



REPUBLIC OF KENYA



**Clesoi Holdings Ltd v Prime Bank Ltd & 2 others (Civil Case E090 of 2021)  
[2021] KEHC 74 (KLR) (Commercial and Tax) (28 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 74 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E090 OF 2021  
MW MUIGAI, J  
SEPTEMBER 28, 2021**

**BETWEEN**

**CLESOI HOLDINGS LTD ..... PLAINTIFF**

**AND**

**PRIME BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**JOHN GIKONYO T/A GARAM INVESTMENTS/AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**LUCAS NGIGI & JOHN MBUGUA KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Between 1994-2008, Jay Agencies Ltd & Camp North Ltd sought from 1st Defendant Bank loan facilities. The Letters of offer were duly executed by 2 of the Plaintiff Directors namely, Mr. Rajesh K. Shah, Mr. Pramod K. Shah & Mr. Nipti Shah. Jay Agencies was advanced at first Ksh.1.5 m which was later reviewed to Kshs 30m. These loan facilities were secured by Charge over the Plaintiff's suit property LR No 209/10830/5. The Plaintiff guaranteed the said loan facilities.
2. By Default, of the 2 Companies to service the Loan facilities, the 1st Defendant issued demand letters and later Statutory Notices to the Plaintiff through Messrs Kiruti & Co Advocates and demanded from the 2 Companies, Jay Agency Ltd Ksh 10,311,046.30 cts and Camp North Ltd Ksh 88,726,422.30 cts.

**CERTIFICATE OF URGENCY/NOTICE OF MOTION**

3. By Certificate of Urgency & Notice of Motion filed on 11th February 2021 the Plaintiff/Applicant deposed that the 2nd Defendant conducted a sham auction on 19th January 2021 that purported to sell the suit premises LR No 209/10830/5 to the 3rd Defendant under instructions of the 1st Defendant.



The purported sale was/is marred by illegalities and fraud and statutory notices under Sections 90 & 96 of Land Act were not issued.

4. The Defendants are now in the process of transferring the suit property to the 3rd Defendant despite breach of mandatory provisions of the law and unless restrained by the Court, the Plaintiff stands the imminent risk of losing its property which loss cannot be adequately compensated by damages.
5. It is in the interest of justice that the Court, grants temporary order of injunction restraining the Defendants by themselves, their employees, servants, agents or auctioneers from doing any of the following acts; advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer, taking , possession, appointing receivers or exercising any power conferred by Section 90 (3) & 96 of *Land Act*, leasing, letting, charging or otherwise howsoever, interfering with the Plaintiff's ownership or title to all that parcel of land known as LR No 209/10830/5 pending hearing and determination of the suit.
6. The Court may grant any other orders as may deem fit and just in the circumstances and Costs be determined.
7. The Plaintiff/Applicant sought these orders based on the following grounds, the Plaintiff was at all material times the registered owners of LR No 209/10830/5 and the same was illegally sold by the 1st Defendant to the 3rd Defendant through the 2nd Defendant.
8. Jay Agencies & Camp North Ltd created 4 charges in favor of the Defendant for cumulatively Ksh.40 million between 1994-2008. The Defendant unlawfully used threat of the suit property to demand sums not due or owing thereby fettering and/or clogging its equity of redemption.
9. The Plaintiff deposed that the Defendants acted in bad faith, arbitrarily, dishonestly and unfairly and the process used was/is illegal, flawed unjust and inequitable and against the rules of natural justice.

#### 1ST DEFENDANT/RESPONDENT'S REPLYING AFFIDAVIT

10. The Application was opposed vide the sworn Affidavits Alka Sahi dated 10th March 2021 and 19th March 2021 and stated that;
11. The 1st Defendant granted financial facilities to Camp North Limited and Jay Agencies Limited. The Letters of Offer were duly executed by at least 2 of the Plaintiff Directors, Rajesh K. Shah, Pramod K. Shah and Nipti R. Shah.
12. Sometimes in 1994, Jay Agencies Limited obtained banking facilities in the sum of Kshs.1.5 Million which was later reviewed and renewed to Kshs.30 Million. They were secured inter alia by a charge over the Plaintiff's property Clesoi Holdings Limited LR. No. 209/10830/5 Nairobi.
13. The two borrowers defaulted and the 1st Defendant Bank issued demand letters and subsequently Statutory Notices were issues by Kiruti & Co. Advocates. The Statutory Notices demanded payment of Kshs.10, 311, 046.30 from the Plaintiff on account of Liabilities of Jay Agencies Limited and Kshs.88, 726, 422.30 by Camp North Limited.
14. The Plaintiff then filed a Notice of Motion dated 19th April 2011 seeking temporary injunction restraining the 1st Defendant from selling the said property which orders were granted on 15th March 2012 pending the hearing and determination of the suit.
15. Paragraphs 38 and 39 of the Amended Plaintiff in HCCC No. 148 of 2011, the Plaintiff pleaded and annexed the Recall Notice dated 13th January 2011 which the 1st Defendant admitted in the Defence dated 8th November 2011.



16. On 30th July 2020 judgment was delivered by Hon. Lady Justice Grace Nzioka, dismissing the Plaintiff's suit. The court noted at paragraph 68 of the Judgment, that the Statutory Notices were issued and delivered to the guarantor.
17. During the pendency of the suit, on 30th October 2014, Hon. Justice Eric Ogolla lifted the injunction orders and as a result, a 40 days' Notice to Sell was issued by the 1st Defendant Bank annexed and marked AS 6 (a) & (d) dated 10th November 2014 and the same was received by various Directors who were also guarantors of the two borrowers.
18. The issue of the issuance of the Statutory Notices is now res judicata because the suit was heard and determined on merit.
19. The Plaintiff then filed a Notice of Motion dated 1st October 2020 seeking an injunction before the hearing of the intended appeal. The court declined to issue the injunction. Attached is a copy of the Ruling dated 7th January 2021 marked AS 7.
20. The Plaintiff also filed an appeal Civil Appeal No. E524 of 2020 Nairobi Clesoi Holdings versus Prime Bank Limited in which they also filed an application seeking an injunction pending the hearing and determination of the appeal. On 18th January 2021 the Court of Appeal declined to issue the injunction orders. The Court of Appeal Order is marked AS 8
21. Garam Investments Auctioneers issued the Notification of Sale and a Redemption Notice both dated 21st October 2020 which were served upon the Plaintiff's Director Mrs. Nipti R. Shah. The Auctioneers also served the Notification of Sale and Redemption Notice upon the registered owner of LR NO. 209/10830/5 (I.R NO. 56321) through the address P.O. Box 41401 Nairobi.
22. After the lapse of 45 days Notification of Sale the sale by public auction was advertised on 14th December 2020 and on 19th January 2021 the property was successfully sold by public auction to Mr. John Mbugua Kariuki for Kshs.64, 000, 000 who was declared the successful bidder. The 1st Defendant Bank executed the Transfer by charge which was transmitted to the 3rd Defendant's Advocates.
23. Consequently, the 1st Defendant Bank completed the exercise of its Statutory Power of Sale and there's no basis for granting the injunction orders sought.
24. The Plaintiff did not come to Court with clean hands for reason that for the last 10 years, the Plaintiff did not pay a penny towards the reduction of the outstanding dues and any continued stay orders will cause irreparable loss to the 1st Defendant.

## 2ND DEFENDANT/RESPONDENT'S REPLYING AFFIDAVIT

25. The Application was opposed vide the sworn Affidavit of Joseph M. Gikonyo dated 22nd February 2021 and stated that; -
  - a) The 2nd Respondent was instructed by the 1st Defendant's Advocates vide a letter dated 16th October 2020 to arrange to sell by Auction LR. NO. 209/10830/5 (IR. NO. 56321) registered in the name of Clesoi Holding Limited and enclosed was the valuation report dated 30th September 2020 in which the market value of the property was indicated as Kshs.85, 000, 000.
  - b) The Auctioneers issued Notification of Sale and a Redemption Notice dated 21st October 2020 which was served upon the Plaintiff's Director and received by Mrs. Nipti Shah on 22nd October 2020.



- c) After 45 days, the Auctioneers advertised the sale by Public Auction on 14th December 2020 in the Daily Nation Newspaper and the sale was scheduled for 19th January 2021 at its offices on 5th Floor, Western Heights, Karuna Road Westlands Nairobi.
- d) The auction was attended by named persons as per the attached list marked JMG 4 and in attendance was Mr. Javaid Iqbal whom he came to learn later was connected to the Plaintiff and Mr. George Mathui representing the 1st Defendant.
- e) At the fall of the hammer, Mr. John Mbugua Kariuki was the highest bidder at Kshs.64, 000, 000. He was declared as the successful bidder and was issued with a Certificate of Sale.
- f) On 19th January 2021, the Auctioneers wrote to the 1st Defendant Bank informing them of the successful Public Auction and subsequently remitted the funds to the Bank.
- g) The 3rd Defendant paid 25% deposit in form of bidding amount Ksh 1,000,000/- & Ksh 15,000,000/- by RTGS by way of deposit and agreed to pay the purchase price in 30 days. Annexed is JMG -5 memorandum of sale of 19th January 2021.
- h) The 3rd Defendant was issued with a Certificate of Sale of 19th January 2021 as annexed and marked as JMG. There was no irregularity of procedure in the conduct of the public auction.

### 3RD DEFENDANT/RESPONDENT'S REPLYING AFFIDAVIT

26. The Application was also opposed vide the sworn Affidavit of John Mbugua Kariuki dated 9th March 2021 and stated as follows;

- a) On 14th December 2020, the 3rd Respondent became aware of an advertised public auction by the 2nd Defendant in the Daily Nation Newspaper for property LR. No. 209/10830/5 (IR No. 56321) and scheduled for 19th January 2021 on the instructions of a charge.
- b) The conditions set out in the newspaper were to the effect that interested bidders were to make bidding deposit of Kshs.1, 000, 000 for each of the advertised properties by way of cash or banker's cheque to the Auctioneer.
- c) The 3rd Defendant then procured two banker's cheques payable to the Auctioneer for the aggregate sum of Kshs.1, 000, 000 which were duly presented to the Auctioneer on the auction date on the basis of being allowed to participate in the auction as a bidder.
- d) At the Auctioneer's office, the 3rd Respondent was the only person who placed bids when the Auctioneer announced the commencement of the auction. The Respondent's final bid in the sum of Kshs.64, 000, 000 was duly accepted by the 2nd Defendant. The allegation that no auction took place on the auction date is not correct.



- e) Upon the bid of Kshs.64, 000, 000 being accepted by the 2nd Defendant, the Respondent was declared the successful bidder and was required to comply with the conditions set for the conduct of the auction in terms of payment of 25% of the bid price by way of deposit. The Respondent transferred via RTGS to the 2nd Defendant Kshs.15, 000, 000 which together with the Kshs.1, 000, 000 paid as bidding deposit constituted the required 25% deposit.
- f) On the basis of the foregoing, the Respondent and the 2nd Defendant executed a Memorandum of Sale attached to the conditions of sale for the purposes of the auction. It is upon this that the Plaintiff's equity of redemption in respect of the property stood extinguished and there is no basis for impeaching the said public auction.
- g) The balance of the bid price was payable within 30 days and the Respondent duly remitted to the 2nd Defendant the balance of Kshs.48, 000, 000 on 15th January 2021 by way of RTGS.
- h) The Respondent has since received from the 1st Defendant a duly executed instrument of Transfer by Chargee in respect of the said property which the Respondent desires to register in his interest as the owner thereof.
- i) It is evidently clear that the Respondent acquired the suit property following an invitation through the public advertisement run by the 2nd Defendant and is therefore an innocent purchaser for value. The Respondent enjoys protection under the law by virtue of the provisions of Section 99 of the Land Act and as such the reliefs sought by the Plaintiff would not be available.

#### APPLICANT'S SUBMISSIONS

28. The Applicant submitted that the 1st Defendant initiated the process of exercise of statutory power in 2011 and the same was halted by an injunction in HCCC NO. 148 of 2011, Clesoi Holdings Limited versus Prime Bank Limited. The previous statutes were repealed by Land Act No.6 of 2012 which changed the nature of the statutory notices to be issued. The Chargee cannot exercise its power of sale under the securities without compliance with S.56 of the Land Registration Act, S.90 and S.96 of the Land Act in respect to the issuance of Notices and is applicable to charges created before or after the Acts became operational.
29. It was the Plaintiff's submission that no notice under S.90 of the Land Act was issued and the Notice under the previous land law regime whose service is disputed, is inadequate and falls short of the mandatory requirements of S.90 of the Land Act. Further, that S.96 of the Land Act is a mandatory requirement and precedes all subsequent steps taken by the Bank in selling the property, the purported notices by the Auctioneers and the sale of suit property cannot stand. The Plaintiff relied on the case of *Stephen Boro Gititha versus Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR the Court held; -

“The case at bar is on all fours with that decision and the conclusions the learned Judge arrived at were therefore correct in law. Section 74(1) of the RLAWas designed to offer protection to Chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot



engender legal title. The learned Judge was right to find and hold that innocence of Gitahi's purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice."

30. Further, the Applicant submitted that nothing in HCCC No. 148 of 2011 and the Appeal thereto is subject of litigation in this suit. The fraudulent and illegal sale on 19th January 2021 was not a subject of the previous proceedings before any court. The matter is neither *res judicata* nor *sub judice*. Section 6 and 7 of the *Civil Procedure Act* apply to cases where the issue in dispute is similar, between the same parties and was conclusively determined on merit by a court of competent jurisdiction.

31. On the issue of fraudulent under sale, the Applicant submitted that the sale by public auction on 19th January 2021 was fraudulent for the reasons that: The Bank's valuation was purportedly done in September 2020 and did not take into account the improvement in the suit property; the purchaser paid 25% of the purchase price 3 days after the auction contrary to the Auctioneers advertisement requiring it at the fall of the hammer; and the Memorandum of Sale and Certificate of Sale were issued before the mandatory deposit was paid making the entire process a nullity. In the case of *Mwathi versus Kenya Commercial Finance Co* [1987] eKLR the Court stated; -

"All conditions for the sale of the property provide that a certain percentage must be payable at the fall of the hammer so as to form a binding contract. It is after the payment that the contract of sale document is signed. It is a fraud to the mortgager and other intending purchasers to conclude a contract without the payment made as required at the fall of the hammer. If other intending purchasers would know that they would be granted more time to pay deposit, they would have given their bids and perhaps for more amount. I feel that since deposit of 25% was paid two days after the sale and after the court order had been served on the auctioneers, there was no binding contract."

32. The Respondents did not conduct the sale in strict accordance with the Rules of Public Auction and are deemed to have conducted a private sale and Section 98(4) of the Land Act makes it mandatory that the said sale be at market value. In addition, that sale does not extinguish equity of redemption.

33. It was the Applicant's submission that no damages can compensate loss of commercial property through fraud and illegal process and further stated that it is more convenient to preserve the suit property pending hearing and determination of the suit. The land laws empower the court to interfere with the exercise of statutory power of sale if the same is done illegally and fraudulently as was the case herein.

34. The Applicant submitted that the suit property was sold at gross undervalue contrary to Rule 11(1)(b) (x) of Auctioneers Rules. These Rules require that the reserve price based on a professional valuation carried out not more than 12 months prior to the proposed sale and description of the suit property to be auctioned ought to be included in the notification of sale. The Applicant referred to the case of *Wamuchi vs HFCK No 2754 of 1994*.

#### 1ST AND 2ND RESPONDENT/DEFENDANT'S SUBMISSIONS

35. The Defendants submitted that the issues of validity of the Statutory Notices and the amounts outstanding are *res judicata* going by the Ruling of Hon. Justice Ogolla dated 15th March 2012 and the judgment of Hon. Lady Justice Nzioka of 30th July 2020. The Court of Appeal on 18th January 2021 also declined to grant injunction orders. Only on a balance of convenience was the Plaintiff issued with the injunction order restraining the Defendant from exercising its statutory power of sale. The Plaintiff benefitted from the injunction orders for a period of over ten years.



36. The Defendants argued that the Notices served on the Plaintiff prior to the first sale sufficed. The Notice issued under S.69A (1)(a) of the Indian Transfer of Property Act is equivalent to the Notice under Section 90 of the Land Act. The savings provision S.107 of the Land Registration Act states:

Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

37. It was the Defendants' submission that the Plaintiff's allegation that the sale of the property was at an undervalue is unfounded and that the Plaintiff specifically instructed a valuer to prepare the parallel valuation report dated 5th February 2021. It placed the market value at Kshs.115, 000, 000 and forced sale value at kshs.86, 250, 000. The Defendants obtained a valuation report dated 19th September 2020 which placed the market value at Kshs.85, 000, 000 and forced sale value at Kshs.63, 750, 000. The Defendants relied on the case of *Zum Zum Investment Limited versus Habib Bank Limited* [2014] eKLR where the court held; -

"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."

38. The Plaintiff alleged fraud and gave particulars of collusion, non-evaluation, non-compliance with conditions of sale and that no public auction took place. On this, the Defendants submitted that the Plaintiff did not provide any evidence of fraud or collusion between the Chargee, the Auctioneer and the purchaser to warrant the court's interference in completion of the sale. In *Central Kenya Ltd versus Trust Bank Limited & 4 others* [1996] eKLR the court observed; -

"The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case."

39. The Defendants submitted that the Plaintiff has not discharged the burden to prove that it stands to suffer irreparable injury is the injunction sought is not granted. Further, that the Plaintiff has not made any single payment towards settling the amount outstanding or redeeming the suit property thus the balance of convenience tilts in favor of the Defendants. The present Application has been overtaken by events, is frivolous and misconceived since the Plaintiff's equity of redemption has been extinguished.

### 3RD DEFENDANT/RESPONDENT'S SUBMISSIONS

40. The Respondent submitted that upon the sale of the suit property during a public auction on 19th January 2021, the Plaintiff's equity of redemption in relation to the same stood extinguished and a remedy in the nature of an injunctive relief would not as a matter of the law be available to it. In *Harishchandra Bhovanbhai Jobanputra & another versus Paramount Universal Bank Limited & 3 others* [2019] eKLR while relying on the case of *Mbuthia v Jimba Credit Finance Corporation & Another* Civil Appeal No. 111 of 1986 the Court of Appeal held that; -

"The answer, then, to the question we posed is that the applicant is not entitled to the orders sought, the property having been sold to a 3rd party at the auction that took place earlier this year. The application has no merit and is dismissed with costs to the respondents."



41. Further, the Respondent submitted that the purchase of property in exercise of a Chargee's Statutory Power of Sale enjoys statutory protection in terms of the provisions of S.99(3) of the Land Act. In addition, the Respondent submitted that the 25% deposit was made in form of cheque payments of Kshs.1, 000, 000 and Kshs.15, 000, 000 through RTGS. The said RTGS remittance was credited to the Auctioneers account on 20th January 2021 and that the transaction of 22nd January 2021 related to transmission of funds from the Auctioneer to the 1st Defendant. Therefore, the 25% deposit was not paid 3 days after the public auction.
42. The Plaintiff has not in the Application demonstrated that it has a prima facie case with a probability of success against the 3rd Defendant.

#### DETERMINATION

43. After consideration of pleadings and submissions of parties through Counsel the issues that emerge for determination are;
  - a) Was the statutory power of sale contrary to mandatory statutory provisions that require statutory notices shall be served to the borrowers/Guarantors?
  - b) Was the sale conducted on 19th January 2021 illegal fraudulent sale?
  - c) Was the said sale a fraudulent under sale at gross undervalue?
  - d) Should an injunction issue?

Was the statutory power of sale contrary to mandatory statutory provisions that require statutory notices shall be served to the borrowers/Guarantors?

44. The Plaintiff/Applicant raised the following legal concerns;
  - a) The 1st Defendant failed to serve the statutory notices prescribed under Sections 90 & 96 of Land Act before the conduct of the impugned statutory power of sale.
  - b) The alleged statutory notices of 2011 & 2014 are not compliant of the Land Act.
  - c) The process of exercise of statutory power of sale commenced in 2011 and vide HCCC148 of 2011 halted the process by issuance of an injunction
  - d) By 2012, the new Land Legislation of 2012, the Land Act mandated that the sale ought to be conducted after statutory notices were issued under Section 90 & 96 of Land Act. The notice under Section 90 ought to be in the mandatory terms prescribed by Section 90 of Land Act in terms of Section 90 (2) & (3) of the Act. So, under the repealed laws the notice did not include that the Plaintiff is entitled to apply to court for relief against the Chargee's remedies outlined under Section 90 (3) of the Act.
  - e) The Plaintiff claimed that the injunction issued in HCCC 148 of 2011 was lifted in the judgment of 30th July 2020, so the alleged notice served under Section 96 of Land Act in 2014 was not valid as there was an injunction in place.



- f) The 1st Defendant failed to disclose to the Court that orders were reinstated in 2014 which means the matters were taken back to the original position; vide Ruling of Clesoi Holdings Ltd vs Prime Bank 2014 (no copy provided)
- g) The Notices staled by virtue of previous proceedings and in light of change of mandatory requirements of such notices in the new land regime, the purported previous notices lapsed and the Defendant is bound to serve fresh notices  
See Nyangito Ochieng & Anor vs Fanuel B.Ochieng & Others 1996 eKLR where C.A held that in the absence of certificate of posting [the Court] was constrained to hold that auction was void.

In Stephen Boro Gitiha vs Nicholas Ruthiru Gatoto & 2 others [2017] eKLR C.A held that Section 74 (1) RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without requisite notice.

Michael Gitere & Anor vs KCB Ltd [2018] eKLR

High Court Civil Case 12 of 2018 Michael Gitere & Anor vs Kenya Commercial Bank Ltd [2018] eKLR

“It must be understood in the face of denial of receipt of statutory notice(s) it is incumbent upon the Chargee to prove posting. It would have been a very simple exercise for the bank to produce slip(s) or letters containing statutory notice(s) The bank did not do so. Instead an Officer from the Bank simply produced file copies of the notices to prove the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non receipt of such notice (s) shifts to the addressee.....”

The Court further held that the requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties.

- h) The issue(s) raised in this suit was not and is not part of proceedings in HCCC148 of 2011 and is also pending in C.A.No E524 of 2021 and it is neither res judicata nor sub judice.

45. The 1st Defendant in response annexed to the Replying Affidavit the following Statutory Notices served to the Plaintiff/Applicant.

- a) Notice of Exercise of Statutory Power of Sale LR. No. 209/10830/5 Chargor; Clesoi Holdings Ltd Borrower; Camp North Ltd, a demand under Section 69 (1) of Indian Transfer of Property Act (ITPA) 1882 giving Notice of 3 months (90 days) from the date of service to exercise the statutory power of sale in default of payment. It is marked AS -3. Annexed is the Copy of Registered Post Mail List and Charges by Postal Corporation of Kenya of sending the Notices from Kiruti Advocates to at P.O. Box 91680-00100 Camp North Ltd and P.O. Box 41401 Clesoi Ltd & Jay Agencies.
- b) The 2nd Notice under Section 96 (2) Land Act 2012 was served on 10th November 2014 giving notice within 40 days from date of service vide Registered Post to Borrowers & Chargors as Companies and Directors of the Companies and are listed in Postal Corporation of Kenya Mail List and



Charges sent by Macharia Mwangi -Njeru Advocates. There is also Affidavit of Service deposited by Gerald Mbuthia confirming service directly to Directors of Jay Agencies Mr Pramod Shah but he did not find the Directors of Camp North Ltd and Clesoi Holdings at Westlands Church Road off Mangu Gardens.

- c) The 2nd Defendant filed Response and deposed that in accordance with Rule 15 (c) of Auctioneers Rules, he issued Notification of Sale of 45 days to the Jay Agencies & Camp North Ltd dated on 29th October 2020 by Registered Post.

46. From the above outline, this Court is satisfied that the Plaintiff/Applicant was served with mandatory requisite Notices of Section 69 of ITPA (90 Days' Notice), Section 96 of Land Act 40-day Notice & 45 Days' Notice by Auctioneers.

The issue that a fresh notice ought to have issued by the new legal regime that came into force in 2012; the Land Act 2012 provides;

162. Savings and transitional provisions with respect to rights, actions, dispositions etc

(1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

47. The Statutory Notice under Section 69 of ITPA giving 90 days' Notice remains a valid Statutory Notice as the incoming Land Act did not repeal the ITPA Act and that Act was applicable at the time parties contracted and executed the charge documents. The Court finds that the requisite Notices were duly served to the Plaintiff/Applicant as demonstrated above.
48. The Applicant confirmed postage by providing the List of registered post mail and the charges thereof of the requisite notices in one instance physical service of process. The burden shifts to the Addressee to prove that service was not done and they did not receive the process.
49. The Applicant in its depositions oscillated between whether /if the Statutory Notices were duly served and/or that once proceedings stalled and proceeded again, the issue of Statutory Notices ought to have been issued afresh. The Court cannot tell which position the Applicant takes on Service of Statutory Notices. However, the evidence on record is satisfactory that the Notices were properly served and the Plaintiff was granted the statutory periods of Notice by each Notice to exercise equity of redemption and no prejudice was occasioned.
50. The Ruling by Hon LJ G. Nzioka of 30th July 2020, found that statutory notices were served as paragraph 68 provides,

“There is evidence that Notices were sent to the principal borrowers and guarantors, but the unique circumstances of this case, is that, the Plaintiff is the Principal borrower and guarantor too. As such Statutory Notices served to both the Principal debtors and Guarantor were received by the same persons. Obviously they did not pay the outstanding amount”



51. Hon. Justice E. Ogolla at page 8 of his Ruling with regard to Statutory Notices noted; -
- “The Statutory Notices and the amounts stated therein have not been challenged. More importantly, the two borrowers namely Jay Agencies Limited and Camp North Limited have not challenged the amount claimed.”
52. The Borrowers/Chargors/Guarantors engaged the 1st Defendant bank and obtained facilities as follows;
1. Charge of 5th May 1994 for Ksh 1.5m borrowed by Jay Agencies.
  2. Further Charge of 23rd May 2000 for Ksh 8.5m by Jay Agencies.
  3. Charge of Ksh 18m by Camp North Ltd.
  4. Further Charge of 16th December 2008 for Ksh 12m.
53. Hence the statutory notices though issued within a span of 10 years have been/are relevant to the outstanding loan /overdraft facilities as shown above.
54. The Court in Joseph Kiarie Mbugua vs Garam Ltd & Anor [2006] eKLR stated; -
- ‘However, in my humble opinion, once he[the Auctioneer] has received such letter of instructions and has given the debtor 45 days ‘notice it would be unfair to insist that if that sale is suspended, and he gets another letter instructing him to proceed with the sale of the same property, in respect of the same loan and from the same mortgagee, he should give the same 45 days’ notice afresh. I think one has to look at the purpose for such a notice. In my opinion , such notice as is clearly stated in the Rules, is to give the debtor opportunity to redeem the property. I cannot see any good reason for giving the same opportunity every time the sale does not go through...’
- ‘If it was mandatory that 45 days’ notifications of sale be issued every single time when the chargee or the judgement-creditor wished to publicly auction immoveable property, borrowers and judgement-debtors would never persuade their creditors to put-off sales, so as to allow the debtors an opportunity to redeem their properties. Thus, a strict application of rule 15 (d) of the Auctioneers Rules would actually be counter-productive to the borrowers and judgement-debtors.’
55. The Court of Appeal while upholding the validity of a Notice issued under S.69A of ITPA in Eurobank Ltd (In liquidation) vs Twicter Investments Ltd & 2 Others [2020] eKLR stated; -
- “From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days).....They did not complain at all that the notice they had been given was invalid. Following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to re-issue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A(1)(a).”
56. From the above facts and legal requirements outlined above the Court is satisfied the statutory notices were properly and legally served to the Plaintiff/Applicant and therefore did not vitiate the statutory power of sale.



Was the sale conducted on 19th January 2021 illegal & fraudulent sale & Was the said sale a fraudulent undersale at gross undervalue?

57. The Plaintiff/Applicant stated that the auction/sale of 19th January 2021 did not take place at the venue, the suit property was not valued before the illegal predetermined sale, no bid numbers were issued and the bidders were illegible including the 3rd Defendant and there was no waiver of the conditions of sale.
58. The Plaintiff/Applicant asserted that the 3rd Defendant did not pay 25% of purchase price on the day of the auction. The 3rd Defendant did not deposit the Kshs 10 million required before a bidder is allowed to bid.
59. The Plaintiff/Applicant deposed that the representatives of 1st Defendant were consulting with the 3rd Defendant and stage-managed the Auction and directed the 2nd Defendant on what to do.
60. The auction did not take place and instead it was a sham as it was prearranged. The Plaintiff's representative who attended the auction alleged that no auction took place. What transpired was a private arrangement between the Defendants. It was an unlawful fraudulent process which was incapable of conferring any title of proprietary rights to the alleged successful bidder.
61. Applicant took issue with valuation of the suit property as it is worth Ksh 130m and not the Ksh 64m.
62. To the process and outcome of the auction, the Court finds that the details outlined above as submissions by the Plaintiff/Applicant ought to have been deposed and sworn in an Affidavit by the deponent whom if the same was contested may be put to test on the content of the Affidavit.
63. The maxim of he who alleges must prove aptly applies, the non-disclosed source cannot be put on notice to prove the allegations on a balance of probabilities' as the allegations are not deposed in an affidavit but most of these allegations are irregularly raised for the 1st time in written submissions and thus remain hearsay evidence.
64. Secondly, the submissions are not clear on what is alleged to have transpired on 19th January 2021, is it that as a matter of fact no auction/sale took place or an auction was conducted but the manner process and outcome was contrary to a proper auction? This cannot be answered by the Plaintiff/Applicant save by the undisclosed source. Who ought to give direct evidence. The Plaintiff/Applicant failed to provide any evidence to lend credence to the unlawful auction. The court finds it cannot dispel or uphold the alleged conduct of the auction as no cogent or tangible evidence is preferred in proof of fraud irregularity and/or illegality as stated in *Central Bank Ltd Vs Trust Bank Ltd & Others [1996] eKLR*; -

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.”

65. The 2nd Defendant provided the following documents on the conduct of the sale/auction;
  - a) Letter of instruction of 16th July 2020 from 1st Defendant's Advocates.
  - b) Certificate of Service of 29th October 2020
  - c) Notification of Sale of 21st October 2020
  - d) Copy of advertisement of Public Auction



- e) Attendance List
- f) Particulars of the Property & Conditions of Sale
- g) Memorandum of sale
- h) RTGS transfer from 3rd Defendant to 2nd Defendant of 25%
- i) Certificate of sale
- j) Letter of 19th January 2021 from 2nd Defendant to 1st Defendant.
- k) Report & Valuation Report by Lead Realtors Ltd Valuers, Estate Agents & Consultants marked JMG1b of September 2020, which consists of Pictures, Description, Methodology & Valuation.

66. The Valuers indicated at Pg 7 that they were denied permission to inspect the property internally and the construction and accommodation details were gathered from external viewing and combination from previous reports done on the same property.

- Valuation; Market Price Ksh 85,000,000/-
- Forced Sale Value/Mortgage Value/Reserve Price Ksh 63,750,000/-
- Insurance Value Ksh 69,000,000/-

67. The Plaintiff/Applicant contests the Valuation as it was contrary to Section 97 of Land Act and Rule 11 of the Auctioneers Rules. 97. Duty of chargee exercising power of sale

- (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.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

68. The 1st Defendant conducted valuation and obtained Valuation Report of September 2020 and the sale was conducted on 19th January 2021. The Valuation Report was valid for 12 months. The requirements of Rule 11 of the Auctioneers Rules were complied with as shown by the letter of instruction of 16th October 2020 paragraph 9 which outlines contents of Rule 11 of Auctioneers Rules. Rule 11 of the Rules mandates the disclosures to be as contents of court warrant or letter of instruction.

69. The sale was not conducted under Section 98 of Land Act so as to ensure sale at market price as it was not by private treaty.

The Plaintiff/Applicant indicated that they conducted Valuation in February 2020 and the Forced Sale Value was Ksh 86,250,000 & Open Market Value was Ksh 115,000,000/-. The Valuation Report was prepared after the impugned sale on 19th January 2021 after the fact and not before the intended sale



by virtue of Rule 10 of Auctioneers' Rules 1997 by applying to Court to conduct the Valuation before the sale by Auctioneer. 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.

70. The 1st Defendant relied on the case of *Zum Zum Investment Ltd vs Habib Bank Ltd* [2014] eKLR (supra) where the court held that merely producing a counter-valuation report and claiming that the intended selling price is not the best price is insufficient. There must be satisfactory demonstration as to why the intended selling price is not the best price.
71. The Auctioneer issued requisite notice under Rule 15 of Auctioneer Rules. The Auctioneer conducted the auction on 19th January 2021 at 5th Floor Western Heights Karuna Road Westlands Nairobi. The Auction was attended by the Attendees listed in JMG4.
72. To the advertisement and legal requirement that the highest bidder shall pay 25% of purchase price as per Reserve price by Valuers of Ksh 63,750,000/-, the 3rd Defendant paid deposit of Ksh 1,000,000/- (and not Ksh 10m as alluded to by Plaintiff/Applicant) as was required in the advertisement, in the Daily Nation 14th December 2020. The copies of 2 cheques dated 18th January 2021 are annexed to 3rd Defendant's Affidavit. It is upon being declared the highest bidder, that the 3rd Defendant took the 2nd Defendant's details and sought transfer of Ksh 15m from his Company Account New Crystal Dairy to the 2nd Defendant as shown by the SWIFT message slip dated 20th January 2021. The amount was promptly paid after fall of the hammer as soon thereafter, and practically possible, the 3rd Defendant took the 2nd Defendant's details to the bank and by the time the funds were transferred through swift it was on 20th January 2021. The 3rd Defendant did not know the purchase price in advance nor that he would be the highest bidder so as to come to the Auction with bulk of money. It was reasonable in the circumstances to await the outcome of the auction and immediately as practically possible pay the total of 25% which was not paid in instalments.
73. It was not 3 days later as alleged by the Applicant, as the funds were credited to the 1st Defendant's Account 3 days later on 22nd January 2021 from the 2nd Defendant, the Auctioneer and not from the Purchaser 3rd Defendant. Thereafter, the 3rd Defendant executed the Memorandum of Sale on the same date to pay the balance of the purchase price within 30 days and which he did vide RTGS of 15th February 2021 of Ksh 48m and signed transfer by Chargee in the exercise of power of sale with 1st Defendant Bank marked JMK7.

Should an injunction issue?

Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides: -

“Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



74. In *Giella –versus- Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition’
- “First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
75. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. – versus- Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely:
- i. There must be a serious/fair issue to be tried,
  - ii. Damages are not an adequate remedy, and
  - iii. The balance of convenience lies in favour of granting or refusing the application.”
76. The Court of Appeal in *Mrao Ltd versus First American Bank of Kenya & 2 others* [2003] KLR 125 defined arguable case; -
- “A genuine and arguable case a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
77. The Parties duly executed the loan agreements and charges and are bound rights and obligations under the Contracts. The Plaintiff/Applicant and/or Borrower serviced the facilities as shown by the annexed Statements of Account to the Plaintiff’s bundle. Later, the Plaintiff defaulted hence the Statutory Notices and demands for the outstanding amount.
78. The Plaintiff/Applicant and 1st Defendant have engaged in settlement of outstanding debt for the last 10 years or so. The contested interest, alleged illegal and non-contractual penalties and charges that prevented the Plaintiff/Applicant from exercising equity of redemption were raised in various matters as litigation in Court and have been subject of various decisions of the Courts. The Plaintiff has lodged an appeal in the Court of Appeal pending hearing and determination and the prayer for injunction was not granted.
79. The parties’ dispute on contested figures has never been pursued vide reconciliation of Accounts between the parties since grant of injunction in 2012 until the same was vacated. Suffice to say that there is outstanding principal amount that has not been repaid.
80. The Plaintiff/Applicant submitted that no amount of damages can be near adequate to compensate the Applicant for loss over time and unique property business and if sold and transfer completed the Applicant’s business will be annihilated and be exposed to 3rd Party claims and leases will be cancelled.
81. On the other hand, the 1st Defendant submitted that the statutory power of sale was properly and legally conducted. The Court in HCC 148 of 2011 upheld validity of charge documents and the Plaintiff having tendered the property as security it made it a commercial commodity. In the 10 years subsistence of the suit, the Plaintiff never made a single payment towards settling the outstanding



amount . The 1st Defendant was/is not able to recover Ksh 130,000,000/- as regards Camp North Ltd & Ksh 17, 884,158.55 as regards Jay agencies as at 31st December 2013.

82. This Court makes the observation that the dispute between parties has been in Court for 10 years under the instant Court file and previously HCCC 148 of 2011. Numerous Applications on the subject matter have been determined by Ruling of Hon. J E.Ogolla , Hon LJ G.Nzioka & Hon LJ G.Ngenye so this Court will not delve into the same issues again.
83. In a nutshell these decisions confirm validity of charge documents and Statutory Notices. This Court finds that the Statutory Power of Sale was lawfully conducted and the allegations of fraud, illegality and/or irregularity with regard to the statutory power of sale are not borne out by the evidence on record. A prima facie has not been established to warrant grant of interim injunction.

#### DISPOSITION

84. The application of 11th January 2021 is hereby dismissed with costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO COVID-19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

MR. MIRIE FOR THE PLAINTIFF - PRESENT

MS. NZUKI FOR THE 1ST AND 2ND DEFENDANTS - PRESENT

MR. MUTUA FOR THE 3RD DEFENDANT – PRESENT

COURT ASSISTANT: TUPET

COURT: The Ruling will be availed to the parties/Counsels.

The Parties/Counsels shall be availed the Certified Copies of proceedings and Ruling upon payment or requisite fees.

MR. MIRIE: We seek stay of transfer of title for 45 days pending appeal.

COURT: Stay of execution is granted for 30 days.

