



**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**AT KISUMU**

**COMMERCIAL CASE NO 3 OF 2019**

**DESNOL INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

1. In its Notice of Motion dated 20<sup>th</sup> November 2020 and filed on 26<sup>th</sup> January 2021, the Defendant sought leave to exercise its right of purchase under Section 100 of the Land Act No 3 of 2012 of charged properties namely: LR No Kisumu/Ojola/3927, LR No Kisumu/Ojola/4116 and LR No Kisumu/Bar/2178 (hereinafter referred to as the “subject premises”). The Application was supported by an Affidavit that was sworn by Sylvia Wambani, the Defendant’s Legal Officer on 21<sup>st</sup> January 2021.
2. The Defendant averred that the Plaintiff sought for advanced banking facilities from it that were secured by various charges over the subject premises from the year 2013. It added that the facilities were restructured resulting into the bank issuing one letter of offer dated 27<sup>th</sup> June 2017 for Kshs 91,101,000/= as the monies advanced to the borrower, which letter of offer identified the existing legal charges over the subject premises registered in its favour.
3. It asserted that the Plaintiff defaulted on the agreed terms of the said letter of offer, as a result of which it commenced recovery proceedings by issuing the relevant statutory notices. It was apprehensive that the Plaintiff continued defaulting even after the statutory notices were issued thus the amount in arrears accrued interest at default rates. It added that to-date the facility remained un-serviced to its prejudice.
4. It contended that the Plaintiff by itself and its directors filed **Civil Suit No 3 of 2019 Desnol Investment Limited vs Family Bank Limited and Commercial No 3 of 2019 Joan P. Natome & Another vs Family Bank Limited** which were subsequently consolidated and whereafter parties entered into a consent in which the Plaintiff would settle the arrears failing which it would sell the subject premises.
5. It was its contention that the Plaintiff defaulted on the terms of the consent and whereupon it proceeded to sell the said subject premises. It pointed out that it attempted to auction the subject premises on 27<sup>th</sup> August 2019 and 10<sup>th</sup> September 2020 but both auctions failed to attain the reserve price as a result of which the debt had continued to escalate.
6. It pointed out that a current valuation of the subject premises existed and it had taken all the necessary steps to comply with the requirements of the Land Act, 2012. It urged this court to grant it leave to purchase the subject premises by public auction for the reason that a public auction was the most advantageous way of selling the charged property as to comply with the duty imposed on the chargee by Section 97 of the Land Act.
7. In opposition to the Defendant’s application, on 6<sup>th</sup> March 2021 the Plaintiff filed a Replying Affidavit sworn by Clive Ouko Natome, its Managing Director, on 9<sup>th</sup> March 2021. The same was filed on 10<sup>th</sup> March 2021.
8. The Plaintiff averred that the mode of purchased proposed by the Defendant was not the most advantageous mode of exercising statutory power of sale as Section 98 of the Land Act provides other modes which included sale by private contract at current market rate.
9. It denied that there had ever been a public auction conducted at the notice venues as required by law. It further stated that it had approached the Defendant several times requesting it to allow it to lease the subject premises so as to generate steady income to repay the loan but it had always unreasonably withheld the consent. It was therefore its contention that the Defendant wished it remained in default so as to purchase its subject premises at a throw away cost.
10. It added that the subject premises especially Kisumu/Ojola/3927 and Kisumu/Ojola/4116 had always been grossly undervalued contrary

to Section 97 (1) of the Land Act. It pointed out that in 2018, the developments were at 68% completion and had a higher open market rate and reserve price compared to 2020 when the developments were at 72% completion. It contended that in ordinary circumstances the value of the properties ought to increase as assets appreciate in value by virtue of time and developments.

11. It urged the court not to grant leave to the Defendant to purchase the subject premises in order to safeguard its rights and argued that safeguarding parties' rights is the reason why the law requires that leave is first granted.

12. On 1<sup>st</sup> April 2021, Sylvia Wambani swore filed a Supplementary Affidavit in response thereto. The same was filed on 12<sup>th</sup> April 2021.

13. The Defendant contended that the Replying Affidavit was devoid of merit, a waste of the court's time and brought in bad faith.

14. It agreed that Section 98 of the Land Act that made available options to the Chargee at the point of sale, which options included but were not limited to a public auction with a reserved price and by a private contract at market value. It contended that the said options could be exercised at the discretion of the chargee, which it pointed out it exercised through auctions which were not successful.

15. It was its contention that the Plaintiff had made unsubstantiated claims and had failed to offer proof of any attempts to move it to purchase the subject premises by way of private contract at market price. It asserted that the Plaintiff's allegation that there was no public auction conducted by the Defendant is not supported by any documentary evidence, yet on its part it annexed auctioneer's reports on the said failed auctions.

16. It was emphatic that it opted for the public auction as it afforded it an opportunity to engage and entertain more prospective purchasers which it believed had a wider avenue than that of a private contract. It further added that its choice of sale by way of public auction was guided by statute and the applicable rules and upon the auctions being unsuccessful, it was now moving the court under Section 100 of the Land Act for the relevant remedies.

17. It averred further that no cogent evidence had been advanced by the Plaintiff to doubt the conclusions made by its valuer in its Valuation Report dated 4<sup>th</sup> February 2019 that was prepared before the COVID 19 pandemic struck and depressed the market. It was emphatic that it stood to suffer great prejudice if the present application was not allowed as prayed for the reason that the loan was non-performing and continued to accrue interest at default rate, which accrued sums stood to outstrip the value of the subject premises.

18. The Defendant's Written Submissions and Case Digest were dated 6<sup>th</sup> April 2021 and filed on 12<sup>th</sup> April 2021 while the Plaintiff's Written Submissions were dated 21<sup>st</sup> April 2021 and filed on 26<sup>th</sup> April 2021. This Ruling is therefore based on the said Parties' Written Submissions which they relied upon in their entirety.

## **LEGAL ANALYSIS**

19. The Defendant submitted that considering it failed in its attempts to sell off the subject premises at public auctions and the Plaintiff has not made any attempts to pay the debt, it had made out a case for it to be granted leave to purchase the subject premises under Section 100 of the Land Act.

20. The Defendant submitted that the valuer sufficiently attributed the decrease in property market to sluggish growth, stagnation and decrease in property values. In this regard it relied on the case of **Zum Zum Investment Limited vs Habib Bank Limited [2014] eKLR** and the case of **Palmy Company Limited vs Consolidated Bank of Kenya [2014] eKLR** where the common thread was that a plaintiff had to give reasons why it was discrediting a valuer's valuation report.

21. It also relied on the case of **Olkasi Limited vs Equity Bank Limited [2015] eKLR** where it was held that the fact that an applicant's valuation placed a valuation that was higher than the one of the valuer did not mean that a respondent had undervalued a property.

22. It submitted that the Plaintiff did not challenge the valuer's competence, that the valuer considered irrelevant factors or that the valuation was done before the intended sale.

23. It was its contention that it was a win-win situation as it stood to recover the arrears through the sale while the monies would be utilised to regularise the loan amount.

24. On its part the Plaintiff submitted first that Defendant's application is not properly before court as it ought to have been brought by way of originating summons under Order 37 (4) of the Civil Procedure Rules and not by way of notice of motion. It pointed out that the Defendant failed to give the provisions of the Civil Procedure Rules under which the application is brought.

25. It further argued that Section 100 of the Land Act places a burden and duty on the court to protect the chargor for the reason that the chargee being an interested party wielding commercial interest would in most cases be driven by the urge to make profits at the detriment of the chargor who in most cases would be distraught and wallowing in despair. It submitted that it was for that reason why leave had to be obtained by a chargee.

26. It relied on the case of **Ecobank Kenya Limited vs Moru Ridge Limited & Another[2020] eKLR** where in directing the sale be by way of private treaty at market rates, the court held that in the event leave to sell is granted, the court ought to note that the sale is not restricted to public auction but other modes of sale as well including sale by private treaty at market price which is more advantageous.

27. It was its contention that it could be that the Defendant had tried in vain to sell by auction yet it still wanted to be allowed to purchase the

properties in a public auction. It argued that a public auction would be disadvantageous for the reason that the playing ground is not leveled. It added that the chargee would instruct auctioneers who would be under the chargee's control and the chargor would not succeed even if it was given an opportunity to bid.

28. It pointed out that in the case of **Jashvantsing L. Solanki vs Diamond Trust Bank Ltd [2014] eKLR**, it was held that the issue of undervaluation was one that could be remedied through claim of damages and that the same applied where there was an injunction injunctioning a chargee from exercising statutory power of sale. It contended that in application such as the instant case, the court has an obligation to supervise strict compliance with Section 97 (2) of the Land. It placed reliance on the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited** (Supra) where the court held that the onus of establishing on *prima facie* basis that the applicant's right has been infringed by the respondent by failing to discharge the duty of care under section 97(1) of the Land Act lay on the applicant. It was its case that the suit premises had been undervalued necessitating interference of the court. It argued that the undervaluation was deliberate and the court ought to call for a rebuttal and or explanation as the same had not been given.

29. It was not in dispute that the Defendant advanced, to the Plaintiff, the sum of Kshs 91,101,000/=. It was not in dispute that the Plaintiff defaulted in making the loan payment and sought several indulgences from the Defendant which it still failed to honour. The Plaintiff had also defaulted on a consent that it entered into with the Defendant herein on 25<sup>th</sup> March 2019 where they had agreed that the Plaintiff would pay the arrears in two (2) instalments of Kshs 10,331,565.50 each failing which the Defendant would be at liberty to realise the security.

30. In a nutshell, it was not contested that the bank's statutory power of sale had arisen following the plaintiff's failure to service the loan. It could therefore proceed to realise its security in any of the following ways provided for in Section 98 of the Land Act. The same states that:-

31. Section 98 of the Land Act which stipulates as follows:-

**“(1) If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be—**

**(a) of the whole part of the charged land;**

**(b) subject to or free of any charge or other encumbrance or charge having priority to the chargee's charge;**

**(c) by way of subdivision or otherwise;**

**(d) by private contract at market value;**

**(e) public auction with reserve price;**

**(f) for a purchase price payable in one sum or by installments; or**

**(g) subject to any other conditions that the chargee shall think fit, having due regard to the duty imposed by section 97(1).**

32. Section 97(1) of the Land Act states that:-

**“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale”.**

33. Going further, Section 100(1)(2) and (3) of the Land Act stipulate that:-

**2. Other than in the circumstances provided to in subsection (3), a charge exercising the power of sale may, with leave of the court, purchase the property.**

**3.If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at the public auction so long as the price bid for the charged land by the charge is the greater of-**

**a) The highest price bid for that land at the auction; and**

**b) An amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”**

34. The Defendant adduced in evidence copies of Auctioneers' Reports regarding the failed auctions. There was a letter from Keysian Auctioneers dated 17<sup>th</sup> June 2019 indicating that they had received bids which were way below the forced sale value. The auction was on 14<sup>th</sup> June 2019.

35. In their letter of 28<sup>th</sup> August 2019, the said Auctioneers wrote to the Defendant informing it that it carried out the auction on 27<sup>th</sup> August 2019 but that the offers that had been placed were also below the forced sale value. The current market value of Kisumu/Ojola/3927, LR No

Kisumu/Ojola/4116 as at 10<sup>th</sup> December 2020 had been put at Kshs 105,000,000/= while the forced sale value was put at Kshs 78,750,000/=. It was for this reason that the Defendant had moved the court under Section 100(1) (2) of the Land Act.

36. In the present case, having regard to the fact that the Defendant had made numerous unsuccessful attempts to sell the subject premises at public auction and considering that the Plaintiff did not make any viable proposal to pay the debt this court was of the considered view that the Defendant had made out a case for the grant of leave to purchase the charged subject premises under Section 100(1) of the Act.

37. It was its further finding that the Defendant had demonstrated that it was not able to secure suitable buyers willing to buy the property at a public auction. Alleging undervaluation *per se* cannot form a ground for the chargor to stand in the way of a chargee whose power of sale has arisen. **Palmy Company Limited vs Consolidated Bank of Kenya** (Supra). The Plaintiff had a remedy of seeking damages if the subject premises were sold at an under value as provided in Section 97(3) of the Land Act which states that:-

**“(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market.**

**(a) there shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection (1); and**

**(b) the charger whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1).”**

38. Going further, this court took judicial notice that the outbreak of COVID-19 pandemic had made it difficult to transact commercial business due to the economic meltdown. The turnaround of the economy is expected to take some time during which time the arrears if the Plaintiff's loan will continue accruing and thus outstrip the value of the security.

39. As Section 98 of the Land Act provides different ways in which a chargee may exercise its statutory power of sale, it was not for this court to impose any particular mode. Indeed, there is no hard fast rule on the mode of sale/purchase by the chargee and that sale by public auction is only one of such modes of sale.

40. The Defendant was, however, under a duty of care as a chargee while exercising its power of sale as envisaged under Section 97(1), 98(1) (g) and 100(3)(a) of the Land Act to obtain the best price reasonably obtainable at the time of sale. The court of course expects the Defendant herein to obtain a current valuation report in line with Rule 11(1) (b) (x) of the Auctioneers Rules 1997 that stipulates that:-

**“A court warrant or letter of instruction shall include in the case of immovable property, the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”**

41. Although the Defendant was supposed to move this court by way of Originating Summons as submitted by the Plaintiff, this court found that mistake not fatal compared to meeting the ends of justice and had due regard to Article 159 (2) (d) of the Constitution of Kenya 2010 to administer justice without due regard to procedural technicalities.

## **DISPOSITION**

42. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 20<sup>th</sup> November 2020 and filed on 26<sup>th</sup> January 2021 was merited. It is hereby directed that leave be and is hereby granted to the Defendant, pursuant to Section 100(1) of the Land Act, to purchase the charged property herein namely, LR No Kisumu/Ojola/3927, LR No Kisumu/Ojola/4116 and LR No Kisumu/Bar/2178 in terms of Prayer No (1) therein on condition that it fully complies with the provisions of the law.

43. Each party to bear its own costs of the application.

44. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**J. KAMAU**

**JUDGE**