



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.E137 OF 2018

ECOBANK KENYA LIMITEDPLAINTIFF

VERSUS

MORU RIDGE LIMITED.....DEFENDANT

LEXIS INTERNATIONAL LIMITED.....INTERESTED PARTY

RULING

1. The plaintiff/applicant herein (**the Bank**) sued the defendant (**the Borrower**) through the Originating Summons dated 13th November 2018 wherein it seeks leave, pursuant to Section 100(1) of the Land Act to purchase the charged property being LR No. 29059 I.R. No. 149050 at a public auction. The summons are brought under **Order 37 Rule 4** of the **Civil Procedure Rules (CPR), Sections 90, 97, 98, 100 and 104** of the **Land Act** (hereinafter “**the Act**”) and **Section 75** of the **Land Registration (General Regulations)**. The application is supported by the affidavit of the plaintiffs Head of Early Warning Remedial and Recovery **M/S Elizabeth Hinga** and is based on the grounds that:

- a) The bank advanced the borrower the sum of Kshs 400,000,000.00 for the construction of four blocks of residential apartments on lease described as Unit Number M0014 situated on Land Reference Number 29059 Kiambu in the name of Moru Ridge Limited.*
- b) The said borrowing was secured by, among others, Legal Charge for Kenya shillings Four Hundred Million (Kshs 400,000,000.00) over Land Reference Number 29059 Kiambu.*
- c) Following the persistent default aforesaid, the bank’s advocates served the Statutory Notices under the Land Act.*
- d) The borrower has in the past admitted the debt, sought various indulgences and failed to honor its repayment proposals.*
- e) On 2nd March 2018 the facility was restructured and the terms were accepted by the borrower. Despite the restructure the borrower refused to meet any of the obligations that had been agreed.*
- f) The borrower failed to pay arrears. As at 26th July 2018 the accounts had an outstanding balance of the sum of Kshs 558,732,805.19 together with interest which accrues at the Bank’s Base Lending Rate.*
- g) The bank has on diverse occasions put up the charged property for sale by public auction without success. The reserve price could not be attained and the debt continues to escalate.*
- h) Leave be granted to the plaintiff pursuant to Section 100(1) of the Land Act, 2012 to purchase the charged property Land Reference 29059 I.R. No. 149050 at a public auction.*
- i) The Interested Party and the plaintiff herein had agreed in Milimani Comm. No. 291 of 2018 Lexi International Ltd V Dalali Traders Ltd, Ecobank and Moru Ridge Ltd to have the property sold by public auction and any surplus be paid out in accordance with Section 101 of the Land Act.*
- j) A sale by public auction pursuant to Section 100 is the most advantageous way of selling the charged property so as to comply with the duty imposed on the charge by Section 97(1) of the Land Act.*

k) The plaintiff shall duly comply with the provisions of Sections 100(3) of the Land Act.

2. At the hearing of the case, **Mr. Kigata**, learned counsel for the plaintiff submitted that under Section 100(1) of the Act, a chargee may, with the leave of the court purchase the charged property as long as the court satisfies itself that granting the leave is the most advantageous way of disposing of the said property. Counsel submitted that all the attempts, by the plaintiff to dispose of the charged property had failed thereby necessitating the filing of the present suit.
3. Counsel relied on the decision on **Ecobank (K) Ltd v First Choice Mega Stores** [2018] eKLR wherein under similar circumstances, the court granted the bank leave to purchase the charged property by public auction pursuant to Section 100 of the Act.
4. Counsel argued that Section 97 of the Act imposes a duty on the bank to reduce its loss and that under Section 100(3) of the Act, there is no requirement that the charge purchases the said property at market price since the sale is to be undertaken by way of public auction where the rules governing such sale is applicable.
5. It was submitted that sale at market price is only a requirement where the sale is by private treaty and that the plaintiff was therefore not obligated to purchase the suit property at the market price.

The interested party's case.

6. Through the replying affidavit sworn by the Interested Party's Director, **Mahesh Vekaria**, on 5th March 2019 it is averred that upon being notified of the plaintiff's intention to sell the charged property, the Interested Party instructed its lawyers to file a case being HCCC 291 of 2018 **Lexis International Ltd v Dalali Traders, Ecobank & Moru Ridge Ltd** (hereinafter "**the related suit**") wherein it sought to protect its interests on the property.
7. The Interested Party's case is that it has an equitable interest in the charged property on account of a contract and construction works it had undertaken on the property for which it claims that there are unpaid invoices amounting to Kshs 585,216,587.95 as at 28th February 2019, which amount, it alleges, the defendant acknowledges and admits.
8. At the hearing of the case, **Mr. Odongo**, learned counsel for the Interested Party submitted that on account of the unpaid amounts arising from the contract between the Interested Party and the defendant, the Interested Party has an equitable interest and/or builder's lien over the suit property. Counsel added that the trial judge, in the related suit, had advised the parties to sell the suit property before reverting to court for advise on the excess proceeds recovered from the sale. For the argument regarding the builder's lien counsel relied on the South African case of **Fynbosland 435 CC v in Torro ya Africa (Pty) Ltd. And Others** (1861/2011) [2011] ZANWHC 68 (15 December 2011) wherein the court held that:

"A builder's lien is a right of retention over the building or structure which a builder has constructed or repaired to secure payment of the contract price..... The lien entitles the applicant to his full contract price..... It is not in dispute that the applicant has a builder's lien on the buildings that is completed as well as those which are partly built at Naledi Extension 25. The lien is in respect to the outstanding payment for work done in respect to the houses referred to above.... I am of the view that the applicant has succeeded in establishing that it has a right or a builder's lien over the low cost housing units erected by it as well as whatever infrastructure was installed by it. The dispute regarding the lien is between the applicant and the Municipality. The Municipality did not take issue with the applicant over this dispute. The first and second respondents cannot profess to have facts which can gainsay the applicant's allegations in that regard. The first respondent has correctly, in my view, admitted that the applicant does have a builder's lien over the houses and infrastructure constructed by it."

9. Counsel submitted that the Interested Party does not object to the plaintiff's application for leave to purchase the suit property but on condition that such purchase is at market price which will be the most advantageous way of dealing with the said property.
10. Counsel submitted that under Section 97 of the Act, the chargee owes the chargor and the Interested Party a duty of care to secure the best reasonable price at the time of the sale. For this argument counsel cited the decision in the case of **Patrick Kangethe Edward v Co-operative Bank of Kenya Limited & Another** [2016] eKLR wherein the court held that:

Section 97(1) Land Act now places a duty of care on a charge while exercising its powers of sale. That duty to this court includes the duty to ensure that the best achievable price is realized and further that the chargor whose land is to be sold is not exposed to unnecessary and avoidable expense and costs."

11. Counsel maintained that while Section 100(1) of the Act allows the chargee to purchase the charged property, with the leave of the court, the said Section does not indicate if such sale should be conducted by public auction or private treaty. He added that the mode of sale is provided for at Section 98(d) of the Act which states that the chargee shall sell by private treaty at market value and that sale by public auction envisaged under Section 100(3) of the Act is just one of the options for sale.

The defendant's case.

12. The defendant opposed the Originating Summons through the replying affidavit of its General Manager **Mr. Dickson Wanjohi** who avers that, it is unconscionable for the applicant to purport to persuade the court to allow it purchase the entire property for Kshs 645,000,000/- to cover a claim of kshs 558,732,805.19 when the value of the land on which the apartment blocks in question is valued at kshs 910,000,000/-. He also takes issue with the amount of the interest of Kshs 405 million charged by the chargee when the drawdown from the subject facility was not more than Kshs 366 million.

13. He avers that the plaintiff did not disclose that it had so far paid over Kshs 168 million in interest and that the plaintiff seeks to rely only on its own valuer's assessment of the value of the property. He further states that there are 25 innocent purchasers of apartment units on the suit property whose equitable interests must be protected. In this regard, the defendant attached the list of buyers as annexure "DW-2" to the replying affidavit.

14. On the Interested Party's claim regarding lien over the subject property, the defendant's deponent avers that the said claim does not lie in view of the arbitration clause contained in Clause 45.0 of its contract with the Interested Party. He adds that the Interested Party owes the defendant the sum of Kshs 8,2017,324.97 which it intends to counterclaim and that it is therefore farcical for the Interested Party and the plaintiff to agree on the sale of the charged property to the defendant's exclusion.

15. He further states that the plaintiff has not exhausted all the remedies available to it under the Land Act on account of the securities it relies upon.

16. At the hearing of the case, **Mr. Marete**, learned counsel for the defendant took issue with the procedure adopted by the plaintiff in seeking leave to purchase the charged property.

17. Counsel submitted that in determining the most advantageous way of selling the land, the court should factor in the interests of the innocent purchasers who ought to be given a chance to be heard.

18. Counsel argued that contrary to the plaintiff's claim that the charged property is the entire LR No. 29059 the property under the charge is only a portion of the suit property identified as Unit No. M0014.

Plaintiff's rejoinder

19. In a rejoinder to the defendant submissions, **Mr. Kigata** reiterated that the sale of the suit property by public auction will be subject to the conditions for sale at a public auction.

20. Counsel confirmed that the property that is the subject of the dispute is Unit M0014 as shown in the valuation report and that the notice for sale was in respect to the said unit and not the entire suit land.

Analysis and determination

21. I have carefully considered the Originating Summons filed by the plaintiff herein, the response tendered by the defendant and the Interested Party and the submissions made by the parties' respective counsel together with the authorities that they cited.

22. The main issue for determination are as follows:

a) Whether the plaintiff has made out a case for the granting of leave to purchase the charged property under Section 100 of the Act, and if so, whether such sale is to be at the market price or on forced sale value.

b) Whether the interested party had established that it has proprietary/equitable rights over the suit property.

c) Whether the defendants claim on valuation of the suit property, interest charged by the bank, the interests of the alleged 25 buyers, exhaustion of all the available remedies by the plaintiff and the procedure adopted by the plaintiff in filing this Originating Summons are factors that the court should consider in determining this case.

Leave to purchase the charged property

23. It was not in dispute that the plaintiff advanced, to the defendant, the sum of Kshs 400 million for the construction of the four blocks of residential apartments on a leasehold property known as Unit No. M0014 situated on LR No. 29059 Kiambu. The parties were in agreement that the property that is the subject of these proceedings is Unit No. M0014 situated on LR No. 29059 and not the entire LR No. 29059 I.R. No. 149050. The said loan facility was secured by among other securities, a legal charge for Kshs 400 million over the said Unit No. M0014.

24. It was not in dispute that the defendant defaulted in making the loan payment and sought several indulgences from the plaintiff which it still failed to honour. In a nutshell, it was not contested that the bank's statutory power of sale had arisen following the defendant's failure to service the loan, as agreed, despite its restructure which loan stood at Kshs 558,732,805.19 as at 26th July 2018.

25. It was further not in dispute that the bank put up the charged property for sale by public auction on diverse occasions without success thereby necessitating to the filing of the instant Originating Summons for leave to purchase the charged property.

26. Section 100(1) (2) and Section 97(1) of the Act stipulates that:

Section 100(1) (2)

"Other than in the circumstances provided to in subsection (3), a charge exercising the power of sale may, with leave of the court, purchase the property."

“A court shall not grant leave unless the chargee satisfies the court that a sale of the charged land to the charge is the most advantageous way of selling the land so as to comply with the duty imposed in the charge by Section 97(1).

Section 97(1)

“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale”.

27. In the present case, having regard to the fact that the plaintiff has made numerous unsuccessful attempts to sell the charged property at public auction and considering that the defendant did not make any viable proposal to pay the debt I find that the plaintiff has made out a case for the granting of leave to purchase of the charged property under Section 100(1) of the Act. I find that the plaintiff has demonstrated that it was not able to secure suitable buyers willing to buy the property at a public auction at the forced sale value.

28. Consequently, I find that plaintiff’s application is merited and that leave to purchase the property presents the most advantageous way of dealing the suit property. and would ensure the duty of care by a chargee while exercising its power of sale as envisaged under Section 97(1) of the Act.

Purchase at market price of Forced sale value.

29. The plaintiff argued that Section 100 of the Act does not place any requirement on the chargee to purchase the charged property at market price. The interested party, on the other hand, contended that leave to purchase the property should be on condition that the same is purchased at market price.

30. Section 97(1) of the Act, which I have already highlighted in this ruling, imposes a duty on a chargee who exercises a power to sell including the exercise of the power to sell in pursuance of an order of a court to obtain the best price reasonably obtainable at the time of sale.

31. Section 98 of the Act Stipulates as follows:

“(1) If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be—

(a) of the whole part of the charged land;

(b) subject to or free of any charge or other encumbrance or charge having priority to the chargee’s charge;

(c) by way of subdivision or otherwise;

(d) by private contract at market value;

(e) public auction with reserve price;

(f) for a purchase price payable in one sum or by installments; or

(g) subject to any other conditions that the chargee shall think fit, having due regard to the duty imposed by section 97(1).

(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.

(3) A sale of the charged land by a chargee in exercise of the power of sale shall be made in the prescribed form and the Registrar shall accept it as sufficient evidence that the power has been duly exercised.

(4) Upon registration of the land or lease or other interest in land sold and transferred by the chargee the interest of the chargor as described therein shall pass to and vest in the purchaser free of all liability on account of the charge, or on account of any other charge or encumbrance to which the charge has priority, other than a lease easement to which the chargee had consented in writing.”

32. Section 100(3) of the Act on the other hand stipulates that:

“If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at the public auction so long as the price bid for the charged land by the charge is the greater of-

a) The highest price bid for that land at the auction; and

b) An amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”

33. My understanding of the above provisions is that the sale by the chargee, in exercising the statutory power of sale, may either be conducted by public auction or by private treaty. Indeed, in the wording of Section 100(3) of the Act is clear that the chargee may bid, **if** the charged land is to be sold by public auction. I am in agreement with the submissions by counsel for the Interested Party that the use of the word **if** in Section 100(3) of the Act envisages that the sale may be by other means other than public auction.

34. Having regard to the above provisions, I find that there is no hard fast rule on the mode of sale/purchase by the chargee and that sale by public auction is only one of such modes of sale.

35. The applicant's case was that all its attempts to sell the suit property at a public auction did not bear any fruits. The failure to sell the property at a public auction notwithstanding, the applicant still seeks the leave of this court to use the same public auction mode of sale through the instant application. My finding is that in the circumstances of this case, it will be foolhardy and indeed illogical to allow the chargee to purchase the suit property at a public auction, and expect it to obtain the best price reasonably obtainable, when it has been categoric that such an option has already failed. I therefore find that the provisions of Section 98(1)(d) of the Act will be the most appropriate in the circumstances of this case, which is to allow the applicant to purchase the suit property by private treaty at market price as a way of achieving the best price obtainable in line with the dictates of Section 97(1) of the Act.

Interested party's claim of lien over the suit property.

36. The Interested Party claimed that it had a lien/an equitable interest on the suit property on the basis that the defendant it money in respect to the construction work that it had undertaken for the defendant on the suit land. The Interested Party informed this court that it has already instituted a case against the defendant over the said debt being HCCC 291 of 2018, the related case herein.

37. On its part the defendant denied owing the Interested Party any money and claimed that the Interested Party that owes it Kshs 8,207,324.97 which it intends to counterclaim.

38. Black's Law Dictionary 10th Edition defines *lien* as follows:

“A legal right or interest that a creditor has on another's property, lasting usu. until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained.”

39. My finding is that in view of the fact that the Interested Party's claim is not admitted by the defendant and considering that the Interested Party's claim is pending before a court of competent jurisdiction, it will not be in the purview of this court to determine, in these proceedings, whether or not the Interested Party has an equitable interest over the suit property. I hasten to add that if indeed the Interested Party will establish, in the related suit, that the defendant owes it the money that it claims, then such a lien is recognized under section 97(1) of the Act which imposes a duty on the chargee who sells charged land pursuant to an order of the court to obtain the best price reasonably obtainable at the time of the sale.

The Defendant's claim

40. The defendant claimed that there were some 25 third parties who had purchased apartment units in the suit property whose interests need to be taken into account in determining this case. The defendant attached a list containing the names of the alleged purchasers to its replying affidavit as annexure “DW2”. My finding is that the attached list does not provide sufficient proof of the alleged purchase and that if indeed such purchasers exist, then nothing would have been easier than for the defendant to produce the respective sale agreements for this court's perusal. Needless to say, the alleged purchasers have not been enjoined to these proceedings in which case, this court is not capable of determining the rights, if any, of parties who are not before it.

41. The defendant also raised the issue of the amount of interest charged by the charge and the valuation conducted, by the plaintiff on the suit property. Courts have taken the position that interest charged on the loan facility is a matter that is governed by the contract between the parties and that a chargee cannot be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing or interest charged. (See *Mrao Ltd v First American Bank of Kenya Ltd* [2003] K.L.R. 125).

42. Courts have also held that undervaluation *per se* cannot form a ground for the issuance of orders of injunction since breach by the chargee in selling the property at an undervalue can be remedied through a claim for damages. (See *Jashvantsing L. Solanki v Diamond Trust Bank Ltd*. [2014] eKLR).

Conclusion

43. Having regard to the findings that I have made in this ruling, I find that the plaintiff has made out a case for the granting of the orders sought in the originating Summons dated 13th November 2018 which I hereby allow in the following terms:

a. Leave is hereby granted to the plaintiff, pursuant to Section 100(1) of the Land Act, to purchase the charged property herein being Unit M0014 situated on Land Reference Number 29059 I.R. No. 149050 Kiambu in the name of Moru Ridge Limited by private treaty at market price.

b. The plaintiff is awarded the costs of the application.

Dated, signed and delivered in open court at Nairobi this 22nd day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Gichuhi for plaintiff.

Miss Kemunto for the defendant and Interested Party.

Mr. Marete for defendants.

Court Assistant – Sylvia