



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL DIVISION

CIVIL CASE NO. 51 OF 2020

ENOS OUMA NYAWATA.....PLAINTIFF

VERSUS

EQUITY BANK KENYA.....1ST DEFENDANT

ANTIQUA AUCTIONS.....2ND DEFENDANT

J U D G M E N T

1. The Plaintiff's case is set out in the amended **Plaint** dated **21st December, 2020** wherein **ENOS OUMA NYAWATA** (herein referred to as 'the Plaintiff') a Director of **Giefcon Limited** has sued **Equity Bank, Kenya Ltd** and **Antiqua Auctions** (herein referred to as 'the Defendants') seeking for:-

a) A declaration that the Defendants' actions are illegal and in contravention to the provisions of law.

b) A mandatory injunction do issue to restrain the Defendants/Respondents or any other person authorized by the Defendants/Respondents however from transferring and/or causing any further interference in the suit property Subdivision Number:11128 (Original No.632/237) Section 1 Mainland North (C.R 40444), or any attempts thereof geared retention under their control of the demise property and/or evicting, the Plaintiff/Applicant's agents, servants, assigns and/or any other person authorized by the Plaintiff/Applicant from the suit property being all that parcel of land known as Subdivision Number:11128 (Original No.632/237) Section 1 Mainland North (C.R 40444) and/or interfering in any way whatsoever the Plaintiff's/Applicant's peaceful occupation of the suit property, and/or in the alternative.

c) A declaration that the suit premises was sold below the market value for a forced sale as per the valuation report dated 2nd May, 2017 contained in the loan agreement/or which is part of the loan agreement and hence the public auction was null and void.

d) Based on the market value for a forced sale per the valuation report by Njuhia Muoka Rashid Co. Ltd contained in the loan agreement, compensation by way of damages for the loss suffered due to the irregular sale.

e) Costs of the suit and interests thereof.

2. The facts of the case are that by a charge dated **13th June, 2017**, the 1st Defendant advanced a loan of Kshs.11,345,000/= to **Giefcon Limited** which loan was secured by the Plaintiff's parcel of land known as **Subdivision No.11128 (Original No.632/237) Section 1 Mainland North (C.R.40444)**[herein-after 'the suit property']. According to the Plaintiff, the 1st Defendant had the property valued by an independent valuer who reported the market sale of the property to be Kshs.9,400,000/= and forced sale value of Khss.7,000,000/=.

3. That the Plaintiff defaulted in payment of the loan advanced to **Giefcon Ltd** and the 1st Defendant outsourced the 2nd Defendant to recover the title of the Plaintiff's property and it proceeded to conduct a public auction of the same so as to realize the amount owing to the 1st Defendant.

4. According to the Plaintiff, the 2nd Defendant auctioned the property way below the market value and in an irregular manner contrary to the provisions of the law.

5. In defence, the 1st Defendant filed a statement of defence dated **6th November, 2020** in which it denied that the Plaintiff is entitled to any of the reliefs sought. The 1st Defendant has admitted that it advanced the Plaintiff a loan of Kshs.11,345,000/= and that 2nd Defendant sold the Plaintiff's property which was used to secure the said loan by public auction. It however denied that the property was sold at Kshs.5,000,000/= or at way below the market value.
6. It is the 1st Defendant's contention that before instructing the 2nd Defendant to sell the property, it retained two firm of valuers to establish the forced sale value of the said property. That there were two **Valuation Reports** dated **16th July, 2019**, and **11th December, 2019** stating the forced sale value as Kshs.4,500,000/= and Kshs.5,200,000/= respectively. The 1st Defendant instructed the 2nd Defendant and the sale by public auction was conducted on **20th March, 2020** in reliance on the highest value of the two, being Kshs.5,200,000/=.
7. On **8th February, 2021**, the parties agreed to admit all the documents filed in support of their respective case.
8. The Plaintiff opted to testify orally and did so on **15th June, 2021**, whereby the five (5) documents he had listed were admitted as evidence. The Defendants opted to rely on the witness statement by **Janet Maraka**, dated **13th November, 2020** and list of documents it had filed on even date.
9. According to the Plaintiff, who testified as PW1, he applied for a loan over a property which was charged by the bank, for Kshs.9.5 Million. He stated that the forced sale price of the property was Kshs.7,000,000/= but when the auction took place, the same was sold at Kshs.5,000,000/= which he protested.
10. The Plaintiff had applied for and obtained summons to issue upon the two valuers but abandoned the same.
11. On **15th June, 2021**, the parties agreed to file written submissions, and they each filed elaborate submissions. The 1st Defendant filed their submissions on **20th September, 2021** while the Plaintiff filed his submissions on **26th September, 2021**.

ANALYSIS AND DETERMINATION

12. I have read through the pleadings, evidence and the written submissions by the parties. From the arguments by either party, I find it is clear that the Plaintiff is the registered owner of the charged property and a guarantor of the loan of Kshs.11,345,000/= that was advanced to **Giefcon Limited**. It is also not in dispute that the Plaintiff property has been sold upon the terms of the guarantee for the loan and charge created thereof. There is further no dispute that the 1st Defendant was entitled to exercise its statutory power of sale of the suit property, subject to the stipulated procedure under the Land laws.
13. The substantive issue for determination is *whether the 1st Defendant in exercise of its statutory power of sale failed to act in accordance with the applicable law hence caused the Plaintiff unwarranted loss and suffering. The next issue for determination is whether the auction was null and void. The third issue for determination is whether the property was sold below the market value. And lastly, whether a mandatory injunction should issue.*
14. With regard to the first issue in respect of exercise of statutory power of sale, I will begin by considering the law governing the same. In my observation, I find that the Plaintiff did not address himself to the validity of the statutory Notice that was issued to him. Nonetheless, **Section 90** of the **Land Act** provides as follows:-

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 in 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."

While **Section 96(1)** of the **Land Act, 2012** provides that:-

96(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land".

Once a chargee has decided to exercise its statutory power of sale, **Section 96(2)** of the **Land Act** puts another caveat that:-

96(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

Then **Section 56(2)** of the **Land Registration Act** provides:-

"(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the chargee".

Rule 15(d) of the **Auctioneer Rules** provides that:-

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction”

15. The foregoing provisions of the law, they irresistibly leave no doubt that the 1st Defendant, as a chargee had the power to exercise its statutory power of sale in the event the Plaintiff defaults in repayment of the loan. And in exercise of that power, the 1st Defendant instructed the 2nd Defendant to advertise the Plaintiff’s property for sale, and proceeded to sell the same. In retaliation, the Plaintiff filed the present suit.

16. Under **Section 90 and 96(2)** of the **Land Act** as reproduced above, enjoin the 1st Defendant to serve the Plaintiff with a Notice calling for the rectification of the default. On perusal of the documents filed by both parties in support of their respective positions in this case, I find that the 1st Defendant attached a **letter** dated **23rd June, 2020**, a Notification of Sale, detailing its statutory Notices issued and sent to the Applicant by registered post. The Plaintiff has not disputed service of these Notices by the 1st Defendant. The only dispute raised by the Plaintiff is how the auction was carried out during the ban of public gathering and that only one bidder attended the same.

17. In the case of **GIRO COMMERCIAL BANK LIMITED –VRS- HALID HAMAD MUTESI[2002]eKLR**, the Court of Appeal stated that it has been held time and again:-

“That a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction”.

18. Since it had not disputed that the statutory power of sale had arisen and based on the evidence on record in addition to the fact that the service of Notices was not objected to, it is my humble view that the 1st Defendant in exercise of statutory power of sale had observed and or complied with provided legal procedure.

19. Moreover, the auction was duly advertised and open to the public as required by **Section 98** of the **Land Act** which provides:-

98(2) If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are, as near as may be, followed in respect of that sale”.

20. In my view, I also find that a valid auction took place whereby a third party emerged the highest bidder and upon the fall of the hammer, that Plaintiff’s equity of redemption was extinguished.

21. The next issue that arises for determination is whether the property was sold below the market value. In the case of **PALMY COMPANY LIMITED –VRS- CONSOLIDATED BANK OF KENYA LIMITED [2014]eKLR**, it was held that:-

“The purpose of the valuation under Section 97(2) of the Land Act is two fold:-

a) to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the chargor to property. Doubtless, best or reasonable price which is comparable to interests in land of the same character and quality is part of the right to property itself, and;

b) 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”.

22. Therefore, under **Section 97(2)** of the **Land Act**, the duty is a serious legal requirement which will entitle the chargor to apply to court under **Section 97(3)** of the **Land Act** to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void.

23. Similarly, Gikonyo, J in the case of **KOILEKEN OLE KIPOLONKA ORUMOS –VRS- MELLECH ENGINEERING & CONSTRUCTION LIMITED & 2 OTHERS[2018]eKLR**, held that:-

“... the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under Section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the chargee and its agents, especially the auctioneers”.

24. The question then becomes, whether the 1st Respondent as the chargee satisfied the requirement of **Section 97(2)** of the **Land Act**.

25. According to the Plaintiff in submission, the suit property was valued at a market value of Kshs.9,400,000/= with a forced value at Kshs.7,000,000/= but the 1st Defendant’s valuers, **PAUL WAMBUA VALUERS LTD** valued it at market sale value of Kshs.7,000,000/= while the same was sold at a public auction for a forced sale value of Kshs.5,200,000/= which was below the value of the suit property. The Plaintiff contends that the sale of the suit property which was undervalued, amounted to an illegality as the power of sale resulted to an

injustice to the Plaintiff.

26. Furthermore, the Plaintiff asserted that the valuation reports by the Respondent do not have all the fundamental information since the valuers only conducted an assessment outside of the suit property and did not ascertain the interior of the suit property thereby relied on a copy of valuation availed to them by the bank to get the details required. As such, the Respondent's valuation report does not meet the threshold of a valuation report to be relied upon.

27. In response, the 1st Respondent stated that they complied with **Section 97(2)** of the **Land Act**. The 1st Respondent submitted that they instructed the **Firm of Africa and Beyond Valuers Limited** to carry out a forced sale valuation of the suit premises. The **Valuation Report (DEX – 2)** is dated **15th July, 2019** putting the forced sale value of the suit property at Kshs.4,500,000/=.

28. A second valuation was done by **PAUL WAMBUA VALUERS LTD** dated **11th December, 2019** and gave a forced sale value of Kshs.5,200,000/= as per the **Valuation Report (DEX – 3)**.

29. The only objection by the Plaintiff is that the reports do not represent the true market value of the suit property. It was submitted by the 1st Defendant that the Plaintiff relied on a Valuation Report which was done some three years ago.

30. In the case of **ZUM ZUM INVESTMENT LIMITED –VRS- CONSOLIDATED BANK OF KENYA LIMITED**[2014]eKLR, Kasango, J stated the following:-

“In my view, the Applicant has demonstrated

satisfactorily why this court should disregard the Respondent's Valuation Report and only rely on the

Applicant's Valuation Reports. It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time”.

Kasango, J went ahead to state:-

“The Applicant needs to show for instance, that the Respondent's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale”.

31. It is noteworthy that the Plaintiff did not raise any of such grounds. In the case of **PALMY COMPANY LIMITED –VRS- CONSOLIDATED BANK OF KENYA LIMITED (Supra)**, the court stated as follows:-

“The onus of establishing on prima-facie basis, that the Applicants' right has been infringed by the Respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies on the Applicant..... The court needs cogent evidence and material in order to say that prima-facie, there has been an undervaluation of the suit property which is an infringement of Section 97(2) of the Land act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent”.

32. In view of the above finding, it is upon the Plaintiff to show this court that the 1st Defendant failed to discharge the duty of care under **Section 97(1)** of the **Land Act**. I note that the Plaintiff has not tabled an independent report to give his version of what should be the value of the property or discredit the valuation by the two valuers.

33. However, the Plaintiff relied on a Valuation Report that had been conducted way back in **2017**, wherein the market value was placed at Kshs.7,000,000/=. The Plaintiff has not presented any latest valuation save that of the 1st Defendant which was carried out in the month of **2020**, prior to the date of the intended auction. In that regard, I am of the considered view that the 1st Defendant discharged its duty under **Section 97(1)** of the **Land Act** by carrying out a proper valuation of the suit property.

34. Finally, also for determination is whether a mandatory injunction can issue in the circumstances of this case. For mandatory injunction to issue, the test is as correctly set out in **Vol.24 Halsbury Laws of England 4th Edition, Paragraph 98**, thus:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted”.

35. In the present contract, the loan was secured by a registered legal charge signed by the parties governing the mortgage. It is the mortgage deed which provides one of the terms to be the repayment of the debt in equal instalments for 36 months. By the aforesaid legal charge, the Defendant's power of sale to recall the principal amount together with interest as specified in the contract became due and owing, which triggered the instant motion.

36. In this instant case of a mortgage contract, the transaction executed and completed while the 1st Defendant disbursed the loan to the

Plaintiff, that action was *fait accompli*. It is therefore evident that nothing short of actual payment is regarded as sufficient to extinguish a mortgage debt. In my view, the Plaintiff has not satisfied this court to exercise discretion to grant an equitable remedy of injunction. The Plaintiff ought to have settled the loan amount to the 1st Defendant before asking the court to deprive the mortgagee of its right to realize the benefit of the security.

37. Therefore, this is clearly a contravention of the equity of principle that whoever comes to equity must come with clean hands.

38. From the foregoing finding, the suit is hereby dismissed for lack of merit with costs to the 1st Defendant.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Onduso counsel for Plaintiff

Mr. Gikandi counsel holding brief for Mr. Kongere counsel for Defendant

Court Assistant - Bancy