”), approached it for a loan facility of KES 14,824,000.00 for the purpose of financing the cost of repairs, renovations and improvements on 4 residential properties including the suit property. As a condition for the drawdown for the credit, the Plaintiff provided the suit property as security. Consequently, the Plaintiff executed a charge over the suit property in the Bank’s favour.
5. The Bank states that the loan fell into arrears, whereupon it commenced recovery by issuing all statutory notices before instructing the Auctioneer to advertise and sell the suit property. The Bank states that the public auction was held on 27th June 2021 at 12.00 noon whereupon the suit property was sold to the highest bidder who offered KES. 22,550,000.000.
6. In her Complaint dated 29th July 2021, the Plaintiff states that although the Borrower was repaying the loan, in mid-2020 he began facing challenges due to the impact of the COVID 19 pandemic. She states that the Bank excluded her from any discussions or engagements relating to the borrowing and that she was not informed of the default by the Borrower. She also claims that she was never served with any statutory notices and that the auction that was conducted on 27th June 2021 was a phantom auction which did not attract any bids. She further states that the Defendants have failed to disclose to her the details of the bidders and the subsequent processes. In the alternative, she pleads that she is entitled to the balance of the amount recovered as the amount due to the Bank was KES. 2,546,362.58.
7. The Plaintiff therefore seeks to set aside the sale that took place on 27th July 2021 and an injunction prohibiting the Defendants from disposing of the suit property. In the alternative, she seeks a declaration that she is entitled to balance of the proceeds from the purported auction that took place on 27th July 2021.
8. Turning to the application for injunction, counsel for the Plaintiff submits that she has met all the conditions for the grant of an injunction

as set out in *Giella v Cassman Brown* [1973] EA 385. From the pleadings, evidence and submissions, the Plaintiff's case is founded on three broad grounds; First, that the Bank did not serve her with mandatory statutory notices under sections 90 and 96 of the Land Act. Second, that the auction purportedly conducted on 27th July 2021 was a sham and third, damages are not an adequate remedy in the circumstances of the case.

9. Counsel for the Plaintiff correctly points service of the statutory notice is a mandatory pre-requisite for the chargee to exercise its statutory power of sale and that once the chargor denies receiving the statutory notices, the chargee bears the burden of proving that the notices were duly served (see *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260 and *Isabella Nyambura Gitau v HFC (K) Limited and 2 others* ML COMM E002 of 2020 [2020]eKLR).

10. In its deposition, the Bank set out the procedure it followed before selling the suit property by public auction. It states that on 22nd July 2020, it issued to the Plaintiff by registered post the 90-day notice required under section 90 of the Land Act. Upon the lapse of the first notice, it issued a 40-day notice as required by section 96(2) of the Land Act on 9th November 2020. Thereafter, the Bank instructed the Auctioneer to proceed with the sale of the suit property. The Auctioneer made efforts to serve the Plaintiff and Borrower personally but failed to do so. He however posted the notice on the door of the suit property and sent the redemption notices and notification of sale to the Plaintiff by registered post too. Prior to the sale, Daytons Valuers Limited conducted a valuation of the suit property on 8th March 2021. In its report, it assessed the market value of the suit property at KES. 24,000,000.00 and the forced sale value at KES. 22,500,000.00. The Auctioneer published an advert in the Daily Nation disclosing the date, time and place of the proposed sale and that the public auction was conducted on 27th July 2021. Bricklane Homes Limited was the highest bidder offering KES. 22,550,000.00 which was accepted upon signing the Memorandum of Sale and confirmed by the Auctioneer issuing a Certificate of Sale upon confirming that 25% of the price had been sent to the Bank.

11. Although the Bank states that it sent the statutory notices by registered post, I have looked at the Replying Affidavit and I find that the Bank has not exhibited any of the Certificates of Posting in respect of the statutory notices dated 22nd July 2020 and 9th November 2020. I must therefore conclude that the Bank has failed to discharge its burden of showing that it sent the notice to the Plaintiff.

12. Turning to the second issue regarding the auction, I have looked at the evidence and indeed an auction took place on 27th July 2021. There is a certificate of sale executed by Bricklane Homes Limited as the purchaser and a bank advice showing that it paid KES. 5,637,500.00 to the Bank being 25% of the purchase price on the same day. This means that the Plaintiff's equity of redemption was extinguished at the fall of the hammer.

13. The Plaintiff, as chargor, has a right at any time before the auction to pay the amount outstanding and redeem the property. Once the Bank exercised its statutory power of sale, the Plaintiff's right to discharge the suit property was extinguished. The finality of the sale is buttressed by section 99 which protects the purchaser from any action to set aside the sale and provides for damages as a remedy. It states as follows:

99 (1) This section applies to—

- (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
- (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
- (b) Is not obliged to see to the application of the purchase price;
- (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

14. These provisions were the subject of comment by Ngugi J., in *Joyce Wairimu Karanja v James Mburu Ngure & Another* KBU HCCA No. 118 of 2017 [2018] eKLR where he observed as follows:

[30] This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.

15. In my view, once the sale took place, the Plaintiff's right of redemption was thereby extinguished and the Plaintiff's remedy lay in damages as provided by section 99 of the Land Act.

16. In order to support its plea to set aside the sale, the Plaintiff has cited Maina Wanjigi and Another v Bank of Africa Kenya Limited and 2 Others ML HCCC No. 234 of 2014 [2015]eKLR where the court observed in that case that: Since there was no auction as deemed by the law, whatever transpired on 3rd June 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder - the 3rd Defendant. I therefore reject the submission that the Third Defendant had acquired title which needs to be protected by law. A title can only be acquired through a lawful process which this was not.

17. In the case I have set out, the party who had acquired the interest in the property was the third defendant. In this case, even if I were to hold that the sale was a sham, my discretion would be impeded by the fact that a party who has acquired an interest in the suit property whether lawfully or not has the right to be heard before any adverse order is made against it. This is the fundamental rule of natural justice expressed by the Court of Appeal in Pashito Holdings Limited & Another vs Paul Ndungu & 2 Others NRB CA Civil Appeal No. 138 of 1997 [1197]eKLR as follows:

The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

"However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief".

18. In conclusion, while I find that the 1st Defendant has not discharged its burden of showing that it served the statutory notices under sections 90 and 96 of the Land Act, I decline to issue an injunction on the ground that the third party who has acquired an interest in the suit property has not been joined to this suit and should not be condemned unheard before an adverse order is made against it.

19. The Plaintiff's Notice of Motion dated 29th July 2021 is dismissed with costs to the Defendants.

**DATED and DELIVERED at NAIROBI this 27th day of AUGUST 2021.**

**D. S. MAJANJA**

**JUDGE**

**Court of Assistant: Mr M. Onyango**

**Mr Abidha instructed by Abidha and Company Advocates for the Plaintiff.**

**Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the Defendants.**