



REPUBLIC OF KENYA



International Limited & another v National Bank of Kenya Limited & another (Civil Appeal E050 of 2020) [2021] KEHC 68 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 68 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E050 OF 2020
GWN MACHARIA, J
SEPTEMBER 23, 2021**

BETWEEN

**INTERNATIONAL LIMITED 1ST APPLICANT
ABDI MUMIM HAJI ABDI 2ND APPLICANT**

AND

**NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT
MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND RESPONDENT**

(Being an appeal from the entire Ruling and Order of the Chief Magistrate's Court at Nairobi in CMCC No. 9443 of 2019 delivered by Hon. L. Gicheha (CM) on the 22nd day of September 2020)

RULING

1. On 4th December, 2020, this court delivered a Ruling in which it dismissed the Appellants' application for a temporary injunction pending the hearing and determination of the appeal herein. In addition, the court ordered the 1st Respondent and the Appellants to jointly appoint a Valuer to prepare a current valuation report for purposes of the intended public auction of the subject property within 21 days of the Ruling after which the Bank would be at liberty to proceed with the sale process.
2. The Appellants have now filed a Notice of Motion dated 8th July, 2021 pursuant to Section 1A, 1B, 3A, 34 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and Order 22, Order 40 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, 2010 and all other enabling provisions of the law. The application seeks the following orders:
 1. Spent
 2. Spent



3. Spent
 4. THAT an injunction order be issued by this Honourable Court restraining the 1st and 2nd Respondents whether by themselves, directors, agents, servants, officers, employees and/or otherwise howsoever from disposing off the suit property known as L.R. NO. KAJIADO/DALALEKUTUK/2484 in any manner whatsoever until a current joint valuation report is prepared by a valuer(s) appointed by the Appellants and the Respondents as ordered by this Honourable Court vide its Ruling of 4th December 2020.
 5. THAT an order and be hereby issued that the actions of the Respondents of causing the Property to be valued at a forced sale price of Kshs. 4,500,000/- is malicious; in bad faith; amounts to gross undervaluation of the suit property; is in violation of the order of this Honourable Court issued on 4th December 2020 and thus null and void.
 6. THAT this Honourable court does grant any other or further relief as it may deem fit.
 7. THAT the Respondents do bear the costs of this application.
3. The application is based on the grounds on the face of the motion and supported by an Affidavit sworn on even date by ABDI MUNIM HAJI ABDI, the 2nd Appellant herein and a Director of the 1st Appellant. He deposed that on 7th July, 2021, he received a copy of a Notice dated 6th July, 2021 from the 2nd Respondent together with a copy of a Notification of Sale dated 7th July, 2021. Upon perusal of the Notification of Sale, he noted that the suit property, Kajiado/Dalalekutuk/2484, was scheduled for sale by public auction on 28th July 2021 and had been valued at a forced sale price of Kshs. 4,500,000/-.
 4. In his view, the value of Kshs. 4,500,000/- is a gross undervaluation of the suit property. He noted that in a Replying Affidavit sworn by Anthony Chambira on 30th September 2020 and filed in this court by the Respondent in response to the earlier application, it was indicated that on 13th May, 2019, the same property was valued by the Respondent at a market value of Kshs. 16,000,000/- while the forced value was placed at Kshs. 12,000,000/-. Further, that in January 2020, he instructed a valuer to value the suit property and vide a report dated 25th January, 2020, the same property was valued Kshs. 18,000,000/- and the valuation report was served upon the Respondents.
 5. He averred that following the Ruling of 4th December, 2020, the Respondent's counsel, vide letters dated 7th December, 2020 and 11th December, 2020, forwarded to the Appellants' advocates a list of valuers suggested by the Respondent for consideration by the Appellants. The Appellants' advocates responded vide a letter dated 16th December 2020 making its own proposal of valuers. When it became apparent that the parties could not agree on a single valuer to carry out the joint valuation, the Respondent vide a letter dated 7th January 2021 proposed that each party appoints its own valuer. The Appellants' advocate responded via email on 9th January, 2021, in which she sought for the parties to agree on whether each party would be bearing its own costs. Both counsel for the Appellants and Respondents deliberated on this issue as evidenced by a thread of emails annexed hereto. However, the issue of who was to bear the cost of the valuer and/or if both parties would share the cost thereof was not agreed upon.
 6. Subsequently, vide a letter dated 4th February, 2021, the Respondents wrote to the Appellants' counsel requesting for the details of the valuer appointed by the Appellants. The Appellants' advocate



- responded vide a letter dated 5th February, 2021 indicating that the Appellants were not opposed to the joint valuation but it was prudent that each party bears the cost of its valuer. The Respondents' advocates responded vide a letter dated 5th February, 2021 but did not commit on whether the 1st Respondent was going to bear the cost of its valuer. The Appellants' advocates responded to the said letter vide an email of 8th February, 2021 as well as a letter dated 10th February, 2021 in which they forwarded the details of the valuer appointed by the Appellants. The Respondents' advocates acknowledged receipt of the said letter vide a letter dated 12th February 2021.
7. Since then, the Appellants and their advocates have never heard from the Respondent and/or their lawyers in respect to the issue of valuation. It was not until 7th July, 2021 when the 1st Appellant was ambushed by an officer of the 2nd Respondent who served him with a 21 days' Notice dated 6th July, 2021 as well as a Notification of Sale dated 7th July, 2021. The Appellants averred that if any valuation was done in the circumstances, it was in total disregard of this Honourable Court's Order of 4th December 2021 directing parties to undertake a joint valuation of the suit property and amounts to contempt of the said court order.
 8. Further, he averred that if the Respondents are not estopped from proceeding with the said auction on the basis of the gross undervaluation of Kshs. 4,500,000/-, the Appellants will suffer irreparable harm that cannot be compensated by way of damages. It was also his view that it is impossible and unheard of that a property that was valued at the sum of Kshs. 18,000,000/- in January 2020 could now be valued at Kshs. 4,500,000/-. Finally, he stated that this application has been brought in good faith, without undue delay and the Respondents have been put on notice. Thus it is only just and fair that the orders sought be granted.
 9. In response, the 1st Respondent filed a Replying Affidavit sworn on 16th July 2021 by MORRIS S. TIEMA, its Remedial Analyst. He deposed that following the court's order for a joint valuation of the suit property, the Bank's advocates on record, via a letter dated 7th December 2020, promptly forwarded to the Appellants' Advocates a list of Valuers suggested by the Bank for consideration by the Appellants. However, no response was forthcoming from the Appellant's Advocates thus prompting the Bank's Advocates to follow up on the same via a letter dated 11th December 2020 in light of the strict timelines ordered by the Court for compliance.
 10. The follow up letter did not illicit any response until 16th December, 2020 when the Appellant's Advocate responded with a list of their own proposed Valuers indicating that the Bank's proposed Valuers were not acceptable to the Appellants. He averred that from the above actions of the Appellants, it was apparent that their sole intention was to delay the matter in an effort to frustrate and circumvent the Orders of this Honorable Court. That this position was communicated to the Bank by its Advocates via a letter dated 16th December 2020 advising the Bank to appoint its own valuer to undertake the exercise jointly with the Appellants' valuer of choice.
 11. Consequently, the Bank appointed Messrs. Zenith Management Limited to carry out the valuation on its behalf, a position that was communicated to the Appellants' Advocates via a letter dated 7th January, 2021. Despite several correspondences between the parties' Advocates, the Bank's efforts to engage the Appellants to conduct the joint valuation did not bear any fruit and this prompted the Bank's Advocates to send a further reminder to the Appellant's Advocates via a letter dated 4th February, 2021. The Appellants' Advocates responded via a letter dated 5th February 2021 mischievously addressing the issue of who is to bear the costs of the valuation and agreeing that each party engages its own valuer for purposes of joint valuation, an issue they ignored earlier on 16th December, 2020. The Bank's Advocates responded by advising that the issue of costs would be addressed by the Court upon



compliance with its orders and directions and further requested for the contacts of the Appellants' valuer to enable them conduct the joint valuation.

12. It was not until 10th February 2021 that the Appellants' Advocates reverted with the details of the Appellants' choice of Valuer which was a clear indication of its efforts to delay the exercise and evade the same as directed by this Honourable Court. Three months later, the Bank's Valuer's efforts to jointly undertake the valuation exercise with the Appellants' Valuer were thwarted by the later who rejected the former's efforts to conduct the same jointly citing that they were carrying out the valuation solely. As such, the Bank's valuers proceeded to inspect the property on 15th April, 2021, carried out thorough market survey and analyzed the prevailing market values of the immediate neighborhood whereupon they attached some of the comparables obtained and arrived at Kshs. 1,500,000/- per acre. In this case the valuer arrived at a market value of Kshs. 6,000,000/- for the subject property being five acres in size and considering a quantum factor of 20%.
13. To this end, the Bank's valuer proceeded to equally conduct the valuation solely in a bid to fulfil its instructions on the subject matter thereby compiling the Valuation Report dated 3rd May, 2021. To date, the Bank has never received feedback and/or a valuation report from the Appellants or their valuer to make a comparison of the same which prompted the Bank to proceed with the intended auction based on the available valuation in order to complete the sale as directed by this Honorable court.
14. He stated that the Appellants through their actions have been indolent in an effort to defeat the ends of justice and are therefore undeserving of the orders sought in the instant Application. He also argued that Orders and directions of this Honourable court ought to be obeyed to the letter and the Appellants' intentional delay to execute the orders of this court are malicious, disrespectful to the court and should be frowned upon. He therefore urged that the Appellants' Notice of Motion should be dismissed with costs to the Bank for want of merit.
15. In rebuttal, the Appellants filed a Supplementary Affidavit sworn on 19th July 2021 by ABDI MUNIM HAJI ABDI, the 2nd Appellant herein. He averred that whereas the 1st Respondent appointed Messrs. Zenith Management Limited to carry out the joint valuation on its behalf, the Appellants appointed Geosky Services. That the Respondent failed and/or neglected to notify the Appellants of any challenges that they faced in working with Geosky Services Limited and in any case, the Respondents have not demonstrated any form of communication that they made to the said valuers for purposes of the joint valuation exercise.
16. He reiterated that a court order is binding on the party against whom it is addressed and until set aside, remains valid and must be complied with. He stated that even after conducting the valuation solely without the involvement of the Appellants, the Respondent failed and/or neglected to furnish the Appellants with the valuation report. In his view, the Respondents are in breach of its duty of care owed to the Appellants to obtain the best price reasonably obtainable at the time of sale. Further, he stated that contrary to the averments by the Respondents, the Appellants through their advocate were in constant communication with the Respondents' advocate to ensure compliance and enforcement of the Court Order. That as such, it is in the interest of justice that this Honourable Court directs that a fresh valuation be undertaken.

Submissions

17. The Application was canvassed by way of written submissions. The Appellants' written submissions were dated 19th July, 2021 whilst the Respondents written submissions were dated 22nd July, 2021.
18. The Appellants formulated three issues for determination which they submitted on as follows:
Whether the intended public auction by the Respondents should be stayed.



19. The Appellants reiterated that the intended public auction is based on a serious and gross undervaluation of the suit property in view of previous valuation reports and also because the valuation report prepared for purposes of the intended auction was not prepared by a jointly appointed valuer as directed by this Honourable Court on 4th December 2020. They submitted that the gross undervaluation of the suit property is in breach of Section 97(1) and (2) of the [Land Act, 2012](#) which places a statutory duty on the bank to ensure that it obtains the best price reasonably obtainable.
20. In support of this, the Appellants relied on the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR where the court stated that the duty under Section 97(1) 2 of the [Land Act, 2012](#) is a serious legal requirement which entitles a chargor to apply to court under Section 97(3) (b) of the [Land Act, 2012](#) to have any sale based on such breach declared void since the purpose of valuation is to obtain the best price reasonably obtainable at the time of the sale. Reliance was also placed on the case of *Orion East Africa Limited v. Eco Bank Limited* [2015] eKLR for the proposition that where a court finds fault with a forced sale valuation, the appropriate remedy is to direct that a fresh valuation be undertaken.

Whether the Respondents action of unilaterally valuing the subject property at KShs. 4,500,000/- is in contravention of the court Order of 4th December 2020.

21. On this, the Appellants submitted that by proceeding to cause a valuation of the property without the involvement of the Appellants and/or their valuer, the Respondents acted in utter disregard of the court order which amounts to contempt of court. In their view, any subsequent actions arising therefrom including the public auction previously scheduled for 28th July, 2021 is null and void and ought to be cancelled. The Appellants relied on the case of *Awadh v Marumbu [2004] KLR 458* where it was stated that court orders must be obeyed at all times and that it is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The Appellants therefore urged the Court to take action against the Respondents and restrain them from disposing off the suit property.

Whether the Appellants stand to suffer any harm.

22. On this, the Appellants submitted that if the sale of the suit property proceeds on the basis of the gross undervaluation, they will suffer irreparable loss which cannot be compensated by way of damages. In the premises, they submitted that it is in the interest of justice that the orders sought be granted.
23. The Respondents also formulated three issues for determination which they submitted on as follows:

Whether the intended public auction by the Respondents is justified

24. The Respondents submitted that despite this Honourable Court's Order of 4th December, 2020 directing the parties to conduct a valuation of the suit Property for purposes of the intended public Auction within 21 days, there were several deliberate attempts by the Appellants to frustrate and delay the same which eventually forced the bank to use its own valuation report. They submitted that no material has been presented by the Appellants to explain why their Valuer did not comply neither is any proof that a report was generated from their end which was subsequently ignored or rejected by the Respondent. In their view therefore, the intended public auction by the Respondents is justified in light of the Appellants' indolence and lack of cooperation.

Whether the Appellants are deserving of this Honourable court's Orders of stay

25. On this, the Respondents submitted that the principles of equity are outright that a party seeking equity must do equity and equity does not aid the indolent. They argued that the Appellants cannot be seen to cry foul seeking the court's mercy when they have deliberately been on the forefront in



frustrating compliance with the court's Orders with no proof that they intended to meet the ends of justice as directed by the court. They argued that nothing prevented the Appellants from following up with their own valuer on the progress and raising the issues they seek to rely on when it became apparent that the valuation was taking longer than expected. Rather, they encouraged the delay knowing it was to their advantage and chose to bury their head in the sand over the same.

26. The Respondents placed reliance on the findings of Mabeya, J in the case of *Jan Bolden Nielsen v Herman Phillipus Steyn Alias Hemannus Phillipus Steyn & 2 others* [2012] eKLR as quoted by Mwongo, J in *Equip Agencies Limited v I & M Bank Limited* [2018] eKLR. It was thus their submission that the Appellants are undeserving of this Honourable Court's further indulgence the same having been brought up over six months after the timelines set by the Court.

Whether the Respondents' actions are in contravention of this Court's Order of 4th December 2020.

27. On this, the Respondents stated that their actions cannot be said to be illegal or irregular as to be in contravention with the orders of 4th December, 2020 in light of the difficulties and frustrations occasioned by the Appellants. They thus urged the court to consider the circumstances of the matter in reaching a conclusion that the Application is unmerited and dismiss the same with costs to the Respondents.

Analysis and Determination

28. I have carefully analyzed the Appellants' application, the Respondent's Replying Affidavit and the parties' respective arguments. In this case and as stated in my earlier Ruling, I harbor no doubt in my mind that the Appellants have not established the threshold for the grant of a temporary injunction as they have not met conditions set out in the case of *Giella v Cassman Brown*. I will therefore not go back to analyzing the same since in any case, the Appellants do not dispute the 1st Respondent's authority to exercise its statutory power of sale which has since crystallized. I note that the Appellants only worry is that they risk suffering irreparable harm which cannot be compensated by way of damages if the sale of the property is conducted on the basis of the value that the 1st Respondent now seeks to rely which was obtained through a valuation conducted contrary to the court's order for a joint valuation.
29. From the correspondences annexed to both parties' Affidavits, I gather that the said court order of 4th December, 2020 was not complied with due to lack of cooperation between both parties. It is evident that the Appellants were not agreeable to the list of valuers that was first suggested by the 1st Respondent and this was duly communicated to the Respondents' advocates. As a consequence, the 1st Respondent's advocates advised their client to appoint its own valuer and also asked the Appellant's advocates to advise their client to appoint their own so that the exercise could be undertaken jointly by both valuers. It is noteworthy that the Appellants took their sweet time to appoint their valuer of choice as this was done on 8th February, 2021, over a month after the court order.
30. Further, from the emails exchanged between the 1st Respondent's Advocates and Zenith Valuers appointed by the Respondent, it appears that the lack of cooperation was extended to the valuers in conducting the joint exercise. In particular, in the email of 19th May, 2021 from Zenith, they noted that they tried engaging Geosky Services Limited for purposes of conducting a joint valuation but the latter informed them that they were supposed to solely undertake the valuation although no proof of such communication was produced. This means that the court cannot place any weight on the same to support the Respondent's claim that the Appellants frustrated the joint valuation exercise.
31. I note that the valuation report prepared by Zenith Management Limited which the 1st Respondent seeks to rely on indicates that the current open market value of the property is Kshs. 6,000,000/= whilst



the forced sale value is placed at Kshs. 4,500,000/=. On the other hand, in the Replying Affidavit of Anthony Chambira filed in this court on 30th September, 2020 in response to the previous application, the 1st Respondent annexed a valuation report prepared by Premier Valuers Limited which placed the market value of the property as at 13th May, 2019 at Kshs. 16,000,000/= while the forced sale value was placed at Kshs. 12,000,000/=. Further, a Valuation report prepared by Accenture Realtors for the Appellants in January 2020 placed the value of the property at Kshs. 18,000,000/=. This means that should the Respondents proceed to sell the property at the current forced sale value, there will be a difference of over Kshs. 10,000,000/= which is a gross undervaluation.

32. In the circumstances, the court can only entertain the instant application under Section 3A of the *Civil Procedure Act* which empowers it to make such orders as may be necessary for the ends of justice. Section 97 of the *Land Act, 2012*, 2012 provides as follows:

- “(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of the 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 and any charge under a subsequent charge or under a lieu 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.”

33. In *Palmy Company Limited v Consolidated Bank of Kenya Limited* the court stated that:

“The purpose of a valuation under Section 97(2) of the *Land Act, 2012* is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property...the second one is to prevent unscrupulous Chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

34. From the above, it is clear that the law places a duty of care on the chargee to ensure that the auction attracts the best market value for the property. The chargee must act in good faith in the exercise of his or her power of sale of charged property. In the instant case, it is impossible to imagine that a property valued at Kshs. 16,000,000/= as at 13th May, 2019 and Kshs. 18,000,000/= as at January 2020 has since depreciated to a mere Kshs. 4,500,000/= in April 2021. Indeed. It is common knowledge that the value of land always appreciates and the figures rises every other year. I am therefore unable to see how Zenith Management Limited arrived at such low values. I have also noted that the Respondents have not discredited the Appellants’ position that the value is too low. There is therefore no doubt that there is a risk that the property may be sold at a gross undervalue to the detriment of the Appellants herein and this will definitely not serve the ends of justice.

35. However, since it is clear that parties are not willing to cooperate to ensure that a joint valuation is undertaken, the best way to proceed in my view, is to order for a third independent valuation and to postpone the auction or sale until a fair and reasonable value for the property is secured. This exercise must be conducted expeditiously. To fast track the same, the matter shall be mentioned on 14th October, 2021 so that if parties shall not have agreed on a valuer, the court shall appoint one and thereafter order that the sale proceeds.

Deposition



36. Accordingly, the court makes the following orders:

- a. An independent valuation of the property known as L.R. NO. KAJIADO/DALALEKUTUK/2484 be conducted so as establish a proper value before the Respondents can proceed with the intended public auction.
- b. The parties shall within 14 days from the date of delivery of this ruling agree on the independent valuer to undertake the exercise but if they fail to agree, the court will appoint one from the official list of Registered Valuers of Kenya For this purpose, the matter shall be mentioned on 14th October, 2021.
- c. The costs of the valuation shall be shared equally by both parties.
- d. The costs of this application shall be borne by the Appellants/Applicants**.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

Ms. Kyeva h/b for Ms. Thiong'o for the Appellants/ Applicants.

Ms. Muyaa h/b for Mr. Limuli for the Respondents.

