



**NCBA Bank Kenya PLC v Angran Limited (Miscellaneous Application 2 of 2021)  
[2021] KEHC 314 (KLR) (Commercial and Tax) (29 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 314 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION 2 OF 2021**

**MW MUIGAI, J**

**NOVEMBER 29, 2021**

**(FORMERLY NO. E545 OF 2020)**

**BETWEEN**

**NCBA BANK KENYA PPLC ..... APPLICANT**

**AND**

**ANGRAN LIMITED ..... RESPONDENT**

**RULING**

**NOTICE OF MOTION**

1. The Applicant filed a Notice of Motion Application dated 9th December 2020 for orders that;
  - a. The Court grants leave to the Chargee herein - NBA Bank Kenya PLC - to dispose of the Suit Property Deluxe Apartment No D-16 on LR No. 209/10836 Casa Ozone Apartments on Dennis Pritt Road, Nairobi in exercise of the said Charge's Statutory Right of Sale at the best possible price notwithstanding that the said price may be at a sum below the Forced Sale Value contained in the Valuation by Hectares & Associates dated the 3<sup>rd</sup> of February, 2020.
  - b. In addition to or supplemental to the Orders sought herein before the Court do issue such other Orders and Directions as may be necessary to meet the ends of justice.



2. Which Application was supported by the sworn Affidavit of Jackson Nyaga dated 24<sup>th</sup> November 2020 and based on the grounds that;

1. The Applicant advanced to Angran Limited, the Respondent herein, loan facilities amounting to Kshs.25,200,000,000/- secured by a Legal Charge over the Property known as Deluxe Apartment No D-16 on the 3<sup>rd</sup> Floor of LR No. 209/10836 Casa Ozone Apartments on Dennis Pritt Road, Nairobi. (Marked A – resolution of Directors dated 24<sup>th</sup> March 2016, Marked B1 & 2 – individual Director guarantees and Marked C – Charge dated 25<sup>th</sup> August 2016)
2. The Respondent failed to make the required payments to service the loan thereby leading to a running default. As at the date of this Application the Facilities were overdue by 1,286 days with arrears in the sum of Kshs. 13,540,048.24/- and the total outstanding sum stood at Kshs. 30,718,520.96 /- which sums continue to accrue/ attract interest.
3. The Applicant attempted to mitigate its losses by pursuing its remedies under the Charge including through the exercise of its statutory power of Sale but none of the remedies has been successful. In particular, all Public Auctions carried out by the Charge have failed to meet the statutory threshold in respect of the bids received. (Marked E1 – 90-day Statutory Notice and Marked E2 – 40-day Notice of intention to sell/Redemption Notice)
4. In addition, Leakey's Auctioneers, who were instructed by the Applicant to exercise the Statutory right of Sale strictly followed the law in advertising the Property for Sale by issuing and serving the requisite Notices. (Marked F1- 45-day Redemption Notice by the Auctioneers dated the 29<sup>th</sup> of May 2018 that includes the Notification of Sale, Marked F2 – Newspaper Advertisement for 16<sup>th</sup> July 2018)
5. In particular, all Bids advanced at the Auctions held by the Applicant have failed to meet the Forced Sale Value of Kshs. 19,500,000/- set out in the Valuation Report by Hectares & Associates dated 3<sup>rd</sup> February, 2020. (Marked H – copy of the Valuation by Hectares Associates Valuers)
6. The inability to dispose of the property through a Public Auction has placed the Applicant in a prejudiced position as the outstanding balances continue to grow exponentially to a level where the Sale proceeds (in the now unlikely event that bids meeting the Forced Sale Value are met) will not satisfy and settle the sums due. and this has an adverse effect on the financial health of and the ability to recover by the Applicant.
7. The interest on the amount advanced to the Respondent continues to accrue and if the situation is not arrested at the earliest opportunity possible, the Applicant may not recover the total amount owed which shall shortly exceed the value of the property.
8. The Respondent was duly notified of the default then owing, the amount required to settle the default and the Bank's intention to exercise their Statutory Rights in the event the default persisted. The said Notices were



duly issues to the Respondent's last known address as set out in the security documents by way of registered Pre-Paid Post. (Marked J – various Certificates of Posting)

### APPLICANT'S SUBMISSIONS

3. The Applicant submitted that under Section 98(1) of the Land Act the Chargee is entitled to exercise the accrued right of sale by way of a public auction with a reserve price. The duty of care set out generally under Section 97 of the Land Act is a Duty of Care that can be countered by the rebutting presumption highlighted under Section 97(3)(a) which allows a chargee an opportunity to rebut the presumption that may be brought about by a sale of the suit property at the best obtainable price.
4. The Applicant relied on the case of Ben Gitonga Muiruri versus Equity Bank [2019] eKLR where the court stated;

"In this matter the plaintiff's complaint is that at the time of executing the charge in 2015 the property had been given a forced sale value of Kshs.178,500,000/= but when preparing to sell the same on account of default a new valuation conducted in the year 2017 returned a forced sale value of Kshs.120,000,000/=.....The later valuation report used as a basis to impute impropriety and breach of statutory duty does not amount to such even if viewed on the earlier report of 2015 because the value returned is well over 25% of the market value in both reports. This court has had a chance to consider similar scenario in Patrick Kangethe vs Co-operative Bank of Kenya Ltd & Others [2017] eKLR when the court rendered itself in the following words.

"My reading of sub-section 97(2) & (3) Land Act give me the understanding that once the valuation is undertaken, a chargee would only be deemed to have failed or breached its duty of care where the sale is at a price of not more than 25% of the given market value".

5. It was the Applicant's submission that it has exercised all efforts to comply with the law prior to Sale as is evidenced in the Application and the Supporting Affidavit. Further, that the Applicant sought the best obtainable price for the collateral and the court has power under Section 106 of the Land Act to consider a Charge on an Application by a Chargee in relation to matters of exercise of Statutory Power of Sale under Section 90 of the Land Act.
6. Further to the above the Applicant submitted that the Respondent has not furnished to the Applicant a viable proposal for the repayment of the debt and the debt continues to accrue owing to application of interest and other charges. The debt due shall outstrip the market value of the security held outstanding at Kshs.26 Million as at February 2020.

### DETERMINATION

7. The Court has considered the Application and the submissions by the Applicant. The issue for determination is whether the Chargee should be granted leave to sell the suit property below the forced sale value?
8. The Application is unopposed as the Respondent herein did not entered appearance or file any Application with regard to this matter. The Applicant served the Respondent by way of an advertisement on the Standard Newspaper pursuant to the court Order of Lady Justice C. Meoli issued on 11<sup>th</sup> February 2021 . The Applicant has also filed an Affidavit of Service by Christopher Omache dated 24<sup>th</sup> February 2021 which indicates that the Respondent was indeed served through the advertisement on the Standard newspaper of the 19<sup>th</sup> February 2021. There is an affidavit of service



of 26<sup>th</sup> January 2021, where the Court Process Server served the Respondent with hearing Notice at the offices of Casa Ozone Apartments where he learnt the Respondent left the premises and served through registered post.

9. The Applicant produced the charge Lease No. 182070 Marked C signed between the Applicant and the Respondent which shows that the Respondent was advanced loan facilities amounting to Kshs. 25,200,000,000/- secured by a Legal Charge over the Property known as Deluxe Apartment No D-16 on the 3rd Floor of LR No. 209/10836 Casa Ozone Apartments on Dennis Pritt Road, Nairobi.
10. Due to the Respondent's default in the loan repayment the Applicant was forced to exercise its Statutory power of sale as provided under Section 90 of the Land Act which provides;
  90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

### **Statutory Notices**

11. The Applicant has proved compliance with the issuance of the requisite Statutory Notices by issuing the Respondent a 90-day Statutory Notice and 40-day Notice of intention to sell/Redemption Notice. In addition, a 45-day Redemption Notice by the Auctioneers dated the 29<sup>th</sup> of May 2018 that includes the Notification of Sale, Newspaper Advertisement for 16<sup>th</sup> July 2018. (Marked E1, E2, F1 and F2)
12. The Applicant contended that it was unable to dispose of the property through a Public Auction and that all bids advanced at the Auctions held by the Applicant have failed to meet the Forced Sale Value of Kshs. 19,500,000/- set out in the Valuation Report by Hectares & Associates dated 3<sup>rd</sup> February, 2020.

### **Whether the Chargee should be granted leave to sell the suit property below the forced sale value?**

13. Having made attempts to sell the charged property by public auction and there being no viable proposal by the Respondent to pay the debt the sale of the security held remains the only viable option available to the Applicant to recover some of its monies and to reduce the exposure.
14. The Applicant has demonstrated that there are no buyers willing to buy the property at the public auction at the forced sale value. The property was legally charged to the bank so as to secure its interest on the sum advanced in favor of the borrower. The Respondent herein surrendered the Title documents for the aforesaid property to the 1st Defendant pursuant to the charge instrument and in so doing; he fully understood and agreed to the full import of the terms set out in the charge instrument registered in favor of the bank.
15. In light of the foregoing, I am persuaded the instant Application by the Applicant to be granted leave to sell the property below the forced purchase the property at the public auction presents the most advantageous way of recovering the monies owed by the Respondent considering that the loan amount continues to accrue interest which the Respondent has been unable to pay.

### **DISPOSITION**

16. Considering all the foregoing circumstances and for the reasons enumerated, the Notice of Motion Application dated 9<sup>th</sup> December 2020 is hereby allowed, the statutory power of sale shall be undertaken although below forced sale value but reasonable market price to best allow offsetting larger portion of outstanding debt.



**DELIVERED DATED & SIGNED IN OPEN COURT ON 29<sup>TH</sup> NOVEMBER  
2021(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

