



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL SUIT NO. 63 OF 2018

(FORMERLY ELC NO. 235 OF 2017)

ECONOMY NETWORK LIMITED.....1ST PLAINTIFF

MARTHA JOSEPH.....2ND PLAINTIFF

PERES ASEWE OKUMU.....3RD PLAINTIFF

VERSUS

EQUITY BANK.....1ST DEFENDANT

NYALUOYO AUCTIONEERS.....2ND DEFENDANT

AND

LEAH ADDA GWIYO.....INTERESTED PARTY

RULING

The application dated 14th June 2019 is for the following reliefs;

(iii) THAT this Honourable Court do granta stay of the intended sale purported to emanate from the unlawful and/or un-procedural Auction conducted on the 18th July, 2017, payment of purchase price, transfer and/or any other dealings on land reference No. KISUMU/KORU/1279 by the Respondents, their agents and/or servants pending the hearing and determination of the suit herein.

(iv) THAT the second Respondent be compelled to produce the proceedings of the Auction conducted on the 18th July, 2017.

(v) THAT the costs of this Application be in the cause.”

1. It is common ground that the Applicant, **MARTHA JOSEPH**, offered her parcel of land, **L.R. NO. KISUMU/KORU/1279** (hereinafter “*the suit property*”) as security for financial facilities which the 1st Defendant (**EQUITY BANK**) advanced to the 1st Plaintiff (**ECONOMY NETWORK LIMITED**).
2. The said suit property was charged to the Bank.
3. The Applicant acknowledges that the 1st Plaintiff defaulted in the repayment of the facility accorded to it.
4. In the light of the said default, the Bank put in place steps to realize the security.
5. Eventually, the suit property was sold by a Public Auction, which was conducted by Messrs **NYALUOYO AUCTIONEERS** (the 2nd Defendant).

6. It is the Applicant's case that the Bank notified her that the highest bidder at the public auction was one **CALEB OMORO**, who had put in a bid in the sum of Kshs 4,600,000/=.
7. The Applicant also told this court that the Bank had notified her that the only other bidder at the public auction was one **MR. ALUDO**, whose bid was in the sum of Kshs 4,550,000/=.
8. The Applicant's first complaint is that although the highest bidder was **CALEB OMORO**, the Memorandum of Sale indicated that the purchaser was one **LEAH ADDA GWIYO** (the Interested Party herein).
9. The Applicant pointed out that pursuant to **Section 17** of the **Auctioneers Act No. 5 of 1996**,

“... the highest bidder shall be the purchaser.....”

10. The Bank responded to the application through the Replying affidavit sworn by **STEVE BIKO**, who is the bank's Credit Manager at its Kisumu Branch.
11. At paragraph 26 of his affidavit, Steve Biko deponed thus;

“THAT I know of my own knowledge that on the said Auction date, I did personally attend the said auction and after successful bidding one Caleb Omoro on behalf of Leah Adda Gwiyo bought the suit property for a sum of Kenya Shillings Four Million Six Hundred Thousand (Kshs 4,600,000/=). Annex hereto and marked GMW-21 is the certificate of sale issued by the Auctioneer.”

12. Clearly, the bank's representative, who attended the public auction, said that it was Caleb Omoro who put in the successful bid, albeit for Leah Adda Gwiyo.
13. On the other hand, Leah Adda Gwiyo, in her affidavit, sworn on 4th July 2019, stated thus;

“5. THAT I attended the Auction, placed my bid and emerged the winner at the price of Kshs 4,600,000/=.”

14. In my considered view, there are three inconsistent narratives concerning the auction, first, that Leah Adda Gwiyo personally attended the auction and put in her bid.
15. Secondly, that Caleb Omoro put in a bid on behalf of Leah Adda Gwiyo.
16. Thirdly, that Caleb Omoro was the highest bidder, in his own right.
17. These three versions of the public auction are not reconcilable. Therefore, there is no way that the Court can determine, at this stage, who it is that attended the auction, and in what capacity.
18. In the case of **JOHN P. O. MUTERE & ANOTHER Vs KENYA COMMERCIAL BANK LTD, HCCC NO. 3125 OF 1995** the court held as follows;

“Once a power of sale has arisen a mortgagee has the right to exercise it.

The Court has no power to prevent the exercise of that power if it is properly exercised.

19. I understand the court to be saying that where the power of sale had not been exercised properly, the court has the power to intervene, as may be deemed appropriate.
20. I appreciate the bold pronouncement by the Court of Appeal in **MBUTHIA Vs JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1985] KLR 1**, at page 6, as follows;

“Next there was the consideration of the scope of the equity of redemption.

It is now clear that the English notions apply, that the equity is lost on the completion of a valid agreement for a valid sale. It is not allowed to continue until conveyance nor until registration.”

21. Once again, there has got to be **a valid agreement for a valid sale.**
22. At the heart of the Applicant's case is the question as to the validity of the sale.
23. If the court were to allow the sale to be completed, through the transfer thereof, the suit property may be put beyond the reach of the court whilst the substantive suit was still pending.

24. In the event that the trial court were to hold that the sale was not valid, yet the suit property had already been transferred, that could give rise to more legal complications.

25. In my considered view, justice demands that the status quo currently prevailing be maintained until the suit is determined.

26. The Applicant and the Bank had, on 26th July 2017, recorded a consent order, which blocked the transfer of the suit property.

27. I appreciate that the Interested Party was not yet a party to this suit, and was therefore not party to the consent order. Therefore, considering that the purchase price was already paid in full by 18th August 2017, the continued delay in resolving the issues is prejudicial to the Interested Party.

28. Accordingly, it is imperative that the substantive suit be set down for hearing as soon as parties comply with all the pre-trial procedures.

29. Finally, I order that the costs of the application shall be in the cause, so that the party who wins the substantive case, will also be awarded the costs of the application.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at KISUMU

This 23rd day of January 2020

T. W. CHERERE

JUDGE