



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO. E007 OF 2020

BETWEEN

JOSEPH THUO KIARIE.....PLAINTIFF

VERSUS

KENYA WOMEN MICRO-FINANCE BANK LTD.....1ST DEFENDANT

CIDERMAC PROPERTIES LIMITED.....2ND DEFENDANT

JOSEPH M. GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....INTERESTED PARTY

RULING

1. By a plaint dated 3rd December, 2020, **Joseph Thuo Kiarie** the plaintiff sued **Kenya Women Microfinance bank Ltd**, hereinafter the Bank, seeking prayers for: permanent injunction restraining the Bank, its auctioneers, agents, employees and servants from selling or interfering with the plaintiff's property **Kiambu/Municipality block 5 (Kiamumbi)/1390** hereinafter the property; a permanent injunction restraining the Bank from charging interest rate above the statutory rate of 14% per annum; and a declaration that the Bank's statutory notice of sale was illegal.

BACKGROUND

2. The plaintiff guaranteed financial facility advanced by the Bank to **Eunice Nduta Thuo** and **James Kiogora Muturi**. The plaintiff secured the said financial facility by a legal charge over the property. It is not disputed that there arose default in the repayment of the financial facility. The bank issued the requisite statutory notices to the plaintiff. The plaintiff filed the following applications:-

- (a) *Notice of motion dated 3rd December, 2020;*
- (b) *Notice of motion dated 9th February, 2021, and*
- (c) *Notice of motion dated 4th May, 2021.*

3. All the above application were withdrawn by the plaintiff by Notice of withdrawal dated 19th May, 2021.

PRELIMINARY

4. The preliminary issue I wish to discuss before delving into the main application is the plaintiff's allegation that the failure to stop the auctioning of the property, by the Bank, was solely due to the Kiambu High Court Judge who was not sitting on the day of the auction, 23rd February, 2021.

5. The plaintiff filed hereof, and the now withdrawn notice of motion dated 3rd December, 2020, in court on 11th December, 2020. The 11th December, 2020 was a Friday, a day this Court uses to write its Rulings and judgments. The Notice of Motion dated 3rd December, 2020 was placed before me on Monday 14th December, 2020. That notice of motion sought to stop the auction of the property that was scheduled

on 15th December, 2020. The application was fixed for *inter partes* hearing on 15th December, 2020. On that day, the plaintiff applicant's advocate did not attend court. The matter was adjourned for another date to be fixed. The plaintiff's advocate fixed that application for hearing *inter partes* on 3rd February, 2021. On that day, 3rd February, 2021, the plaintiff's advocate yet again failed to attend court. At the request of the bank's advocate, who was in attendance, the application was adjourned to 19th April, 2021.

6. The plaintiff moved the court by notice of motion dated 9th February, 2021 seeking for the earlier hearing of that notice of motion dated 3rd December, 2020 on the ground that the plaintiff had received notification of the sale by auction of the property scheduled for 23rd February, 2021. On 23rd February, 2021, the High Court Judge being out of station on official duty, the matter was placed before the Deputy Registrar who at the request of the plaintiff's advocate fixed the matter before a duty judge on 24th February, 2021. It will be noted that although the sale by auction of the property was scheduled on the same day, 23rd February, 2021, the plaintiff's advocate did not request for the matter to be placed before the judge on duty on that same day. Instead the plaintiff's advocate elected to have the matter placed before the duty judge on 24th February, 2021.

7. There is affidavit evidence before court which shows that the auction of the property proceeded on 23rd February, 2021 whereby the property was sold to **Cidermac Properties Limited**.

NOTICE OF MOTION DATED 19TH MAY, 2021

8. It need to be stated that the plaintiff filed an amended plaint which amendment brought into this action the purchaser at the aforesaid auction, **Cidermac Properties Limited** as the 2nd defendant and **Joseph M. Gikonyo T/A Garam Investment Auctioneers** as the interested party. Those auctioneers were the ones instructed by the Bank to carry out the auction of the property. The amended plaint added a prayer for declaration that the auction of the property was void and for that auction sale to be set aside.

9. By the notice of motion dated 19th May, 2021 the plaintiff seeks the following orders:-

(a) **THAT** this honourable Court be pleased to grant a temporary injunction to prevent transfer of the suit premises in favour of the 2nd Defendant, further charge and eviction of the plaintiff in respect of the premises known as Kiambu/municipality block 5 (Kiamumbi)/1390 at Kiamumbi Estate, Kiambu County, pending the hearing and determination of this application.

(b) **THAT** this Honourable Court be pleased to grant a temporary injunction to prevent transfer of the suit premises in favour of the 2nd defendant, further charge and eviction of the plaintiff in respect of the premises known as Kiambu/municipality block 5 (Kiamumbi)/1390 at Kiamumbi Estate, Kiambu County, pending the hearing and determination of this suit.

(c) **THAT** this honourable court be pleased to grant leave to enjoin Cidermac Properties Limited AND Joseph M. Gikonyo t/a Garam Investments Auctioneers as 2nd Defendant and interested party in this suit, respectively.

(d) **THAT** this honourable Court be pleased to make further and appropriate orders that it deems fit to grant pending the hearing hereof.

10. The above prayers are sought on the basis that the Bank breached section 97 of the **Land Act** in failing in its duty of care towards the plaintiff to obtain the best price at the auction of the property. The plaintiff alleged the Bank failed to undertake a valuation of the property before auctioning the property. The plaintiff in so alleging relied on its own valuation of the property which valuation stated the property valued at Kshs.30 million market value and Kshs.22,500,000 forced sale value. The plaintiff alleged the bank sold the property at under value in auctioning the property at Kshs.12,500,000.

11. The plaintiff further deponed that one of the directors of **Cidermac Properties Ltd** was married to *Edwin Mwangi Wairagu* and that the said *Edwin Mwangi Wairagu* was associated with the auctioneer's firm.

12. The plaintiff attached an official search of the property which disclosed the property as at 18th May, 2021 was registered in the plaintiff's name. The plaintiff by his present application seeks preservation of that registration.

13. The plaintiff without being specific alleged the statutory notice served by the Bank was for less than the stipulated period and further alleged that the Bank had overcharged interest on the financial facility.

14. The application was opposed by Bank. The Bank through the affidavit of its legal counsel *Benard Kiprotich* dated 31st May, 2021, stated that the property was sold through a public auction on 23rd February, 2021 to *Cidermac Properties Limited* and the property having being sold the plaintiff's right to the property had passed to the said 2nd defendant. It was also deponed that the plaintiff was served with the 90 days statutory notice dated 22nd August, 2019. That on the plaintiff failing to make good the default the Bank issued 40 days statutory notice dated 20th July, 2020 and a further 45 days statutory notice was also serve. That when the default was not regularised the Bank decided to proceed with the sale of the property by public auction.

15. The 2nd defendant through its director's affidavit dated 25th June, 2021 denied the plaintiff's allegation that its director was married to an associate of the auctioneer's firm, rather, the two directors of **Cidermac Properties Ltd** attached a marriage certificate proving they were married to each other on 29th August, 2009. The 2nd defendant director also attached to the affidavit a copy of the Title deed dated 19th May, 2021 showing the property was registered in that company's name.

ANALYSIS

16. The only prayer before court for consideration is the prayer for injunction to restrain for charging of the property and an injunction to stop the plaintiff's eviction from the property. The plaintiff did not rebut the evidence placed before court that the property was as at 19th May, 2021 registered in the name of the 2nd defendant. Can the plaintiff succeed in its prayer to restrain the registered owner from charging the property and to restrain the registered owner from obtaining vacant possession of the property?

17. In my consideration of the issues identified above it is necessary to remind myself the correct approach of interlocutory injunction application. The correct approach was stated in the holding in of the Court of Appeal in the case **MBUTHIA VS. JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) eKLR** thus:-

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

18. From the above holding it will be noted that this Court is expected to weigh the evidence of the parties without making a final finding of fact.

19. The plaintiff's allegation of the Bank failing to exercise duty care is responded to by showing by the Bank that a valuation was carried out on the property on the instructions of the bank which valuation showed the property was valued at Kshs.15,500,000 market value and Kshs.11,600,000 forced sale value. The property was eventually sold at the public auction on 23rd February, 2021 at the price of Kshs.12,400,000. Although the plaintiff had knowledge of the existence of the Bank's said valuation, as far back as early February, 2021, the plaintiff waited until 17th May, 2021 to instruct his valuer to value the property.

20. **Section 97(2)** of the Land Act provides:-

“(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

21. The plaintiff ought to have established on prima facie basis that the Bank breached the provisions of **section 97(2)**. This was the holding in the case **PALMY COMPANY LIMITED VS. CONSOLIDATED BANK OF KENYA LIMITED (2014) eKLR** thus:-

“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 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.”

22. The plaintiff was also required to establish the principles of granting an injunction stated in the case **CIELLA VS. CASSMAN BROUWN CO. LTD (1973)** as follows:-

- a. The applicant had established a prima facie case with probability of success;***
- b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***
- c. The court was in doubt and that the application would be decided on a balance of convenience.***

23. The grounds relied by the plaintiff were on prima facie basis responded to by the defendants and the plaintiff did not rebut those responses. It follows the plaintiff failed to satisfy the first principle of granting an injunction that is the plaintiff failed to establish a prima facie case with probability of success. Having failed to show that first principle of granting an injunction, the plaintiff's claim for interlocutory injunction fails. The prayers the plaintiff seeks cannot be granted.

24. The prayers the plaintiff seeks cannot also be granted because the plaintiff did not deny the indebtedness towards the Bank. See the holding in of the case **MATAI KABWINYI NYATABORU & ANOTHER VS. UWEAZO MICROFINANCE BANK (2018) eKLR** thus:-

“In the case of LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, Civil Case No. 786 Of 2002 it established that “. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”

25. Further, the plaintiff has a right under Section 99(4) if indeed he proves that the bank exercised its statutory power of sale wrongly, to get the remedy in damages.

26. On the whole, the plaintiff's application dated 19th May, 2021 is devoid of merit and it is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 16TH DAY OF DECEMBER, 2021.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: MOURICE

FOR PLAINTIFF: MR. KURAUKA PRESENT

FOR 1ST DEFENDANT: MR. MULANYA PRESENT

FOR 2ND DEFENDANT : ALICE KAMAU NO APPEARANCE LATER MS. MAINA

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE