



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Shibeka & another v Barclays Bank of Kenya (Civil Suit E089 of 2019)
[2021] KEHC 430 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E089 OF 2019
MW MUIGAI, J
DECEMBER 17, 2021**

BETWEEN

SAMUEL SHIMBA SHIBEKA 1ST APPLICANT

ANNE AMAYA MUSOTSI 2ND APPLICANT

AND

BARCLAYS BANK OF KENYA RESPONDENT

RULING

Notice of Motion Dated 17 Th February, 2021

1. The Applicant sought the following orders

1. That pending the hearing and determination of this application, this Court issues a temporary Injunction/Stay Order restraining the Respondent by itself, its officers, servants, agents or otherwise howsoever from evicting the Applicants from and/or transferring the property known as L.R. 158533 (ORIG NO. 12507/63) Mokoyeti Estate, Langata Area (“The suit property”).
2. That pending the hearing and determination of this suit, this Court be issues a Temporary Injunction/Stay Order restraining the Respondent by itself, its officers, servants, agents or otherwise howsoever from evicting the Applicants from and/or transferring the property known as L.R. 158533 (ORIG NO. 12507/63) Mokoyeti Estate, Langata Area (“The suit property”).
3. That this Court sets aside, in its entirety, the sale by public auction of the suit property purportedly conducted on or about 18th October, 2019 on the premise that the said sale was materially irregular and fraudulent in its



publication and conduct contrary to the strict procedures set out in the Civil Procedure Rules, 2010, the *Auctioneers Act* No. 5 of 1996, the Auctioneers Rules 1997 and the *Land Act* No. 6 of 2012.

4. That consequential to (4) and (5) above, this Court exercises the powers conferred on it by Sections 105 and 106 of the *Land Act* No. 6 of 2012 in the interest of doing justice with respect to matrimonial homes, and be pleased to re-open the charge herein and revise the terms therein allowing, the applicant to amortize the charge by way of renewed monthly instalments on waived off penalty interest terms, having the total outstanding balance determinable taken up by the Applicant's Credit Institution, paying off part of the outstanding balance and securing the balance with the undeveloped (1/2) half-acre after subdivision; or any other way this Court deems fit.
5. The application is supported by the following grounds to be adduced at the hearing:-
 - i. As a result of a loan facility/mortgage of Kshs.19 million advanced by the Respondent to the Applicants around September, 2015, a legal charge was created over all that parcel of land known as property known as L.R. 158533 (ORIG NO. 12507/63) Mokoyeti Estate, Langata Area belonging to the Applicants ("The suit property") as security against the said credit facility.
 - ii. Notwithstanding, the fact that the Applicants have paid to the Respondent a total of Kshs.11 million (Kshs.5.5. million in 2019 alone) out of a possible Kshs.19 million advanced, the Respondent, through Regent Auctioneers, proceeded to sell the suit property by public auction.
 - iii. The said sale by public auction was tainted by material irregularity and fraud, and therefore unlawful and unprocedural for the following reasons:-
 - a. The Respondent's agents (Regent Auctioneers) failed and/or neglected to take out (fresh) Notices of Sale by Public Auction for the purported auction that proceeded on 18th October, 2019 contrary to Rule 15 of the Auctioneers Rules, 1997.
 - b. The sale was conducted based on defective notice which was not only undated but also outdated, in that the notice indicated that the sale would proceed on Friday 21st June, 2019 but the loan account statements indicate that the sale proceeded on 18th October, 2019.
 - c. The sale was conducted based on defective notices in that failed to stipulate the value of the of the property under Rule 15 (b) Auctioneers Rules and



- failed to specify the amount required to redeem the property under Rule 15(d) Auctioneers Rules.
- d. The sale by public auction was not advertised in the newspaper as required by Rule 16 of the Auctioneers Rules.
 - e. The amounts recovered from the purported sale by public auction were never disclosed.
 - f. This matter being already in court, the Respondent's agents (Regent Auctioneers) refused, failed and/or neglected to take orders, directions and/or warrants of sale before irregularly proceeding with the impugned sale by public auction.
 - g. The respondent failed and/or neglected to have a forced sale valuation undertaken by a valuer as necessitated by Section 97(2) of the Land Act.
 - h. The Respondent and/or its agents sold the suit property at a price that was below the market value at which comparable interests in land of similar character and quality is being sold in the open market.
- iv. The Respondent flagrantly and blatantly breached the statutory duty of care it owes to the Applicants under Section 98(2) and 97(1) of Land Act to ensure that the sale is conducted according to the provisions relating to auctions and to ensure that it obtains the best price reasonably obtainable.

Replying Affidavit of 26/04/2020

2. THAT in further response to paragraph 5 of 1st Applicant's affidavit the Respondent find it of importance to highlight the events leading up to the subject of this suit and enumerate as follows:-
- a. Following the Applicants' default, the Respondent issued a statutory Notice dated 10th April, 2018 to the Applicants giving a Three (3) Months Statutory Notice, pursuant to Section 90 of the Land Act, 2012.
 - b. Through email and telephone conversations, the 1st Applicant reached out through the banks Advocates seeking an extension of time to service indicating they are seeking alternative repayment options through a loan takeover from United Nations Saving Sacco limited (UN SACCO).
 - c. On or about 18th May, 2018, the advocates of United Nations Saving Sacco Limited wrote to the Respondent indicating they can only take over the outstanding loan amount up to Ksh. 9,300,000/-.
 - d. The Respondent indicated through their advocates that the Take Over offer by United Nations Savings Sacco Limited was not acceptable to them.



- e. The Applicants failed to comply with the Statutory Notice and subsequently on 16th July 2018, through their advocates, issued the 40 days' Notice to Sell to the Applicants pursuant to section 96(2) of the Land Act, 2012.
- f. The Respondent instructed valuers, Njihia Muoko and Rashid Co. Ltd to provide them with a report and valuation of the property pursuant to Section 97(2) of the Land Act, 2012.
- g. Upon lapse of the 40 day Notice to sell on 27th August, the Respondent issued letters of instructions through their advocates to Leakey's Auctioneers to advertise and sell the suit property through a public auction.
- h. The instructed auctioneers served the 45 days Redemption Notice and Notification of sale pursuant to Rule 15 (b) Auctioneers Rule, 1997 upon the Applicants

Applicant's written submissions on the Applicant's application dated 17th February, 2020:

- 3. Contrary to the Plaintiff's/Applicant's allegations to the effect that, "The Respondent bank had by all indications clandestinely conducted a materially irregular and fraudulent sale", it is the Applicant's submissions that he made a valid purchase of the suit property through an auction sale as a bonafide purchaser for value.
- 4. The Applicant submits that the Auction sale for the suit property was conducted in compliance with the provisions of the Auctioneers Act, chapter 526 and the Auctioneers Rules 1997, and that contrary to the applicant's allegations, only one (1) auction was conducted on the 17th October, 2019.
- 5. The applicant submits that contrary to the Applicants allegation in their written submissions, the said auction sale was advertised in the Daily Nation Newspaper edition under the business column.
- 6. The advertisement stated that the auction would commence at 11.00 a.m. on 17th October, 2019, and the conditions of sale was expressly stated inter- -a-lia as follows;-
 - a. All intending purchasers are requested to view and verify the details themselves as these are not warranted by the auctioneers or our clients.
 - b. A refundable deposit of kshs.1,000,000/- must be paid to obtain the bidding number.
 - c. A deposit of 25% of the purchase price was to be paid in cash by way of bankers 'cheque or RTGS at the fall and the balance within 30 days from the date of auction was to be paid to the Chargee's Advocates.
 - d. Sale is subject to a reserve price.
- 7. It is the Applicant's submissions that he attended the auction sale on 17th October, 2019 and which took place at New Kireita building along Kirinyaga Road at 11.00 am.
- 8. It is important to highlight the fact that there was no order stopping the sale when the auctioneers advertised the said sale. The Applicant submits that there was no subsisting order when the sale actually took place.



9. The Applicant maintains that as per the condition of sale by auction, the Applicant proceeded and made payment of the 25% purchase and which was paid via RTGS and a transaction receipt duly issued as evidence.
10. The Applicant submits that he paid the balance of the purchase price and the Chargees advocate forwarded the completion to the Applicants Advocates and which were received on 13th November, 2019 and subsequently title was issued in the names of the Applicant.
11. Again, the Applicant submits that as was held in *Captain Kanyagia & Another -v- Damaris Wangechi & 2 others [1995] eKLR* as a bonafide purchaser, there was no duty on his part case, in law, as an intended purchaser at the time of the auction sale, properly advertised, to inquire into the rights of the chargee Bank to sell.
12. Tunoi, J.A (as he then was) in the case of *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another [2000] eKLR*, stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts were done fraudulently. It is also settled law, that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
13. The Applicants have not demonstrated to this Court by particularizing the alleged irregular and fraudulent sale by public auction.
14. Further, as was determined in the case of *Joyce Wairimu Karanja -vs- James Mburu Ngure & 3 others [2018] eKLR*, the statute immunizes a purchaser at a sale conducted by a mortgagee in the exercises of the statutory power of sale in Section 99 of the *Land Act*.

Should the sale by auction be set aside?

15. The Applicant submits to the above in the negative for reasons that the suit property auction sale was properly staged , and has answered to what is called “public auction” as has been demonstrated hereinabove and for the following reasons:-
 - a. Having followed all the requisite requirements under Rule 21 of the Auctioneers rules, the seller way of auction passed a valid title to the Applicant capable of being called an indefeasible title as per the law, and all subsequent transactions including the registration of the memorandum to the Applicant and the process of the transfer of the property to the applicant was valid at law.
 - b. Infeasibility of title. Having demonstrated that due to procedure as followed validating the auction sale of the suit property. The title became infeasible.
 - c. The Applicant submits that the suit property has already been sold to the applicant as evidenced by the fall of the hammer which amounted to a binding contract, the subsequent payment of the payment of the 25% deposit on the same day of the auction and execution of the sale agreement. As such the property having been lawfully transferred to the applicant as a bonafide purchaser for value, the applicants have no legal remedies over the property.

Respondents Written Submissions On The Applicant’s Application Dated 17th February, 2020:



16. The application seeks the following orders;-
 - a. That the Court be pleased to set aside, in entirety the sale by public auction of the suit property conducted on 18th October, 2019;
 - b. That the Court be pleased to grant an order for repayment of the purchased money without interest to the purchaser (the purchaser herein).
17. The Respondent submits that prior to sale of the suit property by way of public auction on 7th October, 2019, all the legal requirement under the Land Act, 2012 and the Auctioneers Rules, 1997 were followed to the later as explained in detail under paragraphs 8(a)(e)(f)(g)(h)(k)(q)(s) and (t), 12, 21,23,24,25 and 29 of the Replying Affidavit.
18. The notice served upon the applicants by the Respondent adequately informed them of the nature and extent of the default, the monies due under the charge, the amount that must be paid to rectify the default and remedial period of three months by the end of which the payment in default must have been completed in line with section 90 of the land Act, 2012.
19. Upon failure of the chargor to comply with the notice, the chargee under section 90(3)(e) of the Land Act, 2012 is provided with powers to sell the charged land.
20. Notably, before exercising the sale of the charged property, Section 96(2) of the Land Act provides that 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.
21. Accordingly, the Applicants failed to comply with the Statutory Notice, leading to the Respondent serving them with the 40 days' notice of sell in compliance with Section 96(2) of the Land Act, 2012 as illustrated in paragraph 8 (e) and annexure 'BBK 5' of the Replying Affidavit.
22. Upon lapse of the 40 - day notice period and the default has not be rectified, the Section 98(2) of the Land Act, 2012 provides that the chargee may proceed with the sale by way of public auction, in which case the chargee has a duty to ensure that the sale is publically 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 for land are, as near as may be, followed in respect of that sale.
23. The provisions relating to the sale by way of auction of an immovable property are provided under Rule 15, 16 and 17 of the Auctioneers Act.
24. Rule 16 of Auctioneers Rules, 1997 provided that the advertisement should include the date, time and place of the proposed sale, the conditions of sale, time of viewing the property to be sold; and all information required to be contained in the letter of instruction except the amount to be recovered and the exact amount of any reserve price.
25. The Purchaser upon the fall of hammer transferred Kshs.13,650, 000.00 being 25% deposit of the purchase price as provided in the Conditions of Sale of the auction and Memorandum of Sale as illustrated in annexure "BBK 20 of the Replying affidavit.

Prima facie case

26. The question as to what constitutes a prima facie case was discussed in the case of Mrao Limited -vs- First American Bank of Kenya limited; Civil Appeal 39 of 2002 which was cited with approval in the case of Bulk Medicals Limited -vs- Paramount Universal Bank Limited & 2 others (2006) eKLR and Haslington limited -vs- African Corporation limited (2019) in which the court pointed out that " it is



not sufficient to raise issues (...) the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. All that the court is to see is that on the face of it the persons applying for an injunction has a right which has been or is threatened with violation and the probability of success of the applicant's case upon trial."

27. Thus, it is the Respondent's submissions that the injunctive orders sought by the Applicants are intended solely for purposes of defeating the rights of the Purchaser as the bona fide purchaser of the suit property. Hence, the applicant is not approaching the court in good faith the rather as a mere afterthought aimed at defeating the interests of the Purchaser. We rely on further guidance the position as enunciated by Justice Ringera in *Showind Industries -vs- Guardian Bank Limited & another 92002) IEA 284* as follows:- "..... an injunction is granted very sparingly and only in exceptional circumstances such as where the applicants case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches."
28. We plead that the court in exercising its discretion in granting injunctive orders to look at the strength of the respondent's case with reference to *Orion East Africa Limited -vs- Ecobank Kenya Limited & another [2015] eKLR* where the appeal court pointed out that "in considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead".
29. The Applicants contends that the suit property is their matrimonial home and that they will suffer irreparably damages if the sale by public auction is upheld. They cited the case of *Francis Ngarama Kiratu -vs- Equity Bank [2019] eKLR*.
30. The Respondent wishes to cite the position in John Kagura Githae -vs- KCB & 2 others HCC 34/2013 (NKR) where the court adopted the decision in Downhill Limited -Vs- Harith Ali El - Busaidy [2000] eKLR where the Court held; "if, as the borrower contends, the property had been sold at an undervalue, that was a proper ground for recovering damages from the bank. It is no ground for stopping the sale and transfer to the appellant. We note that the borrower instituted these proceedings after his equity of redemption had been extinguished. He could have paid the amount demanded even after the sale to the appellant but before he was registered as a proprietor.
31. With regards to the other remedies sought by the Applicants, the Respondent submits that the Applicants are not entitled to the prayers sought in the application since the Applicants equity of redemption lapsed immediately upon the fall of the hammer. This was highlighted in *Simon Njoroge Mburu -vs- consolidated bank of Kenya limited [2014] eKLR* when the court noted that "what is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages"

Originating Summons dated 12th October, 2020

32. The Purchaser filed application and sought the following orders;
 1. An order issues directed to the Respondents ordering them to grant vacant possession of the property known as L.R. NO. 158533 (Original No. 12507/63) located in Nairobi to the applicant.



2. An order that the Respondents clear all the outstanding utility bills accrued since the 17th October, 2019 when the property changed hands.
3. An order that in the event that the Respondents do not grant vacant possession, the Applicant be at liberty to evict the Respondents forthwith by the use of the Court Bailiff with the assistance from the OCS Hardy police station.

Supporting Affidavit

33. That the Applicant saw an advertisement for an auction by Regent Auctioneers in the Daily Nation Newspaper dated 2nd October, 2019 which Auction was scheduled for the 17th October, 2019 for sale of all that property known as L.R. NO. 158533 (Original No. 12507/63) Located in Nairobi ("Suit Property) a copy of the newspaper advertisement attached.
34. That the Applicant attended the auction on the 17th October, 2019 which was conducted at Auction Mart, New Kireita building, Kirinyaga road at 11.00 a.m. annexed hereto and marked "PMN-2" is a copy of the bidders' attendance sheet, particulars of the property and the condition of sale sheet.
35. That the Applicant was declared the highest bidder and therefore the Purchaser and was issued with the Certificate of Sale annexed hereto and marked "PMN-3" is a copy of the certificate of sale dated the 17th October, 2019.
36. That on the same day the Applicant paid the 25% of the purchase price as required being Kshs. 13,650,000/- by RTGS and was duly issued with a receipt by Auctioneers.
37. That on the 6th November, 2019 the Applicant completed the payment of the 75% of the purchase price being Kshs.40,950,000/- being the balance of the purchase price annexed hereto and marked.
39. That upon payment of the balance of the purchase price the Chargees advocates forwarded the following completion documents to the Applicants Advocates on record;-
 - a. Original certificate of title over L.R. No.12507/63
 - b. Original and one counterpart charge over L.R. Number 12507/63
 - c. Undated and executed Transfer by chargee in Triplicate of L.R. No. 12507/63.
 - d. Capital Gains Tax (CGT) acknowledged receipt

Which docuemtns were received by my advocates on the 13th November, 2019 annexed hereto and marked "PMN" are copies of letter duly forwarding the completion documents.
40. That the suit property L.R. No. 15833 (original No.12507/63) located in Nairobi is currently registered in the names of Applicant – a copy of the certificate of title registered in the names of Applicant.
41. That the continued occupation of the Suit Property by the Respondent is unlawful. The Applicant is not in a position to take possession of the suit property unless he is issued with a court order for vacant possession and eviction as sought in the Originating summons.

Determination



42. The Court having considered the applications by the Plaintiff/Applicant and the Purchaser and the Respondent bank with submissions the issues that commend themselves for determination are;
- a. Did the Plaintiff/Applicants occupier and owner of the suit property default in servicing the loan facility advanced by the Respondent bank?
 - b. Was the sale of the suit property/public auction conducted as per legal requirements?
 - c. Should an injunction be granted or sale of suit property upheld?
43. The Plaintiffs/Applicants Executive Summary, they outlined as follows;
- 2015-advanced Ksh 19,000,000 paid Ksh 759,701.65
- 2016 Ksh 2, 264,108,40
- 2017 Ksh 2, 220,167.90
- 2018 Ksh 354,313.26
- 2019 Ksh 5, 619, 755.47
- 2020 Ksh 140,990.91
- 2021 Ksh. 10,587
- Total Ksh 11,369,625.24
44. The Court notes that the Plaintiff /Applicants serviced the loan facility regularly from 2015 -2018.In 2019 the plaintiff/Applicant agreed with the Respondent and paid Ksh 3,022,761.07 yet the Respondent proceeded to engage services of the Auctioneer to sell the suit property.The plaintiffs went to Court and tried to stop the auction and were to pay Ksh 2,000,000/- and they paid Ksh 2,072,811.01 in 2019. The Plaintiff/Applicant contend that in 2019, they paid Ksh 5,619,755.47/- which means they paid the arrears outstanding from 2018. The Respondent reneged on its assurance to restructure the loan repayment.
45. Despite these efforts the Respondent sold the matrimonial home by public auction.
46. The Court notes that the Respondent did not dispute or contest these payments.
47. From the evidence on record the Respondent outlined in detail the process and compliance with legal requirements of the public auction.
48. The Respondent served the 90 day notice by letter dated 10th April 2018, the 40 day notice by letter of 16th July 2018, and conducted Valuation of the suit property report dated 28th September 2018 and 45 day redemption notice of 45 days by the Auctioneer of 13th September 2018.
49. The suit property was advertised daily Nation dated 29th October 2018.
50. Premier Credit Bank offered Ksh 3,000,000/- by letter of 9th November 2018 but did not pay. On 28th January 2019,the outstanding amount was Ksh 25,767,524.60/-the Applicant paid Ksh 3,027,447/- and the amount was Ksh 22,890,162.60.The Respondent conducted another Valuation of 25th February by Land Realtors and Regent Auctioneers served the Applicants with another notice of sale on 19th Marc 2019. A Consent Order was entered on 16th April 2019 in Court, the sale was called of pending payment of Ksh 2,000,000/- before 30th April 2019. They failed and Respondent advertised another sale and the Plaintiff/applicant paid Ksh 1,908,583.70 on 18th June 2019. The Applicants



defaulted on the Repayment Schedule. The auction was on 17th October 2019 and ensured the forced sale value under Section 97(2) of the Land Act. The Purchaser obtained the Certificate of Sale.

51. Although from the chronology of events the Respondent by and large complied with legal provisions abiding a statutory power of sale, it is curious that in 2018 when the Applicants obtained a loan from UN Savings Credit Cooperative Society Limited to commit on an amount not exceeding Ksh 9,300,000/- the Respondent refused without any reasonable ground and seemed to be pursuing statutory power of sale immediately thereafter. The amount if accepted would have defrayed a huge amount of the loan outstanding and reduced interest and penalty fees and made it possible for the Applicants to service the balance of the loan comfortably.
52. For these reasons, I find that the Plaintiff Applicants regularly serviced their loan from 2015-2018 when they defaulted and accumulated interest and penalties but they made great effort to defray the outstanding loan facility and made various proposals even if some proposals did not come through. In the circumstances they deserved a genuine chance with the loan facility they obtained from their employer.
53. The Respondent contends that any damage or loss arising from the statutory power of sale redress is through award of damages under Section 105 and 106 of Land Act. Whereas that is the law, the Applicants were not given a chance to redeem the suit property especially after efforts to defray the loan facility and arrears were made in 2018 and genuine proposal to take up Ksh 9,300,000/- of the Loan by the Applicants' employers was refused without reasonable grounds. The Loss of shelter is not compensatable by damages.

Disposition

1. The court grants interim injunction for 90 days/3 months for Plaintiff/Applicants to redeem the suit property, pay the outstanding loan facility in default of the statutory power of sale shall be regularized and the Plaintiff/Applicants vacate the suit premises.
2. If the Plaintiff/Applicants repay and settle the outstanding loan facility within 3 months the Purchase price shall be refunded to the Purchaser as the sale was premature before the Respondent considered the loan takeover of Ksh 9,300,000/.
3. Each party to bear its own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021(VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

